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DIGEST OF DECISIONS

OF THE

SUPREME COURT OF LOUISIANA,

FROM THE 15th TO THE 30th ANNUAL, p. 800, INCLUSIVE:

ALSO: OF

THE CIRCUIT COURT OF THE FIFTH CIRCUIT,

SITTING IN LOUISIANA,

AND THE

LOUISIANA CASES DECIDED IN THE SUPREME COURT
OF THE UNITED STATES.

BY

CHARLES LOUQUE.

ATTORNEY AND COUNSELLOR AT LAW.

NEW ORLEANS:
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P R E F A C E .

THIS digest contains the decisions of the Supreme Court of Louisiana from the 15th, to the 30th Annual, page 800, inclusive, and many unreported cases ; those of the Supreme Court of the United States and those contained in the two Woods' Circuit Court Reports, as regards Louisiana, the equity and admiralty cases on questions of practice being omitted ; mention is made of all the acts of the Legislature, from 1870 to 1878, inclusive.

Each syllabus, from the 16th to the 30th Annual, inclusive, is original ; the others have been transcribed, as reported. Assistance has been derived from Hon. JOHN EDWARDS LEONARD'S work.

This work is presented to the profession, with the hope that its usefulness may prove equal to the amount of labor bestowed upon it.

CHAS. LOUQUE.

New Orleans, September, 1878.

ABBREVIATIONS AND REFERENCES.

C. C.Civil Code.

(—).....When the articles are included in brackets, reference is made to the Code of 1825; otherwise to that of 1870.

C. N.....Code Napoleon.

C. P.....Code of Practice.

M.Martin's Reports.

N. S.....Martin's Reports, New Series.

L.Louisiana Reports.

R.Robinson's Reports.

A.Louisiana Annual Reports.

N. R.....Not Reported.

Wall.....Wallace, United States Supreme Court Reports.

U. S. or Otto..... " " "

H.Howard, " " "

P.Peters, " " "

C. ... Cranch, " " "

E. S.....Extra Session of the Legislature.

O. B.....Opinion Book of the Supreme Court of Louisiana, sitting in New Orleans.

DIGEST.

ABANDONMENT.

1. The filing of an opposition to an account is not, in the sense of article 3485) C. C., an abandonment of a suit instituted in another court. 22 A. 172, *Succession Marigny*.
2. Property cannot be considered "abandoned" in the sense in which the word is used in the act of Congress (13 Stat. 357, sec. 1) unless the owner was voluntarily absent and engaged either in arms or otherwise in aiding or encouraging the rebellion. 2 Woods, 37, *Kimball v. Taylor*. See CONFISCATION, No. 33.
3. Failure to appear on the day of the trial is not an abandonment. See JUDGMENT, VIII. No. 1.
4. For abandonment of suit which nullifies interruption of prescription, see PRESCRIPTION, IV. (c), 4).
5. For surrender of debtor's property to his creditors, see BANKRUPTCY; INSOLVENCY.
6. For abandonment, in contracts of insurance, see INSURANCE, III. (j).
7. For abandonment, as a ground of separation from bed and board, or divorce, see MARRIAGE, II. (a).
8. For abandonment of ownership and property expropriated, see NEW ORLEANS, II. (e), 5), c.
9. For abandonment of property in hypothecary actions, see MORTGAGE, VI. (c), 5).
10. For abandonment of appeals, see APPEAL, I. (d).

ABATEMENT.

For abatement of nuisances, see NEW ORLEANS, II. (d), 1); 2); 3).

ABSENTEES.

I. IN GENERAL.

II. WHO ARE ABSENTEES; OF THE RIGHT TO PROCEED AGAINST THEM; AND THE APPOINTMENT AND CITATION OF THEIR CURATOR.

III. OF THE DUTIES AND POWERS OF THEIR CURATOR; AND HIS FEE.

I. IN GENERAL.

1. A person who does not reside in this State, nor has property here, subjects himself to the jurisdiction of our courts by signing a joint obligation made payable here, and a curator may be appointed to represent him, against whom judgment may be rendered contradictorily, although it may have no *extra territorial* effect. 22 A. 383, *Hyde v. Marcy*; but see acts 1871. p. 19.
2. Where the father, who is the legal heir, has disappeared for many years, but is presumed to be still alive, no action to annul the will of his ancestor can be maintained by his children. 26 A. 127, *Boe v. Filleul*.
3. No judgment can be rendered against an absentee, when his property has not been attached. 23 A. 505, *Leverich v. Dulin*. See II. No. 19.
4. An absentee who owns property within the jurisdiction of the court, may be sued without attachment. The judgment is good as to the property. 29

A. 821, *O'Hara v. Booth and Connell*; 28 A. 577, *Penn v. Evans*; 18 A. 209; 19 A. 36; 2 A. 1010; 6 A. 220.

II. WHO ARE ABSENTEES; OF THE RIGHT TO PROCEED AGAINST THEM; AND THE APPOINTMENT AND CITATION OF THEIR CURATOR.

1. In a proceeding by garnishment against an absentee, the citation should be affixed to the Court-house door, in conformity with article 254 C. P., and not merely served on the curator *ad hoc*; and in such a case, the party seeking to detain the property of the absent debtor in the hands of the garnishee, must give bond, as required by Art. 245 C. P. 15 An. 529, *Cox v. Bradley*.

2. A person who has a domicile in this State, but who is temporarily absent is not an absentee and cannot be proceeded against by the appointment of a curator. 18 A. 695, *Emmerling v. Cucullu*.

3. Plaintiffs not being the cause of defendants' appointed agent refusing the procuration, may proceed against the absentee, by the appointment of a curator *ad hoc*, nor can the party thus declining the procuration, substitute another person in his place. 18 A. 730, *Cestia & Seignouret v. Ferrandon & Cessac*.

4. One absent from New Orleans, with his family during the war and a resident of another State, during that period, having left no agent here on whom citation could be served, is an absentee. 19 A. 333, *Samory v. Montgomery*; 6 N. S. 15; 21 A. 205, *Lasere v. Rochereau et als*; 2 A. 950, *Cole v. Lucas*.

5. A citation posted in the month of September is sufficient, even if the attachment and appointment of the curator *ad hoc* were made the previous January. C. P. 254; 21 A. 462, *Gilles & Ferguson v. Cuny*.

6. The allegation that defendants reside in another State and were absent from Louisiana and not represented herein, is sufficient to authorize the appointment of a curator *ad hoc*. 21 A. 692, *Monition of Hall and opposition of Lawrence*.

7. The only effect of calling an absentee in warranty through a curator *ad hoc*, is to give him, as far as practicable notice of the action. A personal judgment in such a case is not obligatory on the absentee. 15 A. 451, *Pagett v. Curtis*.

8. One occupying furnished apartments, dealing in horses, and usually spending his summers in another State, but paying rent for his rooms during his absence, cannot be considered as an absentee, if there are persons at his dwelling on whom service can be made. 16 A. 391, *State ex rel. v. Judge Second District Court*.

9. The appearance of the absentee simply for the purpose of setting aside the attachment is not an appearance; a curator *ad hoc* should be appointed, contradictorily with whom the proceedings are to be carried on. 26 A. 740, *Meritz v. Marks*.

10. When no property is shown to belong to the absentee, and no suit is pending where he *must* be made a party, and no citation is served on him, the appointment of an attorney *ad hoc* is insufficient. 17 A. 237, *Fell v. Darden & Co.*; 2 A. 562, 1010.

11. A curator *ad hoc* may be appointed to represent an absent defendant, who has a duly appointed agent present, where plaintiff was not aware that such agent had the power to appear in court. 18 A. 656, *Taylor v. Graham*.

12. There are three contingencies in which a curator *ad hoc* may be appointed to an absentee:

1st. If he leave his property without an administrator or agent;

2d. If it be attached at the suit of a creditor;

3d. If the absentee becomes a necessary party to a suit between other persons lawfully in court. 19 A. 36, *Field v. Delta*; 18 A. 209, *Dwight v. Bel-Idcq, Noblom & Co.*; 16 A. 390, *State ex rel. v. Judge Second District Court*; 2 A. 562; 3 A. 101, 426; 5 A. 674; 9 A. 34; 22 A. 383; 23 A. 505; 25 A. 306, *Rogay v. Juilliard*. See *supra*, 10.

13. Plaintiff need not make oath of the facts necessary for the appointment of a curator *ad hoc*. 19 A. 80, *Frost v. McLeod*.

14. The judge should appoint an attorney to represent the absentee; but having appointed a curator *ad hoc* who is an attorney, these words are mere

surplusage. 21 A. 693, *Monition of Hall and opposition of Lawrence*. See EVIDENCE, II. No. 6.

15. Citation against an absentee is properly addressed to the *curator ad hoc*; *a fortiori*, a notice of seizure in executory proceedings may be so addressed: *ib.* 13 A. 405. See CITATION, I. No. 15; *infra*, No. 17.

16. An absentee must be cited by posting the citation and attachment at the door of the room where the court in which the suit is pending is held; this omission is a radical defect. 27 A. 80, *Wooldridge v. Monteuse*; C. P. 254.

17. A citation addressed to "H" who represents defendants under appointment of court as *curator ad hoc*, is null and not cured even by the answer. 18 A. 481, *Galoche v. Grivot and Wife*; 12 R. 541; 13 A. 405. See No. 15.

18. Plaintiffs who know that the agent appointed by the absentee refused to act without any fault of theirs, may proceed by the appointment of a *curator ad hoc*; nor can the designated agent, subsequently substitute another in his place. 18 A. 730, *Cestia & Seignouret v. Ferrandon & Cessac*.

19. An absentee who owns property in this State may be sued without process of attachment. 28 A. 577, *Penn v. Evans*; 18 A. 209; 19 A. 36; 2 A. 1010; 6 A. 220; 29 A. 821, *O'Hara v. Booth, et al.* *Per contra*, see *supra*, I. No. 3.

20. If the order appointing a *curator ad hoc* is invalid, a new order may be obtained. 28 A. 587, *Cavaroc v. Fournet, administrator*.

21. A citation addressed to the agent is not valid. See CITATION, I. No. 15.

22. The absent mortgagor must be represented by a *curator ad hoc*. See EXECUTORY PROCESS, III. (a), No. 3.

III. OF THE DUTIES AND POWERS OF THEIR CURATOR; AND HIS FEE.

1. A *curator ad hoc* cannot waive citation. 28 A. 258, *Ticknor v. Calhoun*.

ACCEPTANCE.

See BILLS AND NOTES, V. DONATIONS, V. (b). SUCCESSION, V. MARRIAGE, XIII. (e), 3). SUCCESSION, V. OBLIGATIONS, III. (b), 2).

ACCESSION.

I. OF THE RIGHT OF ACCESSION TO WHAT IS PRODUCED BY THE THING.

II. OF THE RIGHT OF ACCESSION TO WHAT IS UNITED TO, OR INCORPORATED WITH, THE THING.

(a) *In general.*

(b) *Alluvion.*

I. OF THE RIGHT OF ACCESSION TO WHAT IS PRODUCED BY THE THING.

1. At the dissolution of the community the husband has a right to take from the cattle remaining, a number of heads equal to that brought by him in marriage. C. C. 586, 587; 11 A. 278; 10 R. 46; 25 A. 211, *Succession of Waterer*.

II. OF THE RIGHT OF ACCESSION TO WHAT IS UNITED TO, OR INCORPORATED WITH, THE THING.

(a) *In general.*

1. When the constructions have been made by a third person, with his own materials, the owner of the soil has the right to keep them upon reimbursement of the value of the materials and price of workmanship. 23 A. 138, *Poché v. Thériot, sheriff, et als.*

2. The owner of the soil may refuse to keep the building erected without his permission, and the owner thereof has the right to remove the same, but can claim no compensation. 24 A. 51, *Succession of Anglada*.

3. One who erected on another's land valuable improvements, is entitled to recover the costs of the materials and price of workmanship, if the owner of the soil keeps the same. 16 A. 244, *D'Armand v. Pullin*.

4. The improvements put on the property by one who occupies it under a

promise of sale, if kept by the owner, must be paid for by the latter. 28 A. 31, *J. A. Fernandez v. Bernard Soulié*.

5. A building erected by the owner of the land, becomes part of the immovable, the mortgages existing on the land attach to the building which cannot, in execution, be afterwards sold separately from the land. 29 A. 355, *New Orleans National Bank, etc., v. Raymond*.

6. For crops standing on the land, see EXECUTION, V. (d), 12).

(b) *Alluvion*.

1. To the riparian proprietors belong the accretion formed by deposits of the stream. 22 A. 613, *Barre v. City of New Orleans*.

2. In the sale of riparian land, the test as to whether the alluvion or batture, if any, attached to it, is conveyed with the land or not, is this: If at the time of the sale the alluvion attached has attained a sufficient elevation above the waters, to be susceptible of private ownership, the alluvion does not pass, unless so expressed. 22 A. 613, *Barre v. City of New Orleans*.

3. For a claim against the city for batture, it is necessary to prove that the batture is not required for public use. *Ib*.

4. Where the purchaser's title recites a front on the street between the property sold and the river, the purchaser does not acquire the accretion formed by the river. 26 A. 310, *Winter v. City*.

5. The enlargement of the quay in the city of New Orleans by the alluvial formation of the Mississippi river, accrues to the benefit of the city, which being the proprietor of the quay is as much entitled to the benefit of the law of alluvion as any other riparian proprietor. 10 P. 662, *New Orleans v. United States*.

6. Where the riparian proprietor's estate is cut off from the bank of the river by a public road, the alluvion does not belong to him. 4 Wal. 502, *Saulet v. Sheppard*.

7. The city of New Orleans may determine to what extent the riparian proprietors may use the batture. See NEW ORLEANS, II. (d), 2), No. 1.

ACCESSORY.

See CRIMINAL LAW, VI. (f). OBLIGATIONS, VIII. (g). JUDGMENT, V. (a), 4). SALE, III. (b), 2), B. MORTGAGE, III. (c). PRIVILEGE. CONSTITUTION, II. (c), 3), c.

ACCOMMODATION BANK.

Incorporated under the name of Loan and Pledge Association, 1868, p. 280; name changed, 1870, p. 108.

ACCOUNT.

1. For accounts stated, see EVIDENCE, XII. (g). LOAN, III. PLEADING, I. (a), No. 2; VIII. (b), 1). PRESCRIPTION, III. (e), Nos. 7, 8, 9, 10, 11, 12, 13.

2. For accounts to be rendered by curators, executors, syndics, etc., see SUCCESSION, VIII. (f). INSOLVENCY, V., XII., X. MINORS, III. (f). COURTS, II. (d), 5). JUDGMENT, XV. (c). PRESCRIPTION, III. (g), 3); V. (d).

3. For the agent's obligation to account to his principal, see MANDATE, V. (b).

4. For matters of account, see PARTNERSHIP, II. (b). EVIDENCE, XII. (a), (d), (e), (i). INSOLVENCY, V. PRESCRIPTION, IV. (d), 2).

5. For interest due on accounts, see INTEREST, No. 1.

6. For accounts liquidated by notes, see BILLS AND NOTES, IV. (a), Nos. 2, 3, 5, 6.

7. For burden of proof in relation to notes given to settle accounts, see BILLS AND NOTES, IV. (b), No. 5.

8. For suit on accounts not mentioning specific dates, see PLEADING, V. (a), 3), E. No. 3.

ACCRETION.

See DONATIONS, VI. (c), 4).

ACKNOWLEDGMENT.

1. For acknowledgment of natural children, see PARENT AND CHILD, II.
2. For acknowledgment of deeds, see EVIDENCE, XXIV. XXV. REGISTRY, II. (c); III. (a), 2).
3. For acknowledgment in matters of prescription, see PRESCRIPTION, IV. (d).

ACTIONS.

1. For HYPOTHECARY ACTIONS, see MORTGAGE, VI. (c). Where to be brought, 1876, p. 106.
2. For REVOCATORY ACTIONS see OBLIGATIONS, VII. (b), 2). EVIDENCE, VII.
3. For DIRECT ACTIONS, see OBLIGATIONS, VII. (b), 2), A, No. 7, *et seq.* EXECUTION, V. (a), 3), E. JUDGMENT, I. Nos. 1, 2, 3, 4, 10; XV. (c), 3). No. 3; (e), No. 1. MONITION, No. 2. NULLITY, I. No. 13. OFFICE AND OFFICER, Nos. 33, 34. PETITORY AND POSSESSORY ACTIONS, I. No. 7; II. (a). No. 8; II. (c), 1), No. 4. PLEADING, I. (c), 6), No. 1; 8), No. 4; VIII. (e). No. 6. SALE, X. Nos. 2, 3, 15. SHERIFF, I. (a), Nos. 2, 3. SUCCESSION, VII. (a), 1), No. 8; (f), No. 2; VIII. (f), 1), No. 4; 4), Nos. 6, 10. TAXES, III. (d), 3), No. 13.
4. For PERSONAL ACTIONS, see OBLIGATIONS, VIII. (a), No. 1.
5. For PROCEEDINGS *in rem*, see PLEADING, I. (c), 9), No. 13. JUDGMENT, XIV.
6. For RIGHT OF ACTION, see PLEADINGS, I. (a).
7. EX DELICTO AND EX CONTRACTU, see PRESCRIPTION, III. (a), Nos. 7, 8, 9, 10.

ACTS.

1. For authentic acts, see EVIDENCE, XXIV.
2. For private acts and *sous seings privés*, see EVIDENCE, XXV.
3. For recognitive and confirmative acts, see EVIDENCE, XXVIII. OBLIGATIONS, IV.
4. For acts of the General Assembly, see LAWS.
5. For acts of God, see OBLIGATIONS, IX. VIS MAJOR.
6. For acts of acceptance or renunciation of the community or succession, see MARRIAGE, XIII. (e), 3); SUCCESSION, V.

ADJOURNMENT

Of Parish Courts, see COURTS, II. (f), No. 29.

ADJUDICATION.

See EXECUTION, V. (d). SUCCESSION, VIII. (e), 7). EVIDENCE, XXII. (c). INSOLVENCY, XI. SALE, VII. (c). MINORS, III. (g), 2); 3); 5). ROADS AND LEVEES. III. TAXES, III. (d). BANKRUPTCY.

ADMINISTRATION AND ADMINISTRATORS.

1. See SUCCESSION, VII. VIII. IX. COURTS, II. (d), 5). PARTNERSHIP, II. IV.
2. For personal liability of administrators, see SUCCESSION, VIII. (f), 2), B.
3. For public administrator, see PUBLIC ADMINISTRATOR.

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See COURTS, I. 9, 10; IV. (a). JUDGMENT, XIV. SHIPPING, VII.

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3. For capacity of adopter to appoint a testamentary tutor, see MINORS, I.
4. How to adopt, 1872, p. 79.

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See PRIVILEGE, III. (d). SUCCESSION, V. (c), 2). SHIPPING, X. (c), 4).

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2. In English only, 1874, p. 113; in Orleans, three times in 10 days and once a week in 30 days, 1878, p. 157. Judicial advertisement, except Orleans, 1876, p. 146.

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1. In conservatory process, see ARREST, III. ATTACHMENT, III. INJUNCTION, IV. PROVISIONAL SEIZURE. SEQUESTRATION, II. (b).
2. NEW TRIAL, II. III. JURY, I. (c). CONTINUANCE, II. CRIMINAL LAW, XIII. (c).
3. Loss of written instruments, EVIDENCE, IX. (e). BILLS AND NOTES, XVI.

AFFINITY.

1. A cause of recusation, 1877, p. 35.

AGENCY AND AGENT.

See MANDATE.

ALEATORY CONTRACTS.

1. A contract to run a horse race is not prohibited by law, and money lost on such a race may be recovered by action in the courts. But such contracts, although permitted, are regarded with suspicion by the law, and the judge is authorized to reject the entire demand when the same appears to him excessive. 15 A. 525, *Grayson v. Whatley*.
2. The defendants acting as judges of a race, decided in favor of plaintiff, and paid the money over to the latter, but on the appeal of the owner of the contesting horse, returned the money to the judges and referred the question to the jockey club who decided in favor of the owner of the contesting horse, and the money was paid over to him; *Held*: That plaintiff cannot maintain any action against the judges. 16 A. 249, *Bingamon v. Cocks et als*.
3. Proof indicating the pecuniary standing of the parties must be offered so as to enable the court to decide whether the bet on a horse race, sought to be enforced, is excessive. 18 A. 520, *St. Ceran v. Sherman*.
4. The defendants having entered into a contract to pay to the widow an annuity if she should withdraw her application for the administration and transfer to them her interest in and to the succession, are bound to pay the annuity even if the property of the succession be afterwards lost to them. 26 A. 292, *Archinard v. Boyce*.
5. The purchaser who buys the interest of the seller in the succession, cannot have the sale set aside, because he believed it to be more than it really was. 26 A. 669, *Pool v. Alexander*. See SALE, I. (d), No. 6. TRANSACTION, No. 6.
6. Aleatory contracts, generally cannot be transferred, see OBLIGATIONS, VIII. (a), No. 2.
7. A contract to run a horse race, is heritable, see *ib.* No. 3.

ALIEN.

1. For the tax on foreign heirs and legatees, see TAXES, II. (a).
2. Alien heirs may transfer the shares of stock, without opening the succession of the owner. 1877, p. 60.

ALIENATION AND ALIENABILITY.

See DONATIONS, III. (c). MINORS, III. (g). MARRIAGE, IV. (b); XI. (b). THINGS, I. (a), 1; II. (b). NEW ORLEANS, II. (c). EXECUTION, V. (a), 3), A. PRESCRIPTION, II. (a). SALE.

ALIMONY.

1. The person requiring alimony need not wait till the succession be settled, to claim it. 22 A. 627, *Succession of Lyons*.
2. If it be not proven that the person was in need and incurred an indebtedness for her support, alimony will be granted only from the day the petition was filed. *Id.*
3. No greater alimony will be granted to a bastard child than is shown to be necessary for its support. Should a larger sum become necessary, it is within the province of the Probate Court to grant it. 19 A. 504, *O'Gara v. Riddel*.
4. An ex-parte order rendered upon the petition of the wife who claims a divorce, condemning the husband to pay her alimony and giving to her the keeping of the children is contrary to law and equity. 19 A. 505, *Madden v. Fielding*.
5. An action for alimony by the illegitimate child, cannot be brought against the succession, but only against the heirs. 26 A. 323, *Drouet v. Succession Drouet*; 27 A. 382, *Dalton v. Succession Halpin*.
6. A married woman cannot sue merely for alimony. See MARRIAGE, II. (b), No. 2. PLEADING, I. (c), 1), A. Nos. 6, 7.
7. The plea of reconciliation is a peremptory exception. See PLEADING, VI. (c), 1), No. 1.

ALTERNATIVE.

See PLEADINGS, II. (a). OBLIGATIONS, VIII. (d).

ALLUVION.

See ACCESSION, II. (b).

AMENDMENT.

- In pleading, see PLEADINGS, IX.
 Of judgment, see JUDGMENT, VI. XI. APPEAL, VI. IX (i). NEW TRIAL.
 Of minutes, see COURTS I. No. 6.
 Of answers to interrogatories of garnishees, see EXECUTION, V. (a), 3), D. § 2.
 Of verdict, see JURY, IV. (b).
 Of laws, see LAWS, III.
 Of certificate of transcript, see APPEAL, VIII. (e), 1); (f).
 Of the Civil Code and Code of Practice, see CODES.
 Of the Revised Statutes of 1870, see LAWS, III. (c).

AMICABLE.

1. For amicable compounders, see ARBITRATION.
2. For amicable demand, see COSTS, III. (b). EXECUTORY PROCESS, III. (b).
3. For amicable demand in hypothecary actions, see MORTGAGE, VI. (c), 6.
3. Failure of amicable demand, see COSTS, III. (b).
5. It must be pleaded *in limine*, see PLEADING, VI. (a), 1), Nos. 2, 3.

AMITE.

The acts of 1861 and 1862, incorporating Amite, are valid, see REBELLION.

ANIMALS.

See CORPORATIONS, X. (gg). SALE, III. (d).

ANNUITY.

See RENT.

ANSWER.

In suits, see PLEADINGS, V. (b); c); VIII. (a); (b), 1); (c), 1). JUDGMENT, IX. APPEAL, VI. EXECUTORY PROCESS, IV. EVIDENCE, XII. (j).

For answer to amendments in pleadings, see PLEADINGS, IX (a).

For answer to interrogatories on facts and articles, see EVIDENCE, XVIII. (d).

For answer of garnishee, see ATTACHMENT, X. (b). EXECUTION, V. (a), 3), D. § 2.

For answer to rule *nisi* in application for mandamus, see MANDAMUS, II.

ANTECHRISIS.

See PLEDGE, II.

APPEAL.

I. OF THE RIGHT OF APPEAL.

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| <p>(a) <i>As affected by the amount in dispute.</i></p> <ol style="list-style-type: none"> 1) <i>In general.</i> 2) <i>Matters incidental to the principal action, or execution of judgment; and claims by defendant or third persons.</i> 3) <i>Claims, fictitious or cumulated; those for costs, damages, or interest; and joinder of several plaintiffs or defendants.</i> 4) <i>Estates under administration.</i> <p>(b) <i>As affected by the finality of the judgment, or the irreparable injury it may cause.</i></p> <ol style="list-style-type: none"> 1) <i>In general.</i> 2) <i>In particular cases.</i> <ol style="list-style-type: none"> A. <i>Arrest and habeas corpus.</i> B. <i>Attachment.</i> C. <i>Continuance and new trial.</i> D. <i>Exceptions in pleading.</i> E. <i>Injunction.</i> F. <i>Insolvency.</i> G. <i>Minors.</i> H. <i>Removal of suit to another court.</i> I. <i>Sequestration.</i> J. <i>Succession.</i> | <p>(c) <i>As affected by the confession or execution of the judgment; and renunciation of the right.</i></p> <p>(d) <i>As affected by previous appeal.</i></p> <p>(e) <i>As affected by the capacity or interest of parties; and appeals by third persons.</i></p> <ol style="list-style-type: none"> 1) <i>In general.</i> 2) <i>Marriage.</i> 3) <i>Insolvency and succession.</i> <p>(f) <i>As affected by lapse of time.</i></p> <ol style="list-style-type: none"> 1) <i>Suspensive appeal.</i> 2) <i>Devolutive appeal.</i> <p>(g) <i>As affected by the constitutionality or legality of municipal ordinances or taxes.</i></p> <p>(h) <i>From particular courts.</i></p> <p>(i) <i>As affected by the criminal nature of the judgment.</i></p> <p>(j) <i>In general.</i></p> |
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II. OF THE PETITION, MOTION AND ORDER OF APPEAL; ITS WITHDRAWAL; AND THE RETURN DAY.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>Petition and motion; who are appellants and in what capacity.</i></p> | <p>(c) <i>Order granting appeal; and the return day.</i></p> |
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III. OF THE BOND.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>Form and to whom payable.</i></p> <p>(c) <i>Amount.</i></p> <p>(d) <i>Qualification and surety.</i></p> <p>(e) <i>Rights and obligations of the surety.</i></p> | <ol style="list-style-type: none"> 1) <i>In general.</i> 2) <i>Extent of surety's liability; and judgment against his principal.</i> 3) <i>Proceedings to fix surety's liability and exceptions he may plead.</i> 4) <i>Extinction of surety's obligation.</i> |
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IV. OF THE CITATION.

- (a) *In general.*
- (b) *Necessity and waiver of citation; the time and its extension.*
- (c) *On whom and where to be made; return and proof of service.*

V. OF THE PARTIES.

- (a) *In general.*
- (b) *Who must be made parties, and how far those not parties are affected by or can avail themselves of the appeal.*
 - 1) *In general.*
 - 2) *Garnishees, partners, sureties, and warrantors.*
 - 3) *Insolvency, marriage, partition, succession and tutorship.*
- (c) *Change of parties.*

VI. OF THE APPEARANCE, ANSWER AND MOTION TO DISMISS.

- (a) *In general.*
- (b) *Waiver of motion to dismiss.*
- (c) *When prayer for amendment or motion to dismiss if not waived, must be filed.*
- (d) *Prayer for damages.*

VII. OF THE EFFECT OF THE APPEAL.

- (a) *In general.*
- (b) *Time allowed for suspensive appeal and amount of the bond.*
- (c) *Reversal of the judgment.*

VIII. OF THE DIFFERENT MODES OF BRINGING UP THE APPEAL AND INFORMALITIES IN SO DOING.

- (a) *In general.*
- (b) *Assignment of error.*
- (c) *Statement of facts.*
- (d) *Time within which the transcript must be filed; its extension.*
- (e) *Certificate of the judge and clerk.*
 - 1) *In general.*
 - 2) *Requisites of the certificates.*
- (f) *Diminution of record and correction of errors.*

IX. OF THE JUDGMENT ON APPEAL.

- (a) *In general.*
- (b) *Consideration due to the verdict of the jury, or judgment of the court.*
- (c) *Laches of parties; errors of counsel; defective pleadings or evidence.*
- (d) *Errors below in matters relating to the evidence or trial by jury.*
- (e) *Failure to apply for a new trial; and of the rule; "de minimis non curat lex."*
- (f) *Damages on appeal.*
- (g) *Matters and pleas not acted on below, nor embraced in the transcript.*
 - 1) *In general.*
 - 2) *Applications and claims, defenses and exceptions not made below or waived.*
 - 3) *Evidence.*
- (h) *Form and effect of judgment; and by which of the judges it may be rendered.*
- (i) *Re-hearing; and amendment of judgment.*

I. OF THE RIGHT OF APPEAL.

- (a) *As affected by the amount in dispute.*
 - 1) *In general.*

1. Where a slave had been ordered into the custody of the sheriff by a justice of the peace, in a prosecution against a wife for cruel treatment; *Held*: That an application by the husband, as head and master of the community, to the district judge for a mandamus against the magistrate, the keeper of the parish jail and the sheriff, for the delivery of the slave, was not incidental to the

criminal prosecution, and if the amount involved exceeds the sum of three hundred dollars, the Supreme Court has jurisdiction. 15 A. 603, *Ney v. Richard*.

2. An admission of part of the claim sued on, made by the defendant, and a deposit by him of such amount in court before the trial of the cause, although the balance of the claim is not appealable in amount, will not prevent the defendant from appealing, unless the plaintiff, upon the confession and deposit being made, takes a partial judgment for the amount confessed, with a reservation of his right to prosecute to final judgment the balance of the claim. 15 A. 50, *Blache v. Aleix*.

3. The defendant having admitted and confessed judgment for the greater part of the claim, leaving in contestation a sum below five hundred dollars, thereby rendered the case unappealable. 26 A. 291, *Girardey v. City*; 22 A. 618, *Zacharie v. Lyons, adm'r*. *Per contra*, See No. 57.

4. When the amount claimed exceeds five hundred dollars, and the claim is afterwards reduced, not by pleading, but by proof administered, the claim is appealable. 22 A. 330, *Connors v. Citizens' Mutual Insurance Company; Martinez v. Lieber & Mume, N. R.*

5. When the plaintiff, before judgment, enters a *remittitur* by the effect of which the amount in contestation does not exceed five hundred dollars, no appeal will lie. 21 A. 729, *State, ex rel. Union Telegraph Company v. Judge Seventh District Court*; *ib.* 366; 14 A. 114; 2 How. 73; 7 N. S. 361; 2 L. 102, 286; 2 A. 136; 14 A. 643; C. P. 491; 16 A. 431, *Leblanc v. Pittman & Barrow*; 17 A. 199, *Vincent v. Schweitz, r.*

6. Where the judgment creditor sues to annul a judgment, below five hundred dollars, although the property seized may be worth much more, the Supreme Court is without jurisdiction. 18 A. 398, *State ex rel. v. Judge Fourth Judicial District Court*. See Nos. 58, 26.

7. It is not the amount of the judgment, but the amount in contestation which renders a case appealable. 21 A. 366, *Maxen & Shearer v. Landrum, etc.*

8. Where the amount in dispute is less than five hundred dollars, the court will *ex officio* notice this fact. 19 A. 276, *Boutte v. Maillard*; 22 A. 400, *State, etc. v. Dopf*.

9. The amount due at the institution of the suit constitutes the matter in dispute. 22 A. 25, *Wolf v. Witherell*.

10. The amount sued for renders the case appealable. 24 A. 118, *Blum, Stern & Co. v. Sallis*.

11. In a suit for possession where it is neither alleged, nor proved that the value of the possession exceeds five hundred dollars, the appeal will be dismissed. 22 A. 272, *Slawson v. Meggett*.

12. The court will take judicial cognizance that the amount in dispute, in a contest involving the office of district judge, is above five hundred dollars. 21 A. 289, *Fish v. Collens*.

13. Where the amount in dispute does not exceed five hundred dollars, on its own motion, the Supreme Court will dismiss the appeal. 28 A. N. R., *Raynaud v. Gusman et als*.

14. The affidavit of appellant, that he has an interest of more than five hundred dollars, may be filed in the Supreme Court, to prove his interest to maintain the appeal. 21 A. 447, *Carrollton v. Metropolitan Police*; 20 A. 574, *State ex rel. Cain v. Judge Sixth District Court, Parish of Orleans*.

15. Where appellant has made no effort to prove the amount of damages claimed, so as to give the Supreme Court jurisdiction, the appeal will be dismissed. 21 A. 745, *Pritchard v. Gaudin*; 9 A. 3; 10 A. 282; 16 L. 182; 4 A. 213; 6 A. 735; 30 A. 660, *Wade v. Loudon*.

16. The tax-payer who seeks his remedy before the court, to prevent the payment of large sums from the parish treasury, must show that his interest amounts to more than five hundred dollars; the mere allegation that he will be injured by more than five hundred dollars, is not sufficient to maintain his appeal. 26 A. 673, *Dugan v. Police Jury St. Charles*.

17. Without making affidavit that their interest amounts to more than five

hundred dollars, and that they are tax-payers, appellants, third persons, cannot appeal from a judgment against the parish ordering a tax to be levied to pay the judgment. 28 A. 324, *Rathbone v. Parish of St. James*.

18. Where the appellant files his affidavit that the matter in dispute and his interest therein exceeds five hundred dollars, the appeal will be maintained. 21 A. 336, *State ex rel. Hero v. Pitot et als.*

19. Tax-payers whose interest amount to more than five hundred dollars, may appeal from a judgment imposing a special tax on the parish to pay the same. 27 A. 319, *Flagg v. St. Charles Parish*; 22 A. 602; 23 A. 582, 678; 25 A. 627.

20. The court entertained an appeal taken by a third person, claiming to be the owner of property worth two hundred dollars, seized by virtue of a judgment of eighty-five dollars; appellant claimed five hundred and fifty dollars damages. 21 A. 350, *Stewart v. Cohn*.

21. The Supreme Court cannot entertain an appeal from a judgment dissolving an injunction obtained by the defendant against a judgment of another court, for one hundred and sixty-one dollars and costs, although one thousand dollars alleged damages are claimed. 24 A. 117, *Michoud v. Nolan*; 15 A. 292, *Poré v. Valishe*. See *infra*, 36.

22. A defendant who enjoins the execution of judgments forming less than an appealable amount, cannot appeal, although he claims a large sum of damages and sets up the great value of the property seized. 16 A. 47, *Bruneau v. Haughton*; 21 A. 307, *Gayarre v. Hays, sheriff*.

23. In suits by garnishment, the amount in contestation is the claim against the debtor and garnishees. 23 A. 505, *Leverich v. Dulin*.

24. Where the amount garnisheed is less than five hundred dollars, the Supreme Court is without jurisdiction, on any question between the garnishee and plaintiff. 27 A. N. R., *Harrison v. Carondelet Street and Carrollton Railroad Company*.

25. A garnishee cannot appeal, where several garnishments of different plaintiffs, each below five hundred dollars, have been made, even if there was only one rule to cross the different answers. 26 A. 276, *Collins et als. v. Mississippi and Mexican Gulf Ship Canal and Draining Company*.

26. An appeal may be taken from a judgment on a rule to be paid by preference out of the proceeds of sale, which amount to more than five hundred dollars, when the execution issued on a judgment for less than that sum. 27 A. 503, *Smith & McKenna v. Charles*. See No. 59.

27. Where nothing shows the value of the rights seized, an appeal from the judgment annulling the seizure will be dismissed. 21 A. 193, *Matter of C. Docteur*.

28. Where the injunction was for twelve hundred dollars, the forthcoming bond one thousand dollars, the appeal bond one thousand dollars, and the property was valued at one thousand dollars by a witness, the Supreme Court will maintain its jurisdiction. 21 A. 296, *Gogreve v. Windhorst*.

29. The Supreme Court cannot entertain jurisdiction of cases appealed under the Constitution of 1864, if the matter in dispute does not exceed five hundred dollars. *Ib.*; 20 A. 533, *Myers v. Mitchell*; 567, *Cushing v. Hickle & Co.*

30. No appeal lies for a claim of less than five hundred dollars. 22 A. 272, *Slawson v. Megget*; *ib.* 333, *Case, Receiver v. Hurley*.

31. No appeal lies for a claim of exactly five hundred dollars. 22 A. 218, *Hogan v. Harrison*; 26 A. 61, *Oglesby v. Helm*; 379, *Maham v. Benton*.

32. No appeal lies for a judgment for less than five hundred dollars, because the judge refused to order a tax to be levied to pay the judgment. 28 A. 233, *Hyat v. Police Jury*; *Harris v. Same*.

33. Where creditors claim over each other a fund to be distributed, which amounts to more than five hundred dollars, the case is appealable. 27 A. 503, *Smith & McKenna v. Charles*; 26 A. 372, *O'Hern v. Gouldy*. See *infra*, 4).

34. Where the principal matter in dispute is the title to property shown by affidavit to be worth over three hundred dollars, an appeal will lie to the Supreme Court, although the money demand and judgment in the case be for

a less sum than three hundred dollars. 15 A. 661, *Succession of Renneberg*,

35. A claim for damages based on a wrongful deprivation of some moral gratification or personal convenience when appellant makes oath that his interest amounts to more than five hundred dollars, is appealable. 29 A. 38, *Burke v. Wall*.

36. The appeal must be dismissed if there be nothing in the record to show that the matter in dispute, which is the exhibition of defendants' books to relator, a stockholder, exceeds five hundred dollars. 22 A. 622, *State ex rel. St. Romes v. Levee Steam Cotton Press Co.*

37. The judgment on a suit of a stockholder to compel the officers of the company to permit him to examine the books of the company, does not involve any amount in dispute, and the Supreme Court is without jurisdiction. 25 A. 43, *State ex rel. Newgass v. Friedlander*; 24 A. 148.

38. The gravamen of the action, being the illegal charges, less than five hundred dollars, on sugar and molasses deposited under the sheds of the defendants, leaves the Supreme Court without jurisdiction, although the sugar itself was claimed. 25 A. 75, *McClelland v. Sugar Shed Co.* See CORPORATIONS, X. (hh).

39. A defendant sued for twenty per cent., which is less than five hundred dollars, on his stock note of more than five hundred dollars, has an appealable interest. 25 A. 133, *Peychaud, liq. v. Weber*; 29 A. N. R., *Todd, liq. v. Morse*.

WYLY, J., *dissenting*. The cause of action is not on the note, but the liability of the stockholder to pay the debt of the insolvent corporation. This obligation being only for one hundred and sixty dollars, it is below the jurisdiction of the Supreme Court. *Ib.*

40. When the amount in dispute exceeds five hundred dollars an appeal lies from a judgment refusing to mandamus the chairman of the committee for auditing the expenses of the Senate and dissolving an injunction to prevent him from paying others than relator. 28 A. N. R., *State ex rel. Kline v. Judge Superior District Court*.

41. If the petition claims six per cent. when the note annexed as part bears eight per cent., the court cannot allow more than prayed for, and if the amount claimed be less than five hundred dollars there is no appeal. 22 A. 53, *Citizens' Bank v. Condran*. See INTEREST, Nos. 1, 22.

42. Through error the amount in dispute was found to be more than five hundred dollars, and the motion to dismiss was refused; however on the examination of the case on its merits, the error being discovered, the appeal was dismissed *ex-officio*. 24 A. 94, *Halpin & Moran v. Maxwell, et als.*

43. A judgment of five hundred dollars based on a claim for damages arising from the erection of a high fence by plaintiff's neighbor on the latter's property is a revolving claim, and as such appealable. 25 A. 621, *State ex rel. Darcy v. Judge Fourth District Court*.

44. No appeal lies from an order obtained by an intervenor, to bond the property claimed by him, when its value is less than five hundred dollars. 25 A. 651, *Jennings v. Connico*.

45. A suspensive appeal lies from a judgment on a rule to be put in possession of property purchased under tax sale, when the amount involved exceeds five hundred dollars. 28 A. 724, *State ex rel. Hollander v. Judge Fourth District Court, Parish of Orleans*.

46. Where the value of the property plaintiff asks to have reconveyed to him is five hundred dollars, and the amount of the difference in contestation between plaintiff and defendant as to the amount necessary to redeem, the same having been bought at tax sale, is less than five hundred dollars, the Supreme Court is without jurisdiction. 28 A. N. R., *Reboul v. Billgery*.

47. A suspensive appeal lies from a mandamus directing the office, books, papers, etc., of the sheriff, to be turned over to relator when the amount involved is sufficient to give jurisdiction to the Supreme Court. 20 A. 529, *State ex rel. Ingram v. Judge Sixth Judicial District Court*.

48. The allegation on the writ of mandamus, that the matter in dispute, exceeds five hundred dollars, does not change the legal status of rooms, keys, books and paper pertaining to the sheriff's office, nor show applicant's interest

therein to be of such value. 21. A. 108, *State ex rel. Creagh v. Judge Seventh Judicial District Court*; 186, *State ex rel. Wrotnoski v. Bryan*.

49. An appeal from a mandamus ordering a sheriff to turn over to his successor in office, the room, keys, etc., will be dismissed, unless it is shown that these articles are of a value exceeding five hundred dollars. 21 A. 18, *State ex rel. v. Lagarde*; 22 A. 49, *State ex rel. v. Judge Second Judicial Dist. Court*.

50. A judgment for alimony at the rate of two hundred and fifty dollars per month, during the pendency of the suit, is appealable, although there was only five hundred dollars actually due, at the time of its rendition. 24 A. 601, *State ex rel. Holbrook v. Judge Eighth District Court*; 21 A. 65, *State ex rel. Lyons v. Judge Second District Court*.

51. Although the charter party may be for a greater amount, yet if the claim in litigation thereunder does not exceed five hundred dollars, the appeal will be dismissed. 25 A. 385, *Blanchard v. Kenison*.

52. Where the petition claims judgment for the full amount of the forthcoming bond, which is more than five hundred dollars, or so much thereof as may be due, but the judgment is for less than five hundred dollars, the case is appealable. 28 A. N. R., *Harvey and Wife v. Succession W. P. Harper*.

53. Where the amount in dispute is less than five hundred dollars, the Supreme Court is without jurisdiction, although the release bond on which the suit was brought had been executed for more than that sum. 27 A. N. R., *State ex rel. Harper v. Judge Second District Court*.

54. A third person claiming the ownership of property seized by the constable, alleged to be worth more than five hundred dollars, may appeal from a judgment subjecting the property to the execution. 28 A. N. R., *McCormick v. Sullivan, constable, etc.*

55. The suit was for more than five hundred dollars, a remittitur was entered reducing the claim to five hundred dollars; judgment having been rendered for more than that sum, the defendant is entitled to an appeal. 28 A. N. R., *Louisiana State Lottery Company v. Durant Da Ponte*.

56. There is no criterion by which the value of a lawless possession of real estate can be made. The appeal should be dismissed. 29 A. N. R., *Ternoir v. Weaver, et als.*

57. The fact that in the answer, and as a witness, defendant admitted being indebted for a sum less than five hundred dollars, does not render the case unappealable. 28 A. 818, *Abney, Love & Co. v. Whitted*. *Per contra see ante*, No. 3.

58. Where the adjudicatee, who is a third opponent, pays the price and receives in part payment of his claim a sum which leaves in contestation only the amount received by plaintiff, and which is less than five hundred dollars, the Supreme Court is without jurisdiction to entertain a devolutive appeal from the judgment ordering the distribution. 30 A. 623, *Picard & Weil v. Wade*. See No. 26, 6.

59. Where the plaintiffs claimed two hundred dollars damages, but averred that the damages exceed that sum and filed their affidavit in the Supreme Court to show that their interest exceeded five hundred dollars, the case is appealable. 30 A. 798, *Crescent City Live Stock and Slaughterhouse Company v. Larrieux*.

60. Where the purchaser of property, for a price exceeding five hundred dollars has been garnisheed for less than that sum, and the question at issue is the validity of the purchase, the case is appealable. 30 A. — *Boisdoré v. Dorville, Erath, garnishee*.

61. Further, see COURTS, II. (c).

2) Matters incidental to the principal action or execution of judgment; and claims by defendant or third persons.

1. Whenever the contest between the defendant and his warrantor puts at issue the defendant's right to recover of the warrantor a sum exceeding three hundred dollars, although the demand of the plaintiff and the actual demand in warranty be less than three hundred dollars, the Supreme Court will have jurisdiction over defendant's demand against his warrantor. 15 A. 521, *Vicksburg Railroad v. Hamilton*.

2. When the principal demand is not appealable in amount, and the evidence shows that there is no real foundation for the demand in reconvention for an amount over three hundred dollars, nor any legal ground for supposing that such an amount could be recovered, the appeal will be dismissed. 15 A. 135, *Gagné v. Barrow*.

3. Where the reconventional demand amounts to more than three hundred dollars, although the original claim is not appealable, the Supreme Court has jurisdiction to pass on the reconvention. 17 A. 199, *Vincent v. Schweitzer*; 3 R. 387; 10 R. 438; 11 R. 12; 28 A. N. R., *Blanchard v. Kenison*.

4. Adverse interest over five hundred dollars must be shown, to appeal from an order directing the clerk of the district court to transfer to the parish court the record of a suit. 21 A. 481, *Swan v. Bry, clerk*.

5. An appeal lies from a judgment releasing a garnishment process, where the amount involved is more than five hundred dollars. 28 A. 880, *State ex rel. Gest & Atkinson v. Judge of the Superior District Court*.

6. The Supreme Court has no jurisdiction of an appeal from a rule against the sheriff to complete his deed of property sold by him under a judgment and execution of less than five hundred dollars, although the property sold be worth more, if the judgment debtor be appellant. 30 A. 229, *State ex rel. v. Judge Third District Court*.

3) Claims fictitious or cumulated; those for costs, damages or interest and joinder of several plaintiffs or defendants.

1. An appeal will not lie to the Supreme Court in an injunction suit arresting the execution of a judgment for less than three hundred dollars, and an unreal demand for a larger amount of damages claimed in the petition. 15 A. 292, *Porée v. Valisch*.

2. The consolidation of a suit where the amount in dispute is less than three hundred dollars, with another case brought by another plaintiff, will not render appealable the first suit. 18 A. 136, *Bazoni v. Marcera*.

3. Plaintiffs having joined their claims in one suit for the sake of economy, have made their case appealable. 27 A. 501, *Bowman v. City*.

4. The claim being over five hundred dollars against a succession, but payable jointly by several heirs, making the indebtedness of each below five hundred dollars, does not divest the Supreme Court of jurisdiction. 25 A. 291, *Lartigue v. Clara White*; 325.

5. WYLY, J., *dissenting*. Whether the heirs were sued separately as they might have been or were joined in the same action, can make no difference, the virile share being below five hundred dollars, the court is without jurisdiction. *Id.*

6. A case involving the distribution of more than five hundred dollars, although each claimant's share amounts to less, is appealable. 24 A. 442, *Haughery v. Thiberge*; 26 A. 80, *Lapène & Ferré v. Miguel*. See *infra*, 4).

7. If the interest added to the principal amount to more than five hundred dollars, the case will be appealable. 20 A. 565, *Schlenker v. Taliaferro*.

8. If the principal and interest amount to more than five hundred dollars at the institution of the suit, the case is appealable. 21 A. 155, *Mann & Co. v. Norton*; 22 A. 111, *Jaquet v. Webb, Levert & Co.*

9. In an appeal from an action in nullity, costs subsequently accrued in the original suit, cannot be added so as to give jurisdiction to the Supreme Court. 26 A. 61, *Oglesby v. Nelson*.

10. A judgment on a rule against a security, composed of four hundred and ninety-one dollars, principal; eight dollars interest, and seventy dollars costs, in the original suit, is appealable. 28 A. 110, *State ex rel. Redwitz v. Judge Sixth District Court*.

11. No appeal lies from a judgment on a rule to pay the fees of an expert, amounting to less than five hundred dollars. 28 A. N. R., *Johnson v. Popovich, et als.*; O. B. 45, fo. 62.

12. The claim of a contractor under a city contract for a street, against one of the front proprietors, for a less amount than five hundred dollars, is not appealable. 26 A. 76, *O'Hara v. Davidson*; 21 A. 51, *Rooney v. Brown*.

13. Where several parties unite to defeat an ordinance making a contract above five hundred dollars, they have the right to appeal. 23 A. 761, *State ex rel. Murtagh v. Judge Eighth District Court*.

14. Where plaintiffs sue to annul a contract made with the city for shelling a street, although the amount which each may have to pay is less than five hundred dollars, the case is appealable if the contract amounts to more than that sum. 27 A. 170, *Ready v. City et als*. See *infra*, 19.

15. Where the suit in damages is not serious, the appeal will be dismissed. 28 A. N. R., *Atwood v. Cushing*.

16. Where the demand for damages is made for the purpose of giving jurisdiction to the Supreme Court, and the property seized under a judgment rendered by a justice of the peace, is worth less than five hundred dollars, the appeal must be dismissed. 28 A. 18, *Ribet v. Contreras*; 21 A. 193; 24 A. 117; 26 A. 673.

17. No appeal lies where different defendants are sued in the same case, on a separate contract, each below five hundred dollars. 28 A. 172, *Broadwell v. Smith, et al*.

18. Where the capital, interest and costs enjoined, amount to over five hundred dollars, at the date of the injunction, the case is appealable. *State ex rel. Cheval v. E. North Cullom, Judge Fifth District Court*; No. 4486. Supreme Court at New Orleans; not reported.

19. Where several parties unite in one suit for the purpose of claiming the damages occasioned to each, by one and the same act, and the claim of each amounts to less than five hundred dollars, but the aggregate greatly exceeds the amount, they cannot sever for the purpose of depriving the Supreme Court of jurisdiction, when the case is on appeal. 27 A. 501, *Bowman et als. v. City*; 8 N. S. 338. See *ante*, 12 and 14.

20. See COURTS, II. (c), for jurisdiction of the Supreme Court.

21. The defendant against whom a judgment for less than five hundred dollars has been rendered, who enjoins the same and sues for its nullity, asking at the same time damages for much more than five hundred dollars, does not present a case of which the Supreme Court has jurisdiction. 30 A. 427, *Cushing v. Sambola & Ducros*.

22. DEBLANC, J., *dissenting*. The suit in damages being for more than five hundred dollars, is appealable. *Ib*.

23. Where three plaintiffs claim in all one thousand dollars damages, their claim is joint and the case is not appealable. 30 A. 609, *Larrieux v. Crescent City Live Stock Landing and Slaughterhouse Company*.

4) Estates under administration.

1. In a succession where the matter in dispute does not exceed five hundred dollars, no appeal lies, no matter what would be the value of the succession. 21 A. 264, *Succession of Espinola*.

2. Where the creditors of a succession are litigating their rights contradictorily with each other and the value of the succession exceeds five hundred dollars, an appeal will lie to the Supreme Court, although the claim of each creditor may not amount to that sum. 21 A. 487, *Succession of Gale*.

3. Where creditors of a succession are litigating their rights contradictorily with each other, an appeal will lie, although the claim of each creditor may not amount to five hundred dollars, if the value of the succession exceeds that sum. 28 A. 935, *State ex rel. Hickman v. Judge Second District Court*; 21 A. 487; 29 A. 327, *Succession of Cloney*. See *ante*, 1), No. 33; 3), No. 6.

4. Where the succession is closed and there are no funds for distribution in the hands of the executor, the Supreme Court has no jurisdiction of an appeal from a judgment ordering the executor to pay to a certain creditor, a sum less than five hundred dollars. 30 A. 370, *Succession of Pointer*.

(b) *As affected by the finality of the judgment, or the irreparable injury it may cause.*

1) In general.

1. No appeal lies from a final judgment, until signed. 20 A. 394, *State v.*

Bouchon; 500, *Thiel v. Crutcher & Co.*; 21 A. 261, *Trost v. Fox*; 28 A. 26, *Frantz v. Waggaman, sheriff*; 23 A. 219, *Tietgens v. Succession Kamper*; 22 A. 410; 25 A. 7, *State ex rel. v. Wharton*; 23 A. 400, *Succession Millaudon*. See *infra*, 2), E. Nos. 4 and 18.

2. The court will notice *ex officio*, that the judgment is not signed, and dismiss the appeal. 20 A. 583, *Labatt v. Durruty*; C. P. 546; 4 R. 47; 7 R. 451; 9 A. 42; 20 A. 511, *Johnson v. Gennison*.

3. If the judgment be not signed, the case cannot be passed upon, even with the consent of parties. 23 A. 262, *Bird's Ex. v. Bird*.

4. Judgment in the country being signed on the last day of the term, an appeal before signature, is not premature. 23 A. 705, *Green v. Huey, sheriff*; 15 A. 521, *Vicksburg Railroad v. Hamilton*. See PRESCRIPTION, VIII. No. 4, for time when the judgment has effect.

5. Under the mode of procedure in the country, an appeal taken after a motion for a new trial, from the verdict of the jury has been refused, and before the rendition of the judgment, will be considered as *nunc pro tunc*, and as such is valid. 25 A. 497, *Mouton v. Broussard*; 12 A. 289, 596; 15 A. 521; 23 A. 704, *Green v. Huey, sheriff*.

6. A memorandum by the clerk that the original judgment is signed, but is lost, is not sufficient. This fact should be proved like other facts. 27 A. N. R., *Succession of Haggerty*.

7. A judgment rendered on a rule to compel the sheriff to credit a writ of seizure with a balance in his hands, must be signed before being appealable. 22 A. 16, *Leeds v. Louisiana Manufacturing Company*.

8. The judgment being signed in vacation must be considered as having no signature thereto, therefore the appeal must be dismissed. 23 A. 523, *James v. Fellowes*; 21 A. 306, *Culver, Simmonds & Co. v. H. J. Leovy et als.*; 26 A. 119, *State ex rel. Dixon v. Judge Fifth District Court*. See TERM, No. 2.

9. Where there is not, in the transcript of appeal either a final judgment, signed by the judge, or such an interlocutory judgment as may work irreparable injury, the appeal will be dismissed. 17 A. 97, *North v. Leathers*.

10. The judgment against the sureties on a twelve months' bond, is a final judgment and must be signed before an appeal can be taken. 22 A. 188, *Sibley, Guion & Co. v. Fernie Brothers & Co.*

11. The judgment on a rule to erase taxes, must be signed to be appealed from. *Jacob v. Preston*, not reported.

12. When the interest of one partner has been seized to satisfy a judgment which is unappealable and the appointment of a receiver has been prayed for, an appeal from the order appointing him will lie on the application of the other partner, if his interest amounts to over five hundred dollars. 24 A. 424, *State ex rel. Simonds v. Judge Sixth District Court*; 21 A. 307; 12 R. 519; 6 R. 4; 1 A. 310.

13. A final judgment on a *quo warranto*, even if it contains an injunction against defendant, may be appealed from. 20 A. 575, *State ex rel. Cain v. Judge Sixth District Court*.

14. An appeal will lie from a judgment on a rule to quash executory proceedings. 17 A. 143, *Heft v. Kelty*.

15. A judgment on a third opposition is appealable. C. P. 395; 24 A. 599, *State ex rel. Bagur v. Judge Eighth District Court*.

16. An appeal lies from a mandamus issued to compel a justice of the peace to examine the witnesses and write down their testimony in a case where the defendant waived examination on a charge of assaulting a prosecuting witness with intent to murder. 16 A. 159, *State ex rel. v. Judge Seventh Judicial District Court*.

17. A *subpoena duces tecum* for defendant's books to be examined by an expert, is appealable. 26 A. 57, *State ex rel. Bertin v. Judge Superior District Court*.

18. A judgment ordering the sheriff to deliver to one of the litigants a sum of money in his hands, may cause an irreparable injury. 23 A. 713, *State ex rel. v. Judge Fifth District Court*.

19. The appeal being taken by defendant, merely from the judgment on the

original demand which was dismissed and not upon the reconventional one, appellatant shows no cause of complaint. 25 A. 385, *Blanchard v. Kenison*.

20. No appeal lies from an order obtained by an intervenor to bond the property provisionally seized, even if plaintiff should be compelled to bring another suit to obtain redress. 25 A. 652, *Jennings v. Connico*.

21. No appeal lies from interlocutory orders rendered in partition suits. 28 A. 392, *F. L. Marionneaux v. Succession F. N. Marionneaux*; but see 30 A. 307, *State ex rel. Ventress v. Parish Judge of Iberville*.

22. No appeal lies from an order homologating the report of experts, in a partition suit, because the judgment does not work an irreparable injury. 28 A. 392, *Marrionneaux v. Marrionneaux*.

23. No appeal lies from an order directing a partition to be made in kind and referring the parties to a notary to complete the same. *Ib.*

24. The judgment ordering certain books, papers, etc., of the sheriff's office to be turned over to the officer, legally declared to be entitled to such office by a previous judgment which is final, cannot be suspensively appealed from. 21 A. 107, *State ex rel. Creagh v. Judge Seventh District Court*.

25. An interlocutory order in a divorce suit, giving to one of the parties the custody of the children, cannot work an irreparable injury. *State ex rel. D'Aquin v. Judge Sixth District Court*, O. B. 44, fo. — suit No. 5833, not reported.

26. No appeal lies from an order carrying out a final judgment, such as ordering the sheriff to put the purchaser in possession of property sold by him, after dissolution of an injunction from which no appeal has been taken. 27 A. 703, *State ex rel. Schmidt v. Judge Second Judicial District Court*; 30 A. 179, *Bouttè v. Bouttè*; 229, *State ex rel. Elder v. Judge Third District Court*; 233, *State ex rel. McCloskey v. Judge Second District Court*. See No. 35.

27. Where the Circuit Court of the United States has proceeded to carry out a decree of the Supreme Court, by issuing an attachment against a party who has refused to comply with its mandate, an appeal will not lie from the order directing the attachment. 20 H. 133, *McMicken v. Perin*.

28. No appeal lies from an order continuing a case. 28 A. 575, *Smith v. Anderson and Wife*; 29 A. 694, *Succession Grace*; 1 N. S. 597; 15 L. 521; 12 M. 488.

29. An order to sell property may work an irreparable injury. See *MANDAMUS*, I. (a), 2), No. 12.

30. A judgment transferring a case is appealable. See *MANDAMUS*, I. (a), 2), No. 11. *COURTS IV.* (b), No. 12.

31. A garnishee, under attachment cannot appeal previous to judgment, from the interlocutory decree declaring that he held property of the defendant. See *MANDAMUS*, I. (a), 2), No. 14. See *infra*, 2), B. No. 2.

32. No appeal lies from an interlocutory decree rescinding an order taking for confessed the facts alleged in a motion for a *subpœna duces tecum*, nor from an order rescinding the appointment of experts. 29 A. 805, *State ex rel. Cole v. Judge Fifth Judicial District Court*.

33. If the final decree cannot replace the party in the advantageous position he occupied before the interlocutory judgment, the injury is irreparable. *Ib.* 6 L. 427, *Hyde v. Jenkins*.

34. No appeal lies from a judgment granting a prayer for a jury, continuing a case, or maintaining a challenge to the array of jurors. 21 A. 453, *State ex rel. McCarthy v. Manning*.

35. A judgment on a rule to be put in possession of property sold by the sheriff, is a final decree requiring signature. See *JUDGMENT*, IV. No. 11.

36. Where a dead lock occurs in a partition suit by reason of two contradictory judgments, an appeal will lie. 30 A. 307, *State ex rel. Ventress v. Parish Judge of Iberville*.

37. An appeal does not lie from a judgment ordering an injunction to issue on plaintiff giving bond in such sum as the court will fix after hearing the defendant; until the condition happens. 30 A. 211, *Jefferson and Lake Pontchartrain Railroad Company v. City of New Orleans*.

38. No appeal lies from orders rendered on a prayer foroyer, having for effect to keep the case in *statu quo*, until plaintiff comply with the prayer. 30 A. —, *State ex rel. Harnan v. Houston, judge*.

39. See *infra*, 2), B. Nos. 1, 2; c. Nos. 1 and 2.

2) In particular cases.

A. Arrest and habeas corpus.

1. In matters of *habeas corpus* the jurisdiction of the Supreme Court is original, and the court and each of the judges thereof, may grant the writ in cases in which they may have appellate jurisdiction. 28 A. 887, *State ex rel. Roques v. Fagan, criminal sheriff*.

2. The Supreme Court is without jurisdiction to issue the writ of *habeas corpus* where the petitioner has, for contempt of court, been condemned to ten days imprisonment. 30 A. 672, *James Woods to the court*.

3. For contempt of court, see COURTS, III.

B. Attachment.

1. If a judgment dismissing a rule to dissolve an attachment does not work an irreparable injury, no appeal will lie from such interlocutory decree. 22 A. 249, *Mesritz v. Marks*.

2. The judgment rendered on a rule to cross the interrogatories propounded under an attachment, decreeing the property to be in the hands of the garnishee, and subject to satisfy such judgment as may be rendered against the defendant, is an interlocutory order from which no appeal lies. 23 A. 213, *State ex rel. Scooler v. Judge Sixth District Court*. See APPEAL, I. (b), 1), No. 31.

3. A judgment decreeing the garnishee under an attachment, to have property in his hands, liable for any judgment which may be rendered against the defendant, is an interlocutory order. 23 A. 213, *State ex rel. v. Judge Sixth District Court*.

4. An appeal will lie from a judgment dismissing a rule for contempt on the sheriff to show cause why he should sell the property attached. 28 A. 264, *Bayly & Pond v. Weil*.

C. Continuance and new trial.

1. No appeal lies from an order of the district judge granting a new trial before the judgment has become final, such an order is within the discretion of the district judge, is interlocutory, and does not work an irreparable injury. 15 A. 659, *Wheeler v. Maillot*.

2. No appeal lies from a judgment granting a new trial. 20 A. 168, *McWillie v. Perkins, Jr.*

3. No appeal lies from an order continuing a case. 28 A. 575, *Smith v. Anderson and Wife*; 29 A. 694, *Succession Grace*; 1 N. S. 597; 15 L. 521; 12 M. 488.

D. Exceptions in pleadings.

See PLEADING, VI.

E. Injunction.

1. The execution of a judgment cannot be suspended by a rule. No suspensive appeal lies from the judgment rendered on such a rule. 19 A. 210; *Wiley v. Woodman*; 9 A. 302; 20 A. 558, *Levi v. Converse et al.*

2. An appeal will lie from a judgment dissolving an injunction because the surety on the injunction bond is not good and where irreparable injury may be done. 21 A. 736, *State ex rel. Storrs v. Judge Fourth District Court*; 64; 153.

3. An appeal lies from a judgment dismissing a rule to quash an *alias* writ of *feri facias* issued pending an injunction against a writ of *feri facias* which had been returned, so as to cure the informality complained of. 20 A. 278, *Smith v. Purves et al.*

4. The judgment dissolving the injunction and dismissing the suit is a final

judgment which should be signed and from which a suspensive appeal will lie after signature. 25 A. 7, *State ex rel. Attorney General v. Wharton et als.*

5. When an interlocutory judgment practically decides the issue and has the effect of maintaining the grounds of the injunction, which go to the marrow of the executory process, irreparable injury may result and in consequence an appeal lies. 23 A. 302, *Marrero v. Baker.*

6. A judgment maintaining an injunction which only delays the sale of the succession property is an interlocutory decree, which may cause an irreparable injury. 22 A. 206, *Woolfolk v. Woolfolk.*

7. The judgment under the intrusion proceedings, *ipso facto*, disposes of the injunction taken out as ancillary to the main suit, to prevent defendant from taking possession of the office. No appeal lies from the judgment dissolving the injunction. 28 A. 49, *State ex rel. Dumas v. Carey.*

8. An interlocutory judgment suspendings proceeding until determination of certain issues, may cause irreparable injury and is appealable. 19 A. 166, *Miller v. Dupuy.*

9. The dissolution of an injunction sued out by the wife in an action of divorce, prohibiting a bank from paying to the husband a sum on deposit, may work an irreparable injury. 23 A. 152, *State ex rel. Bene v. Judge Fourth District Court.*

10. A suspensive appeal lies from an order of injunction, compelling defendant to close certain windows made in a wall. 16 A. 396, *Pierce v. City.*

11. It is an irreparable injury caused by a judgment from which lies a suspensive appeal, whenever plaintiff in injunction would be compelled to resort to an action in damages to have his rights adjusted. 23 A. 52, *State ex rel. Pontchartrain Railroad v. Judge Eighth District Court.*

12. The dissolution of an injunction obtained under the act of the legislature of 1872 making provisions for the benefit of indigent persons afflicted with small pox, removed to the Luzenberg Hospital, may work an irreparable injury, from which a suspensive appeal lies. 26 A. 304, *State ex rel. Hayes v. City of New Orleans.*

13. Irreparable injury arises, where the property of one is to be sold to pay the debt of another. A suspensive appeal therefore lies in such a case from an order refusing an injunction on a rule *nisi*. 26 A. 550, *State ex rel. Van Norden v. Judge Superior District Court.*

14. A suspensive appeal lies from a judgment dissolving an injunction to prevent the city from holding an election to submit to the voters whether a tax should be imposed for the benefit of a railroad corporation, where the interest of appellants amount to more than five hundred dollars. 28 A. N. R., *State ex rel. Roudanez et als. v. Judge Superior District Court.*

15. A rule to set aside the order bonding the injunction does not prevent an appeal from said order. 26 A. 603, *Simon v. Walker.*

16. No appeal lies from an order refusing an injunction. 27 A. 672, *State ex rel. Neogass v. Judge Superior District Court; C. P. 895.*

MORGAN, J., *dissenting.* The refusal to grant an injunction is an interlocutory decree which may cause an irreparable injury. *Ib.* 7 M. 457.

17. A suspensive appeal lies from an order refusing to grant an injunction on a rule *nisi*. 29 A. 59, *Heyniger & Co. v. Hoffnung*; 27 A. 672; 28 A. 902, *State ex rel. Winkelman v. Judge of Superior District Court*; 29 A. 795, *Beebe v. Guinault*; 4 M. 503.

18. The judgment, on a rule *nisi*, refusing an injunction, must be signed, to be appealed from. 28 A. 904, *Lahargue v. Waggaman, sheriff.*

19. No suspensive appeal lies from an order granting an injunction; but where an injunction has been bonded and the judge subsequently rescinds his order to bond, a suspensive appeal will lie from the order rescinding the bonding having for effect to prevent defendants from carrying on their tallow factory. 29 A. 869, *State ex rel. Doullut v. Judge Sixth District Court*; 12 A. 455; 3 R. 102; 11 R. 452.

20. EGAN, J., *dissenting.* Damages would repair the injury done by the closing of the factory, if the injunction was wrongfully sued out; therefore the injury is not irreparable. *Ib.*

21. No appeal lies from a judgment dissolving an injunction on bond so as to authorize an administrator to exercise his functions. 28 A. 649, *Anderson v. Smith*.

22. Writs of mandamus and prohibition will not lie, to compel the judge to grant an appeal from a simple refusal to entertain a rule *nisi*, or grant a provisional injunction as a sequence of the issuance of said rule. 27 A. 211, *State ex rel. Gay v. Judge Fifth Judicial District Court*. See *ante*, 17.

23. No appeal lies from a judgment on a rule ordering the sheriff to place the purchaser in possession, when an injunction against the execution had been dissolved and no appeal sought therefrom. 27 A. 703, *State ex rel. Nicholas Schmidt v. Judge Second Judicial District Court*; 30 A. 179, *Boutté v. Boutté*; 29 A. N. R., *Behrens v. Judge Second District Court*. See *infra*, F. No. 2; (g), No. 4.

24. No appeal lies from an order bonding an injunction issued to prevent defendant from suing on certain claims. 28 A. 262, *Brott v. Ellerman & Co.*

25. An appeal lies from an order refusing to allow the release of an injunction on bond under art. 307, C. P. 28 A. 903, *State ex rel. Barthe v. Judge Superior District Court*.

26. In the courts of the United States an appeal from a judgment dissolving an injunction does not keep the injunction in force pending the appeal. So, when the Supreme Court of a State has rendered judgment dissolving an injunction, the only effect of a writ of error is to prevent further action by the State court, not to annul its judgment before a hearing. 10 Wall. 273, *Slaughterhouse cases*.

27. A judgment dissolving an injunction on a rule to quash, which decides all the points in controversy between the parties, is a final judgment requiring signature, to be appealed from. 30 A. 63, *Saloy v. Collins*. See INJUNCTION, I. No. 17.

F. Insolvency.

1. A suspensive appeal lies from a judgment appointing a receiver, this being an interlocutory order which may cause an irreparable injury. 16 A. 83, *Martin v. Blanchin & Giraud*.

2. A suspensive appeal lies from a judgment rendered against a provisional syndic ordering him to pay to the syndic a sum of money above three hundred dollars, in default whereof he be imprisoned, although a previous general order to turn over all property and assets had been rendered, which was final. 16 A. 417, *State v. Judge Fourth District Court*. See *ante*, E. No. 20.

3. No appeal lies from the filing of a supplemental tableau by a syndic so as to make the same conform to the decree of the Supreme Court; it was a mere mathematical calculation. 16 A. 336, *Tuft & Hobart v. Casey*.

G. Minors.

1. No suspensive appeal lies from a judgment dismissing an under-tutor from his trust. 29 A. 408, *Succession Menendez*.

H. Removal of suit to another court.

1. No appeal will lie from an interlocutory judgment refusing the removal of a case, on the application of defendant, from a State to a Federal court. The only remedy the defendant has is by appeal from the final judgment which may be rendered against him in the cause. Upon such appeal, he may assign as error the refusal of the district court to remove the cause. 15 A. 336, *State v. Judge Fifth District Court*; 21 A. 233, *Rosenfield v. Adams Express Company*.

2. An appeal lies from a judgment ordering the removal of a case to the United States Court. 28 A. N. R., *Shook & Palmer v. Cogswell*, O. B. 45, fo. 49; 23 A. 29, *State ex rel. Coons v. Judge of the Thirteenth Judicial District Court*; 29 A. 372, *Goodrich v. Hunton*; 30 A. 474, *Tunstall v. Parish of Madison*.

3. An appeal does not lie from the order of a State court ordering the

removal of a cause to a Federal court; and although the requirements necessary to a suspensive appeal from such an order may have been observed, they are not effectual to prevent a removal. 2 Woods 120, *Ellerman v. N. O., M. & T. R. R. Company*.

4. For removal of cases, see COURTS, IV. (b).

I. Sequestration.

1. No appeal lies from an order permitting the bonding of property sequestered. 20 A. 344, *Block Bros. v. Barthe*; 21 A. 634, *Wolf v. McKinney*; 22 A. 260, *State ex rel. City v. Judge Eighth District Court*.

2. A suspensive appeal lies from an interlocutory judgment, allowing intervenors to bond the property sequestered. The doctrine laid down in the case of *Duperier v. Flanders*, 20 A. 29, is here affirmed, contrary to the cases of *Block Brothers v. Barthe*; 22 A. 535, *Dawson v. Williams*; 25 A. 299, *State ex rel. Gay & Co. v. Judge Fourth District Court*.

3. Defendant whose property has been sequestered, may appeal from the order refusing him the right to bond. 26 A. 65, *State ex rel. v. Judge Superior Court*; 5 N. S. 42.

J. Succession.

1. A suspensive appeal lies from a judgment ordering succession property to be sold, being an interlocutory order capable of working an irreparable injury. 22 A. 200, *State ex rel. Fassman v. Judge Second District Court*.

2. A suspensive appeal will not lie from a judgment ordering an executor to furnish a new security within three days or be dismissed from office. 22 A. 116, *Succession of Cordeviollé*.

3. Executors who have been condemned to pay certain sums of money, by rule, are entitled to a suspensive appeal on complying with requisites of the law. 24 A. 596, *DeFeret et als., executors, v. Judge Second District Court*.

4. A suspensive appeal lies from a judgment putting the public administrator in possession, when his application for the administration is opposed by the heirs claiming to accept purely and simply. 26 A. 122, *State ex rel. v. Parish Judge of Claiborne*.

5. An appeal lies from a judgment rendered on a simple motion, made to appoint the opponent as administrator, where the applicant opposed the motion and offered evidence against the same. 21 A. 394, *Succession Young*.

6. Defendant has a right to appeal from a judgment on a rule ordering execution to issue against him personally, to pay the debt of the succession he administers. 26 A. 385, *State ex rel. Rasberry v. Parish Judge Bossier*.

7. That the appeal from the judgment appointing an administrator is designated as suspensive, matters not. 27 A. 524, *Successions Daigle and Roddy*.

8. A suspensive appeal lies from a judgment discharging the surety on the bond of an executor and ordering him to furnish another surety. 28 A. 871, *State ex rel. Boutté v. Judge Second District Court*.

9. For appeal in executory process, see EXECUTORY PROCESS, III. (a).

10. For stay of sale of succession property, see *supra*, E. No. 6.

(c). *As affected by the confession or execution of the judgment and renunciation of the right.*

1. No appeal lies from a confession of judgment. 20 A. 137, *Stewart v. Betzer*; C. P. 567.

2. In a case where the answers of the garnishee are sought to be disproved and judgment is rendered upon the evidence thus solicited, he may appeal; not when the answers may be considered as a confession of judgment. 22 A. 138, *Daigle v. Bird*.

3. Where the record does not show the appellee to have been cited, and it appears further that the judgment has been satisfied, the appeal will be dismissed. 21 A. 429, *Marcy v. Citizens' Mutual Insurance Company*.

4. It is no ratification of, nor acquiescence in the judgment, appealed from, to assert in a new suit, a right to the same objects claimed on the appeal, by another title and in a different capacity. 23 A. 152, *Ward School v. City Board*.

5. The voluntary execution of the judgment from which a devolutive appeal was subsequently taken and the judgment appealed from reversed, does not entitle the defendant to an action for the repetition of the sum paid in satisfaction of the judgment appealed from. 25 A. 476, *Winston v. Nunez, administrator*.

6. Relator's counsel having ordered the clerk to change his motion of appeal so as to insert the amount fixed by the judge, cannot afterwards mandamus the judge so as to compel him to fix another amount. 28 A. N. R., *State ex rel. Edgard v. Judge Superior District Court*.

7. The police jury having levied a tax to pay the judgment, cannot appeal. 27 A. 230, *David v. Parish East Baton Rouge*.

8. The appeal will not be dismissed because defendant has paid the claim, without costs since the appeal. 18 A. 724, *Harris v. Stubenrauch*.

9. If both parties enter into a written agreement that the execution of the judgment shall not prejudice appellant's right, his devolutive appeal will be maintained. 23 A. 53, *Michel v. Sheriff Parish of Orleans*.

10. Where the parties to a suit have consented in writing to a judgment and the judgment does not conform to the consent, either party may appeal to have the error corrected. 19 A. 433, *Sprowl v. Stewart et als*.

11. An agreement that the court should render judgment on the merits, immediately, is not such a consent as will preclude an appeal. 27 A. 687, *Succession Walter Winn*.

12. A receipt of the amount deposited, "subject to the decision of the Supreme Court," is not an execution of the judgment. 18 A. 363, *Gueniret v. Perret*.

13. A party who voluntarily executes a judgment, cannot appeal therefrom. 22 A. 105, *Sims, administrator v. Lawes*.

14. No appeal can be taken by one who even partially executes the judgment. 28 A. 743, *Succession Bougere*; 18 A. 59, *Succession Egana*; 18 A. 264, *Succession Egana*; 4 A. 150; 14 L. 523.

15. On a motion to dismiss on the ground that appellant has acquiesced in the judgment, evidence of this fact cannot be introduced before the Supreme Court, the case must be remanded to try that issue. 28 A. 272, *State ex rel. St. Martin v. Parish St. Charles*; 3 A. 115; 23 A. 37; 20 A. 574, *State ex rel. Cain v. Judge Sixth District Court, Parish of Orleans*; 29 A. 576, *Evans v. Etheridge*.

LUDELING, C. J., *dissenting*: Such evidence is admissible before the Supreme Court. *Ib.* 14 A. 329. See COURTS, II. (c), No. 2.

16. An agreement that defendant would pay the judgment within thirty days, if execution, which had issued after the dismissal of the appeal by the lower court, would be suspended, is a *nudum pactum* when the judgment of dismissal is wrong. 25 A. 664, *State ex rel. Lacroix v. Judge Fifth District Court*.

17. HOWELL and MORGAN, JJ., *dissenting*: The defendant admitted the correctness of the order of dismissal, and should be bound thereby. *Ib.*

18. The payment of a judgment from which a devolutive appeal has been taken, by giving one of the alternate things decreed by the judgment, after issuance of execution, is not such a voluntary execution as will deprive defendants from recovering what they have paid. 24 A. 458, *Yale, Jr. v. Howard*; 29 A. 862, *State ex rel. Hoey & O'Conner v. Brown*; *ib.* 762, *Johnson v. Clark & Meader*. Ludeling and Taliaferro, JJ., *dissenting*.

19. The city is not concluded by accepting payment of a tax on a reduced assessment, when the clerk who received the payment was not aware that an appeal had been taken from the judgment reducing the assessment and had not consulted the mayor or city attorney. Receiving such payment is no acquiescence in the judgment. 27 A. 520, *Serrill v. City of New Orleans*.

20. It is no acquiescence in the judgment dismissing the suit for want of jurisdiction, when plaintiff brings the same action in another court. 27 A. 625, *Buntin v. Johnson*.

21. Third parties who have an interest to appeal cannot be prejudiced by an acquiescence of defendant, in the judgment. 29 A. 146, *State ex rel. St. Martin v. Police Jury of St. Charles*.

22. Payment under compulsion and threatened seizure is not such an acquiescence in the judgment as will preclude a devolutive appeal. 29 A. 762, *Johnson v. Clark & Meader*.

23. Where the defendant's answer, which the judge took for a confession of judgment, did not admit plaintiff's claim, defendant's appeal from the judgment based on his supposed confession cannot be dismissed. 29 A. 867, *Lawson v. Bruen*.

24. The confession of judgment by the police jury, when they had no power to issue the warrants for which judgment was rendered, will not bar an appeal. See POLICE JURY, No. 24.

25. The plea of discussion and accompanying necessary tender of funds is not an execution of the judgment. See SURETYSHIP, II. (a), 4), c. No. 2.

26. No appeal lies from an order rendered to carry out a final judgment. See APPEAL, I. (b), 1), No. 26.

27. Legatees who have obtained judgment for their legacies, execute their judgment by taking a rule against the executor to sell property; no appeal lies from the judgment rendered on such a rule. 30 A. 233, *State ex rel. McCloskey v. Judge of the Second District Court*.

28. The District Attorney has no right to acquiesce in the judgment appealed from. 30 A. 70, *State ex rel. Duffel v. Marks*.

(d) *As affected by previous appeal.*

1. Appellant having abandoned his appeal by failing to file the transcript in due time, cannot renew the same. 16 A. 340, *Succession Andreus*; C. P. 589, 594; 15 A. 591, 592; 24 A. 149, *Redmond v. Man*.

2. Where there is an evident abandonment of the appeal, a second one cannot be allowed. C. P. 594; 1 R. 100; 22 A. 199, *Sharkey v. Bankston*.

3. Where a party obtains a suspensive appeal and fails to take it up, if there is nothing to show an inability on his part to perfect such appeal by giving the bond required, he will be held to have abandoned it, and cannot afterwards take a devolutive appeal. 15 A. 592, *Tarlton v. Wafford*.

4. Where the order of appeal is obtained by motion, but the bond is not furnished, the appeal is not abandoned, and a new order may be obtained thereafter; *aliter* if the appeal be taken by petition and the citation be served. 20 A. 236, *Mortee v. Edwards*.

5. Appellant has the right to withdraw his appeal before appellee is cited, and to renew it. 16 A. 337, *White v. McGuire*.

6. There is no appeal, and none is abandoned, until the bond is given; no matter how many orders of appeal have been granted. 27 A. 244, *Bank of America v. Fortier*; 20 A. 236; 28 A. N. R., *Edwards v. Ricks et als.*

7. A previous appeal having been granted, the court below is without jurisdiction to grant another. 22 A. 518, *Succession Pomeroy*.

8. Where the appellee has moved for and obtained the dismissal of an appeal, the case not having been tried on its merits, the appellant may appeal again if he claims the right to appeal within a year from the rendition of judgment. 15 A. 116, *Dugas v. Truett*; 17 A. 238, *Hall v. Handlin*. See PRESCRIPTION, V. No. 14.

9. The filing of a petition of appeal does not affect the previous appeal by motion. 27 A. 505, *New Orleans Canal and Banking Co. v. City*.

10. A previous appeal having been granted to the attorney general in behalf of the State, was superseded by a second one granted to the governor who employed special counsel to take said appeal. 25 A. 163, *State ex rel. Strauss v. Dubuclet, treasurer*.

11. The suspensive appeal having been dismissed for informality, appellant may within the year take a devolutive appeal. 29 A. 762, *Johnson v. Clark & Meader*.

12. Where in obedience to a judgment of the Supreme Court ordering certain corrections to be made to an administrator's account, he re-advertises the account, and a creditor moves it homologation, the administrator is not entitled to an appeal. 30 A. 183, *State ex rel. Ray v. Judge of the Parish Court of Ouachita*. See *supra*, (b), 2), F. No. 3.

(e) *As affected by the capacity or interest of parties, and appeals by third persons.*

1) In general.

1. The curator *ad hoc* appointed to defend a non-resident, has the right of appeal. 15 A. 392, *Langley v. Burrows*.

2. A party or stranger to the cause may appeal from a judgment if he alleges that he is aggrieved thereby. 17 A. 320, *State ex rel. Mead v. Belden, Judge Third Judicial District*.

3. A third person, whose interest amounts to above five hundred dollars, has a right to appeal. 23 A. 768, *Byerly v. Judge Eighth District Court*.

4. The city of New Orleans may appeal from a judgment ordering the disposition of money under the control of her treasurer. 22 A. 119, *State ex rel. City v. Judge Sixth District Court*.

5. The governor, as well as the attorney general, has the right to appeal in behalf of the State, and a second appeal taken by the former superseded that of the attorney general. 25 A. 163, *State ex rel. Strauss v. Dubuclet, treasurer*. See CONSTITUTION, II. (d), No. 5.

6. A third party may take a suspensive appeal from a judgment ordering the proceeds of goods seized on an attachment to be paid to the plaintiff, and a mandamus will lie. 22 A. 176, *State ex rel. Sharp v. Judge Sixth District Court*.

7. The testamentary executor has an appealable interest in a judgment rendering him unable to carry out the provisions of the will, which is the law governing his official action. 23 A. 370, *Succession McKenna*.

8. Holders of State warrants are interested in appealing from a mandamus ordering the State treasurer to pay by preference the warrants held by the relator. 24 A. 16, *State ex rel. Hillman v. Dubuclet, treasurer*.

9. To appeal, a third party must show a direct pecuniary interest; the city of New Orleans has no appealable interest in a contest for the offices of aldermen and assistant aldermen when there are no fees or perquisites in litigation. 21 A. 743, *State ex rel. Belden v. Markey, Kaiser et als.*

10. The appellants show an appealable interest, in a judgment against their debtor, by annexing to their petition of appeal a certified copy of their judgment against the defendant. 23 A. 582, *Payne v. Ferguson*.

11. Where third persons appeal they must allege and prove in the lower court that they are aggrieved by the judgment. 24 A. 426, *Fazende v. Flood*.

12. Where the capacity of heirs who appeal, is for the first time, raised in the appellate court, the case must be remanded to try this issue. 24 A. 486, *Succession of Bailey*.

13. Third parties may appeal when they allege that they have been aggrieved by the judgment; so may intervenors who have been refused the right to intervene. 27 A. 184, *State ex rel. Pecot v. Parish Judge St. Mary*.

14. A garnishee who excepts to plaintiff's right to propound the interrogatories, has a right to appeal from the judgment condemning him as such. 23 A. 718, *State ex rel. v. Parish Judge of Ascension*.

15. A garnishee may appeal to protect his own interest. 26 A. 170, *Halpin v. Barringer*.

16. A notary in possession of a deceased notary's records has no interest to appeal from an order transferring the records to the notarial archives. 24 A. 148, *State ex rel. Hero v. Laresche*.

17. The garnishee has no interest to appeal from an interlocutory judgment rendered contradictorily with plaintiff and defendant, ordering him to deposit the funds held by him in the hands of the sheriff. 24 A. 294, *Rochereau & Co. v. Guidry*.

18. The appeal being lost by failure of defendant to prosecute the same, a third person cannot afterwards appeal. 21 A. 142, *Landry v. Landry*; 7 N. S. 345.

19. The capacity of a party appearing as a fiduciary must be averred, else the appeal must be dismissed. 23 A. 136, *Succession of Amanda Hatcher*.

20. An affidavit will not be conclusive on the court, and if it appear that

the appellant has no interest, the appeal will be dismissed. 21 A. 743, *State ex rel. Belden v. Markey et als.*

21. The public administrator has no interest to appeal and can suffer no injury by an interlocutory order revoking his appointment as provisional administrator in a suit to destitute the executrix. 26 A. 553, *Succession Elgee*; 162, *Succession Winn.*

22. A creditor who appeals from an order of seizure and sale against his debtor is only interested as to the existence or validity of plaintiff's mortgage and cannot be affected by the question in whom the title to the note in suit legally exists. 21 A. 52, *Lapice v. Lapice.*

23. A third party may take a suspensive appeal from a judgment ordering the proceeds of goods seized on an attachment to be paid to the plaintiff, and a mandamus will lie to compel the judge to grant the appeal. 22 A. 176, *State ex rel. Gellen v. Judge Sixth District Court.*

24. The auditor and treasurer being defendants in an action to compel them to issue bonds to a railroad corporation, have the right to appeal from the judgment. 23 A. 596, *State v. Judge Eighth District Court.*

25. The injury to third persons cannot arise because there is no authentic evidence of the appointment of the executor, who obtained the executory process, or that he had authority to dispose of the property, or that the debt includes compound interest; the appeal must be dismissed. 23 A. 273, *Sompéyrac v. Succession Hyams.*

26. A suspensive appeal lies from a judgment rendered on a rule taken by a third person to have an order for the sale of property sought to be partitioned set aside, and from the order of sale itself, when such third person swears that irreparable injury, will be suffered by him if said judgments be carried into execution. 26 A. 161, *State ex rel. Caldwell v. Judge Fourth District Court.*

27. Of its own motion the court will dismiss the appeal for want of pecuniary interest in the appellant. 27 A. 90, *Block, Britton & Co. v. Barton, Miller & Co.*

28. One without interest in a judgment cannot appeal. 19 A. 328, *Arrow-smith v. Rappelge.*

29. A clerk of court has no interest to appeal from a mandamus directing him to deliver all process of court, to a certain person who is sheriff. 28 A. 30, *State ex rel. Burton v. D. Jackson, clerk.*

30. A third person may be an appellant, but never an appellee. 30 A. 178, *Boutté v. Boutté's Ex.*

2) Marriage.

1. An appeal will be dismissed if it does not appear, otherwise than by the averment of her attorney, that the married woman, appellant was authorized by her husband. 21 A. 576, *Succession Pomeroy.*

2. The authority of the husband given to his wife to prosecute a suit is sufficient to authorize the wife to sign the appeal bond and prosecute her appeal. 23 A. 569, *Bell v. Silbernagle.*

3. When the husband has authorized his wife to sue she may appeal without further authorization. 29 A. N. R., *McCormick v. Sullivan, constable, etc.*

4. *MORGAN, J., dissenting:* The wife should be specially authorized to appeal. *Id.*; 2 Duranton, No. 459, p. 415; Demolombe, v. 4, p. 152, No. 130; Journal du Palais, 1862, p. 640; C. C. 121; C. N. 215.

5. The wife, a non-resident, sued by attachment, who desires to appeal from the judgment against her through her curator *ad hoc*, should be authorized by her husband or the court. 29 A. N. R., *Harris v. Heord.*

6. The authorization of the husband is implied when he signs the bond of appeal. 19 A. 48, *Wickliffe v. Dawson.*

7. See III. (2), 3), No. 22; V. (b), 3), No. 1.

8. For capacity to sue, see PLEADINGS, I. (c).

9. The petition of appeal in the name of the wife "and of her husband" is sufficient. 30 A. 180, *Boutté v. Boutté's Ex.*

3) Insolvency and succession.

1. A mortgage creditor of the executrix not a party to the suit may appeal from a judgment in favor of the heirs against the executor, recognizing a tacit mortgage in their favor. 20 A. 513, *Woolfolk v. Woolfolk*.

2. If a succession *appears* to be insolvent neither the heirs nor their transferees can appeal from judgments rendered against such succession. 29 A. 397, *State ex rel. Bonnet v. The Judge ad hoc of the Second District Court*.

3. For bond filed after appellant's death, see *infra*, III. (a), No. 23.

(f) *As affected by lapse of time.*

1) Suspensive appeal.

1. An appeal from an order setting aside an attachment in the case of an absentee, if taken within the legal delay of ten days will have the effect of suspending the execution of the judgment; and an appeal bond for costs only is required for such an appeal. 15 A. 709, *Watson v. Simpson*.

2. The delay for a suspensive appeal is suspended by a rule voluntarily tried by plaintiff to set aside the executory process. 16 A. 373, *Abrams v. Jay*. See PRESCRIPTION, IV. (a), No. 1.

3. The right to a suspensive appeal is the rule and it stays proceedings, save in cases specially excepted. 20 A. 574, *State ex rel. Cain v. Judge Sixth District Court*; 529, *State v. Judge Sixth Judicial District Court*.

4. An appeal prayed for and completed within the ten days, after judgment, will be construed as being suspensive. 28 A. N. R., *State ex rel. Eustis v. Judge Fourth District Court*; 17 A. 186, *State ex rel. Crescent City Bank v. Judge Third District Court*.

5. A judgment by default, to become executory, must be notified to the defendant, even when rendered after the overruling of his exception; from which it results that an appeal taken four years after signature of such judgment is in time, if within legal delays after notification. 25 A. 213, *Taylor v. Woodward*; C. P. 575.

6. Defendant's delay to appeal commences from the day notice of judgment is served, in case the judgment be rendered by default. 27 A. 304, *Charles Hoffman v. Howell & Riley*.

7. Anterior to act No. 24 of 1876, it was necessary, in all cases when judgments by default were confirmed, to serve a notice of judgment on defendant. 29 A. N. R., *Sentmanat v. Nelvil Soulé*.

8. In executory process the delay of appeal commences to run from the day the notice of the order of seizure and sale has been served. 16 A. 392, *State ex rel. v. Judge Second District Court*; 14 A. 105. See EXECUTORY PROCESS, III. (a).

9. Notice of homologation of the account on which the creditors were placed, need not to be given, they must be considered as plaintiffs. The delays of appeal commence from the day of signing the judgment. 20 A. 110, *State ex rel. State Bank v. Judge Third District Court*.

10. An appeal from a judgment of divorce must be taken within thirty days not including Sundays, after the signing of the judgment. Acts 1871 p. 151. The notice of judgment having been served at the domicile assigned to the wife who was personally cited, although she had left the State, was valid, and the appeal taken more than thirty days after such notice, must be dismissed. 25 A. 51, *Holbrook v. Bronson, his wife*.

11. An agreement to extend the delay for a suspensive appeal, beyond the ten days allowed by law, is valid. 27 A. 699, *State ex rel. Pontchartrain v. Judge of the Superior District Court*. *Per contra*, see No. 15; VII. (b), No. 2.

12. An appeal granted by the judge in obedience to a mandamus, dates back to the day when application was first made and refused. 28 A. N. R., *Gest & Atkinson v. New Orleans, St. Louis and Chicago Railroad Co*.

13. In counting the delay for an appeal, neither Sundays, nor the day the judgment is signed nor that on which the bond is filed are to be counted. 29 A. 850, *Tupery v. Edmonston*.

14. Interruption of prescription does not apply to appeals. See PRESCRIPTION, IV. (a), No. 1.

15. The delay for a suspensive appeal cannot be extended by agreement. 29 A. 436, *Untereiner v. Miller*; but see No. 11.

2) Devolutive appeal.

1. Defendant who resided in another State when the decree of seizure and sale was applied for, has two years to appeal therefrom. 18 A. 145, *Lambert v. Conrad*.

2. A non-resident may appeal within two years from the day of signing the judgment. 22 A. 314, *Schmidt & Ziegler v. The First National Bank of Selma*.

3. Where the appeal is dismissed by the Supreme Court, and a year has elapsed from the signing of the judgment, no other appeal can be taken. 21 A. 294, *Knox v. Duplantier*.

4. Application must be made to the lower court to have the suspensive appeal declared devolutive. 16 A. 192, *Perillat v. Fernandez*. See *infra*, VI. (a), No. 6.

5. Pending a devolutive appeal, execution may issue and property validly sold. If the judgment be reduced, plaintiff will owe defendant the amount thus reduced. 25 A. 516, *McWaters v. Smith*.

6. The case having been remanded to be tried on the motion for a new trial, and the lower judge having denied the motion, an agreement of counsel to submit the case to the Supreme Court on the face of the record on file, if not carried into effect within the year, cannot be enforced. 28 A. 216, *Higgins v. Haley*.

7. LUDELING, C. J., *dissenting*: No time being specified within which the case was to be submitted, one year could not annul the agreement. *Ib.*

8. A devolutive appeal lies from a judgment rendered on a mandamus. N. R. *State ex rel. John R. Clay v. Johnson, auditor*; 29 A. 862, *State ex rel. Hoey v. Brown*.

9. When an appeal is taken more than one year after rendition of the judgment, and a motion to dismiss is made on the ground that appellant was not a non-resident, the case will be remanded to try that issue. 21 A. 502, *Elton, Ex. v. Temple*. See Nos. 1, 2.

10. The lower court may primarily declare whether the appeal is suspensive or devolutive, and whether the securities are such as the law requires. 21 A. 44, *State ex rel. Withers v. Judge Second District Court*; 114, *State ex rel. Johnson v. Judge Fifth District Court*. See *ante*, No. 4.

11. Relator having taken a devolutive appeal from a refusal to grant his mandamus against the State treasurer, to pay his warrants, the funds which were then on hand are presumed to have been paid to other holders of warrants, and therefore the mandamus must be refused. 29 A. 109, *New Orleans Printing Company vs. Dubuclet*.

12. The agreement of counsel to extend the time for an appeal, will be of no effect, if a year elapses after the rendition and signature of the judgment and before the motion of appeal. 29 A. 435, *Untereiner v. Miller*.

13. If the petition of appeal and bond were filed within the delay of appeal, this will be sufficient. The citation may be served afterwards. 30 A. 181, *Boutté v. Boutté's Ex.*

(g) *As affected by the constitutionality or legality of municipal ordinances or taxes.*

1. When the amount in controversy is less than three hundred dollars, the Supreme Court cannot look into the facts to see whether the lower court has or has not made a false application of a legal ordinance or a constitutional law; all they can do in such a case is to examine the legality or constitutionality of the ordinance, or the constitutionality of the statute under which a tax or impost, or municipal fine has been imposed. 15 A. 215, *Baton Rouge v. Malverhill*.

2. A claim arising from a contract for curbing is not a tax, toll or impost in the sense of article 74 of the constitution of 1868. 4 A. 1, *Lafayette v. Orphan Asylum*; 21 A. 51, *Rooney v. Brown*.

3. No appeal lies from a judgment for less than five hundred dollars rendered upon a claim for repetition of an illegal license paid to the city by error. 28 A. N. R., *Alexander v. City*; O. B. 45, fo. 49.

4. An appeal lies from a judgment ordering the sheriff to place the purchaser at a tax sale, in possession of the property sold, when the matter exceeds five hundred dollars. 28 A. N. R., *Hansen v. Rigamer*; *Ib.* N. R., *Norcross v. Schaeffer*.

5. For appeals in tax matters from justices of the peace, see *infra*, (h) Nos. 4, 7.

(h) *From particular courts.*

1. When the amount in dispute exceeds five hundred dollars, the appeal from the parish court is direct to the Supreme Court. 25 A. 466, *Malone v. Lawrence, Casey, et als.*

2. An appeal from a judgment rendered by the parish court on an injunction to prevent a sale *a la folle enchère*, must be carried directly to the Supreme Court when the amount exceeds five hundred dollars. This a part of the probate proceedings. 27 A. 345, *Succession Bobb*.

3. The Supreme Court cannot revise a writ of prohibition issued or refused by the Third District Court against a justice of the peace. 27 A. 669, *State ex rel. Leahy v. Third Justice of the Peace*; but see MANDAMUS, I. (a), 2), No. 5.

4. The constitutionality of a tax being in question, an appeal lies directly from the justice's court to the Supreme Court. 27 A. 158, *Wilmot v. City*. See APPEAL, I. (g), No. 3.

5. Parish courts have authority to grant an appeal from the homologation of a tableau of distribution made by the clerk of the district court previous to the constitution of 1868. 22 A. 254, *Smith v. Smith*.

6. A party is entitled to an appeal from a conviction in a recorder's court, where a fine of more than three hundred dollars has been imposed. 15 A. 406, *State v. Benit*.

7. In all cases where the constitutionality of a tax is in question, the appeal must be direct to the Supreme Court which will try the questions of law and facts involved therein. A writ of mandamus to enforce the execution of the judgment will issue to the justice of the peace and a writ of prohibition to the parish or district court whenever a suspensive appeal has been taken in such cases from the judgment of the former to the latter court. 30 A. 415, *State ex rel. Boutroux v. Judge Third District Court*.

(i) *As affected by the criminal nature of the judgment.*

1. In criminal prosecutions, the Supreme Court is without jurisdiction, unless the offence charged be punishable with death, or imprisonment in the penitentiary, or a fine exceeding three hundred dollars has been actually imposed; and then, there must be a final judgment before an appeal can be taken. 15 A. 347, *State v. Keeper of Parish Prison*.

2. The jurisdiction of the Supreme Court over misdemeanors attaches only after the actual imposition of a fine exceeding three hundred dollars. 15 A. 603, *Ney v. Richard*.

3. The Supreme Court is without jurisdiction to entertain an appeal by the State from a judgment quashing an indictment. 28 A. 49, *State v. J. W. Callum*.

4. The Supreme Court cannot pass on a refusal to grant a continuance based on matters of fact, in criminal prosecutions. 26 A. 543, *State v. Johnson*.

5. No appeal lies in criminal cases, except when a sentence of a certain severity has been actually imposed; const. Art. 74. An appeal from a judgment granting a new trial must therefore be dismissed. 23 A. 142, *State v. William Welsh*.

6. The Supreme Court in criminal matters cannot revise the judgment of

the lower court as regards matters relating to the sufficiency of the evidence. 26 A. 604, *State v. Fruge*.

7. For appeals in criminal matters from recorder's courts, see *supra*, (h), No. 6.

8. See for same subject, CRIMINAL LAW, XVI. (a), (b), (c).

(j). *In general.*

1. A suspensive appeal lies from a judgment of the lower court dismissing the appeal. 18 A. 628, *State ex rel. Loeb v. Judge Fifth District Court*.

2. Every act required by law to perfect an appeal must be performed within the delay allowed for taking the appeal. 21 A. 481, *Wood, administrator v. Calloway*; 20 A. 236; 17 A. 238; 7 R. 60; 3 L. 77; 2 L. 323.

3. Appeals in election cases are governed by acts 1856, p. 9; 1868, p. 220; and not 1855, pp. 415, 416, §§ 44 and 46. 21 A. 108, *State ex rel Creagh v. Judge Seventh Judicial District Court*.

4. The right of appeal is a constitutional right and its exercise is regulated by law; the district judge passes primarily upon that right, but his decision is subject to revision. 22 A. 592, *State ex rel. Roman v. Judge Sixth District Court*.

5. An action in nullity does not preclude an appeal from the judgment sought to be annulled. 24 A. 168, *Cockfield v. Tourres*.

6. A clerk who has been suspended from office by the judge, under section 1955 of the Revised Statutes, and pleads the unconstitutionality of the law, has a right to appeal. 24 A. 610, *State ex rel. Durapau v. Judge Fourth Judicial District Court*. See No. 9.

7. If defendants are entitled to an appeal, so are the plaintiffs. 27 A. 170, *Ready v. City et als.*

8. Where the district judge went beyond the question presented in the writ of prohibition and decided who was sheriff, an appeal lies from the judgment on the writ of prohibition. 28 A. N. R., *State ex rel. Burton v. Hicks et als.* O. B. 45, fo. 4.

9. A sheriff who has been suspended from office has no right to appeal unless he shows a moneyed interest which will give the Supreme Court jurisdiction. See MANDAMUS, I. No. 5.

10. For appeals from removal of cases from the State to the Federal court, see COURTS, IV. (b), No. 12.

II. OF THE PETITION, MOTION, AND ORDER OF APPEAL; ITS WITHDRAWAL; AND THE RETURN DAY.

(a) *In general.*

1. Appellant who has filed his petition and bond of appeal within legal delays, cannot be made to suffer because the judge signed the order of appeal long afterwards. 28 A. N. R., *Estopinal v. Zunts*; O. B. 45, fo. 24.

2. An order of appeal granted on motion in open court, need not be signed. 28 A. 107, *Theriot v. Michel*.

3. The order being for a devolutive appeal, whilst the motion was for a suspensive one, does not injure the appellee when the appellant submits to this modification. 25 A. 202, *Succession Payne*.

(b) *Petition and motion; who are appellants and in what capacity.*

1. Where an order is granted by the district judge, allowing a devolutive appeal to all parties, upon giving bond, and one of them only avails himself of the order in time, the others will be considered as having abandoned their right of appeal. 15 A. 591, *Williams v. Leblanc*.

2. Citation is not necessary when the judgment is rendered and motion made at the same term, which commences in the parish of Orleans in November and ends in July. 19 A. 291, *Bethancourt v. Stevens*; Opinion Book 38, p. 264, *Fisk v. Gibbs, Bright & Co.*; 24 A. 289, *Blessey et als. v. Kearny et als.*; 29 A. 696, *Sanders v. Edwards*.

3. Third persons may appeal by motion. 21 A. 733, *State ex rel. v. Judge Sixth District Court*.

4. The appeal will not be dismissed for want of citation, if the motion was made in open court and the bond given in favor of the clerk. 22 A. 463, *Ward v. Douglass*.

5. An appeal from a judgment on a mandamus rendered during vacation, may be made by motion. 21 A. 733, *State ex rel. City v. Judge Sixth District Court*.

6. An appeal taken by motion at a different term than the rendition of the judgment must be dismissed. 27 A. 95, *Hardy v. Stevenson*.

7. Where the motion was not made in open court the appeal will be dismissed. 27 A. 119, *Deslonde v. State National Bank*. (N. B. *The written motion was left with the minute clerk during a recess of the court and entered in the minutes*).

8. A motion of appeal granted in open court, at the same term, and the bond made in favor of the clerk, make all parties interested who are not appellants, appellees. 26 A. 312, *Francis v. Lavine et als*.

9. It is sufficient if the minutes of the court show that the motion of appeal was made in open court and the order entered in form. 29 A. 4, *Gaidry v. Lyons*.

10. When a petition of appeal is filed in open court, at the time of the trial, and in presence of the opposite counsel and under peculiar circumstances, citation of appeal is not necessary. 30 A. 509, *Brown v. Brown*.

(c) *Order granting appeal, and return day.*

1. The appeal will be dismissed for want of an order of appeal, notwithstanding a waiver thereof by appellee; consent does not give jurisdiction. 24 A. 276, *Louisiana State Bank v. Barrow*; 20 A. 193, *Batchelor v. His Creditors*; 2 A. 628.

2. The mere filing of a motion for an appeal, with an appeal bond, does not divest the court below of jurisdiction. The order of appeal is essential. 22 A. 373, *McNight, tutrix v. Denouvion*.

3. It was agreed between counsel, "that an appeal from the judgment to be rendered, is granted by simply filing the necessary bond and notifying opposite counsel;" no order of appeal having been granted, the appeal should be dismissed *ex officio*. 23 A. 543, *Dupré v. Mouton*.

4. No order of appeal can be granted before judgment is rendered. *Ib.*

5. A motion to dismiss an appeal because there is no order of appeal, comes too late when made more than three days after the transcript is filed. 27 A. 314, *Walker v. Sauvinet*. See *infra*, VI. (b), No. 4; III. (a), No. 10.

6. The affidavit of the district judge, filed in the Supreme Court, stating that an appeal was granted in open court, is not sufficient to maintain the appeal in the absence of an order from the record. 21 A. 649, *Moore v. Simms*; 6 A. 707.

7. The record should show an extract from the minutes, allowing the appeal, not merely the copy of the motion; but where it is stated elsewhere in the record by the judge, that he did grant the order, the appeal will not be dismissed. 27 A. 97, *Edgerly v. Smith*.

8. Where the order of appeal does not fix the return day, time will be granted for the correction of the error. 20 A. 254, *Brou v. Becnel*.

9. Where the return day was erroneously fixed by the judge, through no fault of appellant, the appeal will not be dismissed. 21 A. 289, *Fish v. Collens*.

10. An appeal made returnable at a certain term of the Supreme Court cannot be submitted on a previous term. 27 A. 29, *State ex rel. Baldwin v. Dubuclet*.

11. An order for a suspensive and devolutive appeal may be granted, separately or in the same order, and the appellant may avail himself of either. 21 A. 192, *Funk v. McVay*. See *infra*, No. 25.

12. Where the return day is improperly fixed, appellant may have the same corrected by the lower court. 26 A. 272, *Cramer v. Brown*.

13. It is sufficient if in a suspensive appeal the judge orders the bond to be given according to law. 22 A. 124, *Bastable v. Succession Denégre*.

14. When there is not sufficient time the appeal should be returnable on the next return day. 25 A. 163, *State ex rel. Strauss v. Dubuclet*.

15. An entry in the minutes that "plaintiff's motion of appeal filed and defendant's counsel takes cognizance and appeal bond fixed at two hundred and fifty dollars," is not a sufficient compliance with articles 574 and 573, C. P. 22 A. 458, *Norris v. Warren*; 21 A. 649.

16. In all cases in which the right of office is involved and an appeal is taken, it shall be returnable in ten days after the judgment, etc. Acts 1870, p. 100 E. S. 22 A. 590, *State ex rel. Clay v. Blandin*.

17. In a contest involving the right to an office, the appeal should be made returnable in ten days, else the appeal will be dismissed. 26 A. 58, *State ex rel. Slack v. Hall*; 21 A. 174, *Ingram v. Doherty*.

18. In the absence of the judge of one of the district courts for the parish of Orleans, another district judge may grant an appeal from a judgment rendered by the absent judge. *Widow de St. Romes v. Levee Steam Cotton Press Company*, N. R.

19. TALIAFERRO and LUDELING, JJ., *dissenting*: There is no law which authorizes another judge to act in the absence of the district judge; the appeal should be dismissed. *Id.*

20. The appeal must be made returnable at the next return day for appeals, and if there be not time enough to give the notice required by law and prepare the transcript, then the appeal should be made returnable at the following term; the court will presume that the district court acted correctly in fixing the return day. 25 A. 293, *Goodwyn v. Perry & Co.*

21. The delay for the return day only runs when the Supreme Court sits. 25 A. 667, *Magloire v. Barbin*.

22. Appeals from the Superior District Court for the parish of Orleans should be made returnable to the Supreme Court at New Orleans. 27 A. 543, *Citizens' Bank v. Board of Liquidation*.

23. The return day of the appeal is sufficiently designated by "the next term of the Supreme Court, commencing in the city of Monroe on the first Monday in July, 1875." 27 A. 547, *Succession Gayle*.

24. When the return day of the appeal is extended by the court, no days of grace are allowed. 28 A. 901, *Bienvenu v. Factors' and Traders' Insurance Company*; *ib.* 790, *Cane v. Caldwell & Kahn*.

25. Appellant who moves for a suspensive or devolutive appeal and perfects the latter, cannot be heard to urge that he intended to perfect his suspensive appeal. 29 A. 838, *State ex rel. Smith v. Judge Second District Court*. See *supra*, No. 11.

26. An error in the return day of the appeal cannot affect appellant if he file his transcript before the proper return day or that fixed by the judge. 29 A. 862, *State ex rel. Hoey & O'Connor v. Brown*.

27. Return day for Tangipahoa, 1877, p. 20.

III. OF THE BOND.

(a) *In general.*

1. Until a party has executed his bond in such sum as is ordered by the judge granting an appeal, his appeal is not perfect, either as a suspensive, or a devolutive appeal. But when the appellant has complied with the judge's order, and given bond in the sum fixed, if the bond be insufficient for a suspensive appeal, still it is good for a devolutive appeal. 15 A. 333, *Keenan v. Whitehead*.

2. The decision in the case of *Nouvet v. Armant*, 12 A. 72, affirmed, to the effect that, where the appeal bond was insufficient at the time the appeal was brought up, the substitution of a new bond cannot cure the defect. 15 A. 523, *Vicksburg Railroad v. Hemphkin*.

3. The surety on the appeal bond having become insolvent, since the filing of the bond, the court has the right to order new sureties to be given within a

certain lapse of time, in default whereof the appeal should be dismissed. 27 A. 649, *Benton v. Mahan*; 29 A. 808, *Dumas v. Marie*.

4. When the bond is given in a case not mentioned in the order, the appeal will be dismissed. 19 A. 73, *In re Dayries, sheriff*.

5. A bond made payable to the appellee should be given in an appeal from a mandamus. 20 A. 529, *State ex rel. v. Judge Sixth Judicial District Court*. See *infra*, III. (b).

6. The intervenor must furnish a bond in accordance with article 575 C. P., where the defendant has been condemned to pay a specific amount. 22 A. 115, *State ex rel. John Wassel v. Judge Fourth District Court*; 1876, p. 49.

7. An intervenor who joins the city in an appeal, should give an appeal bond. 27 A. 469, *State ex rel. Mississippi, etc., Canal Company v. Administrators*.

8. An appeal bond is valid even if the sureties divided their liability thereon. 21 A. 730, *State ex rel. Mitchell, Craig & Co. v. Judge Sixth District Court*; 21 A. 443; 22 A. 124; 28 A. N. R. *McConnell v. Pasley*. See (d), No. 3.

9. An appeal bond is lawful and operative when executed by two or more sureties, who bind themselves each for a stated sum or portion of the required bond. 21 A. 443, *State ex rel. Roman v. Judge Sixth District Court*. LUDELING, C. J. and TALIAFERRO, J., concurring.

10. The objection to the bond cannot be noticed, if the motion to dismiss be not made within three judicial days after the record is filed. 21 A. 329, *Fisk v. Moss*. See II. (c), No. 5; VI. (c), Nos. 5. 6.

11. If appellant is permitted to file a second bond without objection, the appeal will not be dismissed. 20 A. 573, *Budd v. Stinson*.

12. The bond may be furnished at any time within the year even if the motion for a devolutive appeal was made as soon as the judgment was rendered. 25 A. 515, *McWaters v. Smith*.

13. A surety good only for the amount necessary for a suspensive appeal, signing a bond for more than is requisite, does not vitiate the appeal. 25 A. 664, *State ex rel. Lacroix v. Judge Fifth District Court*.

14. There is no law which makes it the duty of the judge to approve an appeal bond. 22 A. 472, *Hathcock v. Gray*.

15. The appeal will be dismissed for want of a bond notwithstanding the waiver thereof by the appellee; consent does not give jurisdiction. 24 A. 276, *Louisiana State Bank v. Barrow*.

16. Where the appeal has been set aside by the lower court because the bond was not filed within ten days, when the same was for the amount fixed by the judge, the transcript may nevertheless be filed and the appeal will not be dismissed. 19 A. 97, *Edgerly v. Smith*.

17. The lower court having declared that the bond was insufficient, the Supreme Court must dismiss the appeal for want of a bond. 23 A. 739, *Huppenbauer v. Marion*.

18. The delay occasioned by a mandamus to compel an appeal cannot prejudice appellants, if the bond be filed after the granting of the mandamus. 27 A. 170, *Ready v. City*.

19. The signature of the appellant is not necessary to an appeal bond, it is enough that it be signed by a sufficient surety. 9 M. 34; 10 M. 74; 6 L. 324; 10 L. 410; 3 R. 264; 5 R. 59; 12 A. 880; 14 A. 701; 11 A. 113; 16 A. 84; 17 A. 77; 25 A. 564, *Sandell v. Douglass, sheriff*; 27 A. 170, *Ready v. City et als*.

20. The bond must be signed by the surety, else the appeal will be dismissed. 23 A. 246, *Slocum v. Williams*.

21. A bond executed by only one out of ninety appellants, perfects his appeal only. 26 A. 356, *Walton v. Police Jury of Concordia*.

22. The husband and wife being sued jointly, answered jointly, and the appeal being granted to both on a motion in open court, and the counsel of record signing the appeal bond for his clients, this is sufficient. 16 A. 84, *Barnabé v. Snaer*.

23. The defendant died after the motion of appeal had been made but before the filing of his bond; the agency of the attorney ceased at the death

of his client; the bond being of no force, the case should be stricken from the docket of the court. 24 A. 477, *Anderson v. Hendricks*.

24. An appeal bond signed by another than the appellant as principal, cannot perfect the appeal. 26 A. 187, *Succession Richardson*.

25. Where an appeal is taken from two judgments or orders, in the same case, one bond of appeal to cover both, is sufficient. 28 A. N. R., *W. C. Hardwick v. M. L. Shelby*.

26. No other condition than that fixed by law for an appeal bond can be exacted by the judge. 28 A. 517, *State ex rel. Roudanez et als. v. Judge B. L. Lynch of the Superior District Court*.

27. The injunction having been issued on a bond, the judge cannot exact from appellants an appeal bond to cover all damages that may be suffered by appellees, because the injunction has been kept in force. *Ib.*

28. The litigants may agree upon a delay, and bond other than provided by article 575, C. P., for a suspensive appeal. 27 A. 699, *State ex rel. Pontchartrain Railroad Company v. Judge Superior District Court*. See APPEAL, VII. (b), No. 2.

29. The appellant having failed to furnish his bond within the delay for the suspensive appeal, and no amount being fixed by the judge, the appeal is not a devolutive one and should be dismissed. 25 A. 424, *Dwight v. Barrow*.

30. When the surety on the appeal bond becomes insolvent, the court may order a new surety to be given by appellant, in default whereof the appeal should be dismissed. 27 A. 649, *Benton v. Mahan*.

31. An administrator of the city of New Orleans must give bond to appeal from a judgment against him in his official capacity. 29 A. 53, *State ex rel. Hoey & O'Connor v. Brown, administrator*; 21 A. 177, *George v. Mount*.

32. If the surety on the bond be not good and solvent, the appeal should be dismissed. 29 A. N. R., *Pradel v. Pradel*; (NOTE.—*This seems to be a devolutive appeal*) O. B. 46, fo. 242.

33. See also PROHIBITION.

34. Article 575, C. P., amended 1876, p. 49.

(b). *Form and to whom payable.*

1. It is no part of the duty of the clerk of the court to prepare the appeal bond, and when the appeal bond was left with the clerk in blank, to be filled up, with the names of the proper obligees; *Held*: That the omission to insert the proper names is not an irregularity from which the appellant may be relieved under the Statute of 1839. 15 A. 173, *Green v. Bowen*.

2. Where a suit was instituted against a party individually and as tutor of his minor children, and judgment rendered in his favor in this double capacity and upon appeal, the bond was only executed in his favor individually; *Held*: That the appeal ought to have been taken against him in both capacities, otherwise the minors are not parties to the same. 15 A. 393, *Bazergue v. Faucheur*.

3. An appeal bond is defective, unless given in favor of all parties interested in the judgment appealed from. 16 A. 165, *Ziegler & Marcy v. Hunter*; 180, *Homerick v. Hunter*; 16 L. 109; 3 R. 436; 5 R. 224; 9 R. 256; 12 R. 180; 14 A. 315. (See acts 1869, p. 11).

4. The appeal should be dismissed if the appeal bond given by intervenor is not in favor of defendant and plaintiff. 16 A. 372, *Allen v. Rodgers*.

5. A bond of appeal in favor of "Homer College," as incorporated, is sufficient. 18 A. 525, *Homer College v. Vaughn*; 12 L. 444; 19 L. 365; 2 A. 359.

6. An appeal bond in favor of the tutrix, who as such administers the estate, will be sufficient where the judgment is the property of the estate. 19 A. 39, *Bronson, Jr. v. Balch et als*; 1 R. 258.

7. Where the appeal bond is not made payable to all the appellees, whether defendants are sued in *solido* or as warrantors, the appeal must be dismissed. 19 A. 137, *Cotton v. Stirling*; 141, *Hutchinson v. Johnson*.

8. Where the bond does not contain the name of appellees, the appeal must be dismissed. 19 A. 197, *Michael v. Babin, sheriff*.

9. The appeal bond should be made payable in favor of the surety on the injunction bond. 19 A. 291, *Bethancourt v. Stephens*.

10. Creditors opposing a tableau of administration, who appeal from the judgment, should make their bond in favor of all the creditors interested in maintaining the judgment. 20 A. 293, *Succession of Kennedy*.

11. Where the bond is made payable in favor of the appellees, through their tutor, they being represented as minors, when in fact they are of age, the appeal must be dismissed. 19 A. 294, *Twitchell v. Avegno*.

12. Where the appeal bond is not made in favor of the warrantors, the appeal will be dismissed. 20 A. 328, *Knox v. Duplantier*.

13. An appeal bond payable to Rice Brothers, when the judgment is in favor of Rice Brothers & Co., is invalid. 20 A. 348, *Rice Brothers & Co. v. Levy*.

14. Where the judgment was rendered jointly against the defendants and one of them appealed, the bond should have been made in favor of plaintiffs and the other defendants, otherwise the appeal must be dismissed. 21 A. 515, *Noble v. Logan*. See *infra*, IV. (b), No. 1.

15. The appeal bond must be made payable to the clerk of the court in conformity with act 1869, p. 11. 22 A. 133, *Jaffray v. Bruff*.

16. An appeal bond made payable to the judge, clerk and appellee, includes the lawful obligee and is therefore valid. 22 A. 133, *Ozier v. Marchand*.

17. An appeal bond given in favor of A, without mention of his capacity, is good if such obligee be the clerk of the court. Judicial notice will be taken of his capacity. 26 A. 318, *Tharp v. Waggner*.

18. The appeal bond is good if executed in favor of L, whom the record shows to be clerk. 27 A. 271, *Succession Fuqua*; 304, *Hoffman v. Riley & Howell*.

19. No bond can be exacted from appellant to secure the damages which may occur to intervenor, in an appeal from an injunction against the levying of a tax for the benefit of intervenor. 28 A. 517, *State ex rel. Roudanez v. Judge Superior District Court*.

20. Where it is suggested to the court that the appeal bond has been altered since the filing of the transcript, this issue will be referred to the lower court for the taking of necessary testimony on that point. 28 A. N. R., *Johnson v. Clark & Meader*.

21. When the bond is not made payable to the clerk the appeal should be dismissed. Any interlineation or correction made after the motion to dismiss has been filed will be of no avail. 29 A. 54, *Johnson v. Clark & Meader*.

22. A bond for fifty dollars to pay the costs of appeal alone, is not such as the law requires. 28 A. 805, *Gillis v. Carter*.

23. The appeal should be dismissed if the name of the surety be left in blank in the bond. 30 A. —, *Succession Lyons*; (pending on re-hearing.)

24. EGAN and DEBLANC, JJ., dissenting: The principals who signed are mentioned; the other obligor is a surety. *Ib.*

(c) Amount.

1. The bond must cover a promissory note ordered to be delivered to plaintiff, else the appeal must be dismissed. 16 A. 251, *Kelly v. Lehman*.

2. No suspensive appeal lies on a bond for costs only, from a judgment directing the sheriff to seize first certain property under the execution. 18 A. 112, *State v. Judge Fourth District Court*.

3. The bond for a suspensive appeal from a judgment on rule against the adjudicatee ordering him to pay the cash portion, and to comply with the adjudication, etc., should be one-half over the amount of the judgment. 20 A. 340, *Succession Armat*.

4. The bond of appeal must exceed by one-half the amount of the judgment, otherwise the appeal must be dismissed. 22 A. 626, *Marchand v. Casanave*.

5. The appeal was taken after the act of 1868, approved September 29th, was in force, and although the bond did not exceed by one-half the amount of the judgment, yet, exceeding one-half, it complied with the requisites of the act. 22 A. 607, *Denton v. Reading*.

6. A bond exceeding by one-half the amount of the judgment and for costs, is sufficient to cover a suspensive appeal from a judgment dissolving a writ of injunction with damages, and the discretion given to the judge by article 574, C. P., is not absolute and uncontrollable. 21 A. 65, *State ex rel. Adams v. Judge Second Judicial District Court*.

7. A bond of sixteen thousand five hundred dollars is sufficient for a suspensive appeal from a judgment of ten thousand five hundred dollars. 27 A. 699, *State ex rel. Pontchartrain v. Judge Superior Court*.

8. To appeal suspensively from a judgment dissolving an injunction issued without bond to arrest an order of seizure and sale, the appellant must furnish a bond for one-half over and above the order of seizure. 25 A. 653, *State ex rel. Richardson v. Judge Fourteenth Judicial District Court*; 18 L. 444; 21 A. 154, *State ex rel. Stackhouse v. Judge Fifth District Court*, overruled.

9. WYLY, J. dissenting: In such a case a suspensive appeal lies on furnishing a bond for costs. *Ib.*; 19 L. 167.

10. The appeal bond to suspend the execution of the judgment dissolving an injunction with damages, need not be one-half over and above the amount of the judgment enjoined. 25 A. 36, *Pourcelle v. Sauvinet*; 29 A. 793, *Malain v. Judge Third Judicial District*; 18 L. 167; 30 A. 685, *Bauer v. Lochte and Sheriff*.

11. In order to appeal suspensively from a judgment dissolving an injunction, appellant should give a bond, not for the value of the property in dispute, but for the damages which may result from the improper issuance of the injunction. 27 A. 336, *State ex rel. Coons v. Judge Superior District Court*. See *ante*, (a), No. 27.

12. A bond of two hundred and fifty dollars is good only for a devolutive appeal from a judgment dissolving an injunction issued against a seizure and sale amounting to several thousand dollars. 27 A. N. R., *State ex rel. St. Romes v. Judge Superior District Court*. No. 5815, s. c.

13. To suspend the execution of a judgment for a specific sum, on an appeal taken by an intervenor, the bond must exceed by one-half the amount of the judgment; the maxim *de minimis* does not apply. 22 A. 115, *State ex rel. Wassel v. Judge Fourth District Court*; 29 A. 776, *State ex rel. Jorda v. Judge Fourth District Court*.

14. A bond for costs is sufficient for a suspensive appeal from a judgment setting aside an injunction to prevent the disturbance of the possession of immovable property. The injunction bond answers for the damages. 28 A. 877, *State ex rel. Carlon v. Judge Superior District Court*. See No. 44.

15. The amount to become due cannot be taken into consideration in an appeal from a seizure and sale. It suffices if the bond exceeds by one-half the amount due at the date of the appeal. 20 A. 179, *Tournillon v. Ratliff*.

16. A bond, to operate as a suspensive appeal from an order of seizure and sale, must be for one-half over and above the amount of the writ. 22 A. 35, *Bankhead v. Judge Seventh District Court*.

17. The appeal bond should be given in accordance with article 577, C. P., if the judgment be not a moneyed demand against the appellant, but simply subjecting the real estate by him held to the mortgage of another. 22 A. 589, *State ex rel. Parks v. Judge Seventh Judicial District Court*.

18. Where the judgment is one maintaining oppositions to the account for a specific amount against the succession, and the order of appeal, is for a bond "as required by law" and the bond given is not for one-half over and above the amount of the judgment, the appeal is lost. 16 A. 371, *State ex rel. v. Judge Second District Court*; 16 R. 515; 10 A. 345; 15 A. 333.

19. A judgment against a succession may be suspensively appealed from, on a bond for costs. 21 A. 44, *State ex rel. Withers v. Judge Second District Court*.

20. A bond for a suspensive appeal from a judgment against a succession must be for one-half over and above the amount of the judgment. 27 A. 326, *Leblanc v. Succession Massieu*. (20 A. 108, overruled). See Nos. 28, 41.

21. A bond for costs is sufficient to suspend the execution of a judgment making a distribution of funds in an insolvent estate. The funds are in the

hands of an officer of the court. 27 A. 685, *State ex rel. Eustis v. Judge Fourth District Court*; 10 A. 345; 20 A. 108.

22. An appeal bond for costs will be sufficient for a suspensive appeal, if the funds are in court. 22 A. 178, 179, *State ex rel. Sharp v. Judge Sixth District Court*.

23. Where the funds are in the hands of the syndic, a suspensive appeal from a judgment rendered on the oppositions to the account, may be taken on a bond for costs. 27 A. 685, *State ex rel. Eustis v. Judge Fourth District Court*.

24. A bond of appeal which mentions no date, no amount, and is made in favor of the clerk of the Fifth District Court, parish of Orleans, but which mentioned the names of the suit and the court properly, is valid; the date of filing fixes the date, and the law fixes the amount. 29 A. 860, *Eschert v. Harrison*.

25. Where the property sued for is in possession of appellee, and the judgment rejects appellant's claim thereto, a bond for costs is sufficient for a suspensive appeal. 27 A. 231, *State ex rel. Pecot v. Parish Judge of St. Mary*.

26. The appeal bond for a suspensive appeal should be fixed without regard to the amount of money ordered to be paid on a mandamus against a public officer. 21 A. 741, *State ex rel. Board Metropolitan Police v. Judge of the Sixth District Court*; 20 A. 108; 10 A. 345, *Blanchin v. Fashion*.

27. The bond for a suspensive appeal from a judgment on a quo warranto, should be fixed by the judge, and is governed by the doctrine taught in *Blanchin v. Fashion*, 10 A. 346. 20 A. 577, *State ex rel. Cain v. Judge Sixth District Court*.

28. If the judgment is not regulated by articles 575, 576 or 577, C. P., and therefore, is not for a specific sum, nor for the delivery of a movable, nor for the delivery of real estate, a bond for costs is sufficient for a suspensive appeal. 21 A. 108, *State ex rel. Hickey v. Judge Fourth District Court*; 23 A. 31, *State ex rel. Beebe v. Judge Second District Court*; but see No. 20.

29. The fixing of the amount of the bond one month after the granting of the appeal is a defect against which appellant is protected. 18 A. 645, *Succession Parker*.

30. Where the appeal bond is not for the amount which the law requires nor the sum fixed by the judge, the appeal must be dismissed. 19 A. 507, *Succession McCall*.

31. When the bond was furnished for more than the order for a devolutive appeal, but less than necessary for a suspensive appeal, the appeal will not be dismissed. 21 A. 597, *Jenkins v. Howard*.

32. The amount of the bond, although too small for a suspensive appeal, will be good for a devolutive appeal if it be for the amount fixed by the Court. 20 A. 340, *Succession Armat*; 1 R. 324; 3 R. 63; 9 R. 185; 10 A. 318; 11 A. 687.

33. A bond given for the amount fixed by the judge, will be sufficient to maintain an appeal. 26 A. 530, *Hughes and Wife v. Caruthers*.

34. The bond being given for the amount fixed by the judge, the appeal will be good as devolutive, if not as suspensive. *Heirs Merriam v. David Jones*; O. B. 45, p. 1, not reported.

35. If the appeal bond be not sufficient for a suspensive appeal, and not in an amount fixed by the judge, the appeal will be dismissed. 26 A. 208, *Bockel v. Rudman*.

36. The bond being for the amount fixed by the judge, is good for a devolutive appeal, if not sufficient for a suspensive appeal. 24 A. 551, *Taylor v. Pipes*; 19 A. 507, *Succession McCall*; 21 A. 597; 20 A. 340, *Succession Armat*.

37. The appeal from a judgment in a petitory action, must be dismissed, if the amount of the bond be not fixed according to Article 577, C. P. O. B. 45, not reported, *Grivot v. Waples*.

38. A bond for costs is sufficient to appeal suspensively from a judgment discharging the surety of an executor and ordering him to furnish new surety.

28 A. 871, *State ex rel. Boutté, ex. v. Judge of the Second District Court*; 21 A. 43, *State ex rel. Gausson v. The Judge*.

39. The judge should fix the amount of the bond for an appeal from a judgment homologating a final account. 29 A. 289, *Succession Hardesty*; 20 A. 108; 21 A. 43; 10 A. 345.

40. An appeal bond for ——— dollars given within the delays for a suspensive appeal from a moneyed judgment, will be sufficient to maintain a suspensive appeal. 29 A. 527, *Gibbs v. Lum & Co.*

41. A bond for costs is sufficient to maintain a suspensive appeal from a judgment decreeing the nullity of a sale of a mere incorporeal thing, such as an inheritance, or rights of an heir to a succession. Article 577, C. P., refers only to *sensible corporeal* immovable property. 20 A. 108, *State ex rel. Hickey v. Judge Fourth District Court*; 10 A. 345; 19 A. 505; 7 A. 127; but see No. 28.

42. To suspensively appeal from a judgment ordering appellant who is executor, to deliver to the succession movable effects and real estate, the amount of the bond should be the value of the movables and the revenues to be derived from the real estate during the suit. 29 A. 840, *State ex rel. Smith v. Judge Second District Court*.

43. A bond to cover the revenues and deterioration of the real estate in possession of the appellant, is sufficient for a suspensive appeal from a judgment making perpetual an injunction and ordering the sheriff to put the appellee in possession thereof. 30 A. 283, *State ex rel. Durand v. Parish Judge of St. Martin*.

44. A bond for costs is sufficient to maintain a suspensive appeal from a judgment dissolving an injunction obtained without bond, against executory process. 30 A. 314, *State ex rel. Williamson v. Judge Fourteenth Judicial District*.

45. A bond for costs is sufficient for a suspensive appeal from a judgment homologating an administrator's account. 30 A. 283, *State ex rel. Durand v. Parish Judge of St. Martin*.

(d) Qualification of surety.

1. The right to enquire into the sufficiency of the surety on an appeal bond, is in the court from which the appeal is taken. 20 A. 390, *State ex rel. Maury & Co. v. Judge Fourth District Court*; 19 L. 174.

2. Sureties on appeal and sequestration bonds are by law required to be residents of the parish wherein the process or appeal is taken. 24 A. 131, *Wells v. Walker*.

3. The surety on an appeal bond is presumed solvent, until the contrary is proven; and in the absence of any proof, the appeal must be maintained. 22 A. 592; 23 A. 714, *State ex rel. Lynch v. Judge Second Judicial District Court*; 25 A. 616, *State ex rel. Hays v. Judge Fifth District Court*. But see acts of 1876, p. 49, whereby the burden of proof has been thrown on appellant.

4. The sureties on an appeal bond may limit their responsibility each for a particular portion of the bond, equaling the amount, in the aggregate, of the bond. 22 A. 124, *Bastable v. Succession Denegre*; 21 A. 443, *Roman v. Judge Sixth District Court*; and 730; *Mrs. Anne McConnell v. John Pasley*, not reported; 29 A. 827, *Gutierrez v. Croner*. See (a), Nos. 8, 9.

5. Where the appeal has been dismissed for insufficiency of the security, the Supreme Court will examine the evidence, to see whether the surety is good. 19 A. 501, *State ex rel. v. The Judge of the Second District Court*.

6. Where one out of four sureties, each bound for the whole amount of the appeal bond is good, this is sufficient. 27 A. N. R., *State ex rel. Gourgotte v. Judge Sixth District Court*.

7. The surety on an injunction bond condemned by the judgment, cannot be surety on the appeal bond. 18 A. 660, *Cimeo v. Danerwheim*; 12 L. 383, but see 2 R. 235. *Infra*, Nos. 13, 14.

8. The surety on an injunction bond, who is not appellant and who has not been condemned to pay anything may be surety of the appeal bond. 25 A. 36, *Courcelle v. Sauvinet*.

9. Judgment having been rendered against the surety as a party defendant, he is rendered incompetent to become surety on the appeal bond in the same case. 18 A. 660, *Cimeo v. Danerwheim*; 12 L. 383.

10. The drawer and indorser having severed in their defence and separate judgments having been rendered against them, the drawer may become the surety on the appeal taken by the indorser. 27 A. 234, *State ex rel. Coleman v. Judge Sixth District Court*; 22 A. 262, *Greiner v. Pendergrast*; 2 R. 235.

11. Two debtors condemned jointly, may become reciprocally each other's surety on the appeal bond. 27 A. 248, *Riley v. Heirs of Riley*.

12. The clerk of the court from which the appeal is taken, may be surety on the bond. 21 A. 669, *Walker v. Simon, Jr.*

13. The surety on an injunction bond may be surety on an appeal bond, from a judgment against both *in solido* from which the principal appeals separately. if he has property sufficient to answer for both bonds. 22 A. 262, *State ex rel. Wilson v. Judge Seventh District Court*.

14. The surety on the injunction bond cannot be surety on the appeal bond. 29 A 808, *Dumas v. Marie*; 18 A. 660. See *ante*, No. 6.

15. The only change made by act No. 24 of 1876 in the qualifications of sureties on appeal bonds is that their property must be within the State. 28 A. 884, *State ex rel. Favre v. Judge Fifth District Court*. See *ante*, (a) No. 32.

16. The sufficiency of a surety on an appeal bond will not be considered in the Supreme Court when not passed upon by the lower court. The testimony taken as to the solvency of the same person, surety on the injunction, will not authorize the court to pass on the question. 29 A. 597, *Edwards v. Edwards*.

17. A minor judicially relieved from minority may bind himself as surety on an appeal bond. 30 A. 534, *Cooper v. Rhodes*.

18. The surety who resides in the Sixth District of New Orleans is not qualified to sign an appeal bond from a judgment rendered by the Fifth District Court for said parish. 30 A. 582, *State ex rel. Zunts & Spori v. Judge Fifth District Court*.

19. Article 575, amended by act 1876, p. 49; qualifications of sureties generally, 1876, p. 109.

(e) Rights and obligations of surety.

1) In general.

1. The surety on the appeal bond is liable for whatever judgment may be rendered by the appellate court against the appellants, although the judgment has been greatly amended and altered. 27 A. 58, *Culver, Simonds & Co. v. Leovy & Hart*.

2. A clause in a bond of appeal that "it is to serve only in case a previous bond for a less amount already furnished is declared or proved insufficient," is of no effect. 27 A. 326, *Leblanc v. Succession Massieu*.

3. One signing an appeal bond as agent without authority is personally bound; if the principal afterwards ratify the giving of the suretyship, he is bound, therefore appellee has never been without security. 27 A. 306, *State ex rel. Norden v. Judge Fifth District Court*.

4. The surety on a bond of appeal will be liable to the full amount of his bond, if the judgment be increased on appeal to a larger amount than the bond. 30 A. 533, *Cooper v. Rhodes*.

5. The discharge in bankruptcy of the principal does not release the surety on the appeal bond. 30 A. 67, *Serra é Hijo v. Hoffman & Co.*

6. The surety on an appeal bond is liable for the judgment rendered on appeal although others than the principal who was cast, signed the bond as principals. 30 A. 72, *Anderson v. Arnette*.

2) Extent of surety's liability and judgment against his principal.

1. The execution having been returned not satisfied, the liability of the surety on the appeal bond attached, and he became liable for the value of the furniture recovered under the judgment, as fixed by the bond. 28 A. 337, *Pradat, widow of Norcross v. Legare et als.*

2. A surety who signed a bond for a suspensive appeal taken by a succession, is liable for the whole amount of the bond, although the succession may be insolvent, and the appellee's claim outranked by creditors who absorb the whole assets. 27 A. 327, *Leblanc v. Succession Massieu*.

3. The surety on an appeal bond, from a writ of seizure and sale, cannot be held liable, inasmuch as execution cannot issue against his principal. 27 A. 706, *Whan v. Irwin, tutor*; 9 L. 299; 10 R. 136, 191; C. P. 596.

ON REHEARING: The security on such a bond is liable for the amount of the mortgage, and no execution need issue against the principal. *Ib.* 1 A. 122; 30 A. —, *Landry v. Victor*; MARR, J., *dissenting*.

HOWELL and WYLY, JJ., *dissenting*: No execution can issue against the principal, C. P. 596, R. S. 3066; and the obligations of the surety cannot be more onerous than those of the principal. *Ib.*

4. The surety on a bond given for a suspensive appeal from an order of seizure and sale, is liable for the amount of the mortgage claim sued upon. 28 A., N. R., *Edward Thompson v. R.E. Grow and Husband*.

5. The surety on an appeal bond is liable for the judgment, although the transcript was not filed in the appellate court. 27 A. 645, *Moore, Janney & Hyams v. Lalaurie*.

6. Appellant fearing that he might not prove the surety on his appeal bond solvent, abandoned the appeal; *Held*: That the surety was responsible for the amount of the judgment, if the principal should be insolvent. 22 A. 296, *Simonds v. Heinn*.

3) Proceedings to fix surety's liability; and exceptions he may plead.

1. A security on an appeal bond cannot contest the judgment and set up matters which might have been pleaded in defense thereto. 20 A. 512, *Murison & Co. v. Butler*.

2. To fix the liability of the surety on an appeal bond, a demand to point out property should be made both on plaintiff and defendant. 16 A. 444, *Perkins v. Bard & Wilson*.

3. Not in executory proceedings. See *ante*, (2), Nos. 3 and 4.

4. To render the surety on the appeal bond liable, the sheriff in his return on the writ must declare that he found no property to seize, notwithstanding the demand on the parties. 20 A. 191, *Shephard v. Stewart*; 4 L. 301; 17 L. 416; 10 R. 138; 13 A. 264.

5. The surety on an appeal bond may be sued without execution against a principal who died insolvent. 20 A. 512, *Murison & Co. v. Butler et als.*; 1 A. 122; 10 A. 284, 544; 11 A. 78. See No. 11.

6. Appellee may proceed by rule against the surety on the appeal bond, when execution against the principal cannot be issued. 27 A. 325, *Leblanc v. Succession Massieu*.

7. The judgment creditor is not bound to seize property so burdened with taxes and of little value, when the attempt to sell would only result in costs, before proceeding against the sureties on the appeal bond. 28 A. N. R., *Rhoda E. White v. Myra Clark Gaines*.

8. A writ received on the fifth of January and returned unsatisfied on the twelfth after demand of every one interested, by order of plaintiff's attorney, it appearing that defendant was not in the parish, is sufficient to authorize proceedings against the surety on the appeal bond. 28 A. 718, *A. H. Gale & Co. v. Geo. W. Doll, and J. Maristany, surety*; 30 A. 386, *Pinard v. George*.

9. When execution could not be issued against the principal, plaintiff may proceed immediately on the appeal bond. 27 A. 465, *Chattanooga Railroad Company v. Dugan*.

10. Where the rule against the surety on the appeal bond was served on the seventh and fixed for the seventeenth and the judgment was rendered on the eighteenth of the same month, the delay is sufficient. 27 A. 112, *Reiners v. St. Ceran*; R. S. 3736.

11. It is useless to issue execution against the principal on an appeal bond, if he has become insolvent; a rule may be taken immediately on the surety. 22 A. 297, *Simonds v. Hein*. See No. 5.

12. It is no defense that the defendant in the original judgment has been garnisheed, or the judgment sold at the instance of creditors of the plaintiff, where the sureties have not been made parties to the proceedings to appropriate such judgment. 93 U. S. (Otto's) 341, *Smith et al. v. Gaines*.

13. A sheriff's return by direction of plaintiff's attorney, of no property found, which recites that the sheriff was unable to find the judgment debtor, and that he made a demand of the surety on the appeal bond to point out property, will be sufficient to authorize proceedings against the surety. 30 A. 386, *Pinard v. George*.

14. When the principal is not present in the parish, nor represented, the return of the writ without demand on him will fix the liability of the surety on the appeal bond. 30 A. 535, *Cooper v. Rhodes*.

15. Sureties, liability how fixed, 1870, E. S., p. 101.

4) Extinction of surety's obligation.

1. The consent of appellee to dismiss the appeal, will release the surety on the bond. 20 A. 179, *Tournillon v. Ratliff*.

2. An agreement to bring one case to the Supreme Court to be tried as a test case, does not release the surety on the appeal bonds given in the cases not brought up under the agreement. 26 A. 320, *Succession Simonds*.

IV. OF THE CITATION.

(a) *In general.*

1. Where there is no prayer for a citation, and appellee is not cited, the appeal must be dismissed. 17 A. 74, *Schmidt v. Benit*; 10 A. 650; 13 L. 50.

2. For want of citation of appeal on the plaintiffs, in a rule to dismiss an administrator, and appoint another who is no party to the proceedings, and is alone cited, the appeal must be dismissed. 21 A. 117, *Succession Tyson*.

3. Where citation was not served on one of the appellees, and none was issued on the other, the appeal will be dismissed *ex officio* by the court. 21 A. 303, *Martin v. Taylor & Pinckard*; 19 A. 296; 26 A. 574, *Newman & Co. v. Levy*.

4. The appellant is not required to look beyond the record and cite persons who were not parties to the action. 16 A. 20, *Fish v. Johnson*.

5. Where the appellee is not cited, the appeal taken by petition must be dismissed. 18 A. 626, *Succession Holmes*.

6. The representative of the estate must be cited, else the appeal will be dismissed. 23 A. 267, *Miltenberger v. Estate Pipes*.

7. Where the citation of appeal is not prayed for by the appellee, and none is issued, the appeal will be dismissed. 21 A. 238, *Adams v. Dermody*.

8. The appeal will be dismissed where the failure to cite one of the appellees, is imputable to appellant. 21 A. 618, *Potier v. Thibodeau*.

9. The omission to ask for citation of appeal is imputable to appellant. 21 A. 629, *Guilbeau, administrator v. Cormier*; 18 A. 700, *Nelson v. Beaumiller*; 12 L. 271; 14 A. 315.

10. Citation of appeal addressed to the appellee individually when he appears in a fiduciary capacity, though prayed for as such, is defective, and the appeal will be dismissed if time be not asked to correct the irregularity. 20 A. 35, *Camutz v. Bank of Louisiana*. See *infra*, 16.

11. It is sufficient if appellant prays for citation on plaintiffs who are appellees. Any error in the citation is not imputable to appellant and his appeal will not be dismissed. 28 A. N. R., *Seghers v. Soule & Gaillard*; O. B. 45, fo. 15.

12. Appellants are not bound to mention the names of the appellees in their petition of appeal; it is sufficient for them to pray that appellees be cited. 28 A. N. R., *Murphy v. Factors' and Traders' Insurance Company*.

13. When the appellee was not cited in an appeal taken at a term subsequent to that of the rendition of the judgment, the appeal will be dismissed. 19 A. 136, *McKowen v. Atkinson*; 16 L. 50; 5 A. 115; 10 A. 650; 9 R. 2.

14. Citation of appeal is necessary, where the order is obtained at another

term then the one during which the judgment was rendered. 21 A. 277, *St. Romes v. Macarthy*.

15. The creditors of the succession or insolvent who have an interest in maintaining the judgment must be cited on appeal. 17 A. 302, *Succession Perret*.

16. When the record shows that the appellee occupies a representative capacity, and the appellant only asked for citation in his individual capacity, the appeal must be dismissed. 23 A. 178, *Minor Osborn*. See *ante*, 10.

17. The appellants having failed to have the creditors who are interested in maintaining the judgment, cited, cannot cure the defect by asking the court to restrict the effect of their appeal so as to render judgment against the parties cited. 22 A. 574, *Succession Pollock*.

18. Under the intrusion act of 1868, No. 156, all parties in interest must be cited, and where there are two relators and only one of them appeals, the other should be cited. 22 A. 467, *State ex rel. Belden & Clay v. Blandin*.

19. The surety on an injunction bond is a necessary party to an appeal, he must be cited, otherwise the appeal will be dismissed for want of proper parties. 22 A. 400, *Avegno v. Johnson*; 20 A. 70.

20. Where the judgment dissolves the injunction without damages and the plaintiff alone appeals, the security on the injunction bond need not be cited. 25 A. 319, *Battalora v. Erath*.

21. The surety on the injunction bond has no interest in a judgment dismissing the suit and reserving defendant's rights to claim damages, and need not be made a party to the appeal. 26 A. 552, *Richardson v. Chevalley*; 23 A. 260, *Lane v. Roselius et als.*

22. The answer to the suit in attachment, claiming damages against plaintiff and his surety on the bond, did not ask for citation on the surety; in such a case the appeal will not be dismissed if the surety be not cited. 22 A. 242, *Salvadore v. Crescent Mutual Insurance Company*.

23. The law does not authorize the appointment of a curator *ad hoc* for the purpose of serving a citation of appeal on the absentee. 21 A. 465, 157; 24 A. 266, *Stevenson v. Edwards et als.*; but see act No. 78 of 1878.

24. The attorneys of record of the appellee, a non-resident, having acknowledged, in writing, service of the citation of appeal, according to article 582 C. P., the appeal must be maintained. 23 A. 581, *Payne v. Ferguson*.

25. Where the appellee resides out of the State, the citation of appeal must be served on his advocate. 21 A. 157, *Parker v. Davis*; 465, *McIntosh v. McLeod*.

26. The citation on appellee's attorney is not valid, when the appellee is a citizen of this State. 23 A. 207, *Jeffrey & Sons v. Philips*.

27. Citation is not necessary, when the judgment is rendered and motion made at the same term, which commences in November and ends in July, in the parish of Orleans. 19 A. 291, *Bethancourt v. Stevens*; Opinion Book 38, fo. 264; *Fisk v. Gibbs*, *Bright & Co.*; 24 A. 289, *Blessey, v. Kearney et als.*; 21 A. 329, *Fisk v. Moss*.

28. When appellant files a supplemental petition, asking for citation on certain appellees, omitted in her petition of appeal, no new bond need be furnished. 29 A. 822, *Borde v. Erskine*.

(b) *Necessity and waiver of citation; the time and its extension.*

1. Defendant's appeal will be dismissed, if the other judgment debtor be not made a party. 21 A. 618, *Broussard v. Guidry*. See *ante*, III. (b), No. 24.

2. An appeal by one of the opponents from a judgment dismissing several oppositions to an account, for want of the presence of opponents, cannot be dismissed for want of citation, when the fault is attributable to the clerk; and the consent of the administrator and appellant, to have the judgment reversed and the opposition remanded for a new trial, cannot be carried into execution, without the consent of all parties interested. 25 A. 534, *Succession Romers*.

3. Where the return day asked for by the appellant, is the day fixed by the judge, and there is not sufficient time to cite the appellee in accordance with

C. P. 583, 180, the appeal must be dismissed. 26 A. 748, *Citizens' Bank v. Ruty*; 8 L. 220; 12 L. 480, 483.

4. Time will be allowed to correct any error in the citation of appeal, committed by the clerk. 21 A. 669, *Walker v. Simon, Jr.*; 29 A. 834, *Hearing v. Mound City Life Insurance Company*.

5. When the appeal is taken in time—C. P. 567, 573—the neglect of the clerk to issue, or of the sheriff to serve the citation of appeal, is not attributable to the appellant, the appeal must be maintained. 22 A. 112, *Galagher v. Thomas*.

6. The succession being solvent an appeal from a judgment rendered on oppositions to the account, cannot affect the absentees who need not be cited. 25 A. 583, *Succession Hart*.

7. Want of citation of appeal is cured, by the appellees making appearance and urging other grounds of dismissal, before that of want of citation. 21 A. 278, *Lee v. Goodrich*.

8. The appellee who appears in the court, before pleading the want of proper citation, waives the defect. 20 A. 22, *Foute v. City*; 28 A. 835, *Jones v. Shreveport*.

9. Want of citation is waived when appellee moves to dismiss the appeal on the additional ground that the record does not contain all the evidence adduced on the trial. 26 A. 148, *Hefner v. Hesse et al.*

10. The appeal will not be dismissed because the citation was served before filing the bond. 29 A. 795, *Beebe v. Guinault*; 14 L. 292; 17 L. 515; 3 R. 271.

(c) *On whom and where to be made; return and proof of service.*

1. The failure of the sheriff to make the service of the citation or his neglect to make his return cannot be attributable to the appellants, and the case should be continued in order that appellee may be cited. 16 A. 303, *Nelson v. Beard*; 13 A. 259.

2. Citation of appeal served on the married woman, authorized and assisted by her husband to bring the suit, is sufficient. 28 A. 442, *Thezan v. Thezan*; 26 A. 542, *Deblanc v. Levasseur*.

3. For service of citation of appeal on absentees, see *ante*, (a), Nos. 22, 23 and 24.

4. When the appellee is not an absentee, but is not present, citation of appeal should be served at his domicile. Service on the attorney can be made only in the case of absentees. 29 A. 822, *Borde v. Erskine*.

5. Appointment of curator *ad hoc*, 1868, p. 129.

V. OF THE PARTIES.

(a) *In General.*

1. The sheriff, who is a mere stakeholder, need not be made a party to the appeal. 27 A. 244, *Bank of America v. Fortier*; 20 A. 283; 1 A. 205; 2 A. 232, 323; 5 A. 668; 11 A. 486.

2. All parties to the judgment must be made parties to the appeal. 20 A. 33, *Succession Forsyth*; 4 A. 577; 18 A. 281; 14 A. 315, 316; 20 A. 35, *Camutz v. Bank of Louisiana*.

3. Strangers who may be interested in the judgment need not be made parties to the appeal. 16 A. 128, *Patten v. Powell*.

4. Only those are parties to the appeal whose names are inserted in the bond. 18 A. 639, *Voekel v. Voekel*; 11 A. 410; 2 A. 452, 902.

5. A party in whose favor a judgment has been rendered by a court having no jurisdiction *ratione materiae*, need not be made party to the appeal. 21 A. 235, *Duncan v. Holt*.

6. An intervenor who has been dismissed, as of non-suit, is not a necessary party to the appeal. 27 A. 201, *Lane v. Clarke*.

7. It is immaterial at what time the motion to dismiss an appeal for want of proper parties is filed, as that defect will be *ex officio* noticed by the court. 19 A. 296, *Tupery v. Lafitte et als*; 12 R. 205; 4 A. 577; 11 A. 410; 12 A. 755; 12 A. 774, 801.

8 There being no want of proper parties in the court below and the appeal being granted in open court, the bond being in favor of the clerk, there can be no want of proper parties in the appellate court. 26 A. 220, *Baker & Thompson v. Pagaud*.

9. The sheriff is not a necessary party to an appeal from an injunction. 29 A. 860, *Eschert v. Harrison*.

(b) *Who must be parties; and how far those not parties are affected by, or can avail themselves of, the appeal.*

1) In general.

1. All parties to the record, interested in maintaining the judgment appealed from, must be made parties to the appeal, otherwise it will be dismissed. 21 A. 209, *Derwey v. Bird*; 16 A. 78, *Belleville Iron Works v. Its Creditors*; 18 A. 281, *Succession Penniston*; 11 A. 674, 409; 12 A. 755; 14 A. 315; 8 A. 367; 9 R. 365; 12 R. 180, 203.

2 Where the obligation is joint, all the co-obligors should be made parties. 18 A. 109, *Ellery v. Dameron*. See acts 1871, p. 19. Joint obligors need not all be made parties to the suit.

3. The indorser must be made a party to the appeal taken by the drawer from a judgment against both. 21 A. 646, *Sittig, tutrix v. Littell*.

4. A motion of appeal and bond in favor of the clerk makes all persons interested, parties to the appeal. 23 A. 370, *Succession McKenna*.

5. The Supreme Court is only seized of jurisdiction to amend the judgment between appellant and appellees. 18 A. 265, *Succession Egana*; 16 A. 195; 15 A. 433.

6. The Supreme Court cannot amend the judgment as between appellees. 20 A. 121, *Noble & Kaiser v. Powell*; 208; 307.

7. An appellant who does not perfect his appeal, cannot be heard before the appellate court on the appeal of others in the same case. 28 A. 522, *Becnel, administrator v. New Orleans, Mobile and Chattanooga Railroad Company*.

8. If one not a party to the judgment, be cited on appeal, the appeal cannot on his motion be dismissed. 29 A. N. R., *Boutté v. Boutté*.

2) Garnishees, parties, sureties and warrantors.

1. Where a garnishee is not made party to an appeal from a judgment rendered in favor of third persons intervening, the appeal will be dismissed. 16 A. 40, *Reese v. Conyers*.

2. Garnishees against whom no judgment has been rendered, are not interested in maintaining the judgment and need not be made parties. 16 A. 324, *Barner v. Gordon*.

3. The surety on an injunction bond, condemned with the plaintiff, is a necessary party to the appeal. 20 A. 70, *Pecoul v. Perret*. See *ante*, IV. (a), Nos. 19, 20, 21; *infra*, No. 5.

4. Sureties on an attachment bond are not parties to the suit, *stricti juris*, and need not be made parties to the appeal. 16 A. 128, *Patten v. Powell*.

5. When the surety on an injunction bond can in no way be affected by any judgment of the appellate court, he need not be made a party to the appeal. 23 A. 260, *Lane v. Roselius et al.* See *ante*, IV. (a), 19, 20, 21, 22; *ante*, No. 3.

6. In a suit brought against the maker of a promissory note, and a commercial firm as indorsers, where judgment by default was made final against the maker, and during the pendency of the suit one of the firm died, and his heir never having been cited, the case was tried only as to the remaining indorsers, and upon plaintiff's appealing, the defendants moved to dismiss the appeal because all the parties to the suit had not been made parties to the appeal; *Held*: That as the suit was tried in the absence of the other parties, there could be no objection to an appeal in the same form. 15 A. 486, *Milttenberger v. McGuire*.

7. One of the commercial partners who appeals from a judgment against the firm must make the other partner party to the appeal. 19 A. 296, *Tupery*

v. *Lafitte & Deffarge*; 27 A. 100, *Hammit and Husband v. N. O., M. and C. R. R. Co.*; see *ante*, III. (b), No. 14.

8. The warrantors must be made parties to the appeal. 19 A. 70, *Armant v. Bourgeois*.

3) Insolveny, marriage, partition, succession and tutorship.

1. When the husband, who has assisted his wife in bringing suit, is not made party to the appeal for the purpose of aiding his wife, the appeal will be dismissed. 16 A. 40, *Reese v. Conyers*. See *ante*, I. (e), 2).

2. All the owners in common must be made parties to the appeal from an action in a partition, else the appeal will be dismissed. 20 A. 358, *Gay v. Marionneaux*.

3. All the opponents to a tableau of distribution must be made parties to the appeal. 18 A. 699, *Blanchin & Giraud v. Martinez*.

4. The co-heirs of defendants need not be made parties to the appeal taken by one of them, from a judgment rendered against all, for their virile share. 27 A. 302, *Stevenson v. Edwards*.

5. A third person taking an appeal from a judgment homologating a tutor's account, must make all persons who have an interest in maintaining the judgment, parties to the appeal. 21 A. 183, *Minors Smith*.

(c) *Change of parties.*

1. Proper parties should be made in the Supreme Court when the appellee died after the granting of the motion of appeal and previous to the filing of the bond. 27 A. 621, *Howard v. Yale, Jr.* See PLEADING, I. (d).

VI. OF THE APPEARANCE, ANSWER AND MOTION TO DISMISS.

(a) *In general.*

1. A motion to dismiss cannot be considered as an answer to the appeal. 18 A. 190, *Johnson v. Jennison*.

2. When the ground for dismissal is doubtful, the appeal will be maintained. 19 A. 81, *Guion v. Creditors Succession Guion*; 10 A. 235; 2 A. 434.

3. If the transcript has been filed, the appeal cannot be withdrawn without the consent of the appellees. 20 A. 257, *Perkins v. Perkins*; 19 A. 103, *Wolf v. Poirier*.

4. A motion to dismiss, on the ground that the bond is not good and solvent, cannot be noticed, if the motion be based upon the evidence contained in the record, such evidence being improperly contained therein. 24 A. 329, *Générés v. Flucker*.

5. The appeal will not be dismissed on a motion based upon the insufficiency of the allegation for an injunction. 26 A. 42, *Walker v. Villavaso*.

6. The district judge may decide whether the appeal is devolutive or suspensive, but his decision is subject to review by the Supreme Court. 29 A. 700, *State ex rel. Pontchartrain v. Judge Superior Court*; 2 R. 551. See *ante*, I. (f), No. 4.

7. The district judge has the right to dismiss the appeal when the surety on the appeal bond is not good and solvent. 28 A. N. R., *State ex rel. Huppenbauer v. Judge of the Sixth District Court*.

8. Appellee cannot renew a motion to dismiss which has been decided against him. 29 A. 829, *Duncan v. Duncan*.

9. The purchaser of property sold to effect a partition cannot move to dismiss the appeal taken by the parties to the suit. 30 A. 178, *Boutté v. Boutté's Ex.*

(b) *Waiver of motion to dismiss.*

1. Appellee having caused the case to be set for trial cannot urge that appellant's right of appeal was lost. 16 A. 337, *White v. McGuire*.

2. A motion to dismiss cannot be entertained if there be an answer to the appeal. 16 A. 288, *Ouliber v. His Creditors*; 27 A. 284, *Succession Dufossat*; 8 R. 168; 3 R. 169.

3. The answer to an appeal, which prays for an amendment of the judgment, waives the application to dismiss. 27 A. 76, *White v. Gaines*; 27 A. 173, *Michel v. Meyer*; 28 A. 835, *Davis v. Levi*; 29 A. 522, *Succession Planchet*.

4. The motion to dismiss for informalities must be made within three days after the filing of the transcript. 22 A. 327, *Murison v. Seiler & Co.*; 23 A. 467, *Kohn v. Davidson*; 21 A. 30, *Dumonchel v. Limerick*; 17 A. 21; 7 N. S. 271; 2 L. 299; 2 A. 138; 3 A. 326; 4 A. 514; 11 A. 613; 12 A. 745. See *ante*, II. (c), Nos. 5, 6, 7.

5. A motion to dismiss is too late after the case has been submitted on its merits, although it was made within the three days. 28 A. 111, *Toups v. Meegel*.

(c) *When prayer for amendment, or motion to dismiss, if not waived, must be filed.*

1. If the appellee demand the reversal of any part of the judgment or damages, he shall file his answer at least three days before that fixed for the argument, otherwise it shall not be received. This clause has reference to the first fixing for trial in the Supreme Court. 15 A. 433, *Converse v. Steamer Lucy Robinson*; 17 A. 182, *Barrett v. Donovan*; 141, *Hite v. Jacobs*.

2. If an amendment is not prayed for in the answer to the appeal, none can be made in favor of appellee. 19 A. 527, *Lynn v. Lowenthal*; 17 A. 141; 18 A. 641; 27 A. 185, *Payne & Harrison v. Mrs. Stackhouse*.

3. A brief is not an answer to the appeal, and the judgment in favor of appellant cannot be amended. 19 A. 303, *Church v. Duru*; 20 A. 454, *Jamison v. Barelli*; 28 A. — *Bailey v. Quick*; 20 A. 24, *Davis v. Lusitanos Association*; 5 A. 140; 1 A. 340; 18 A. 641. See (d), No. 2.

4. A motion to dismiss the appeal on the ground that the record does not contain all the evidence, must be made within three days after the filing of the transcript. 27 A. 676, *Durbridge v. Slaughterhouse Co.* See *ante*, (b), No. 4.

5. A motion to dismiss for irregularity in the bond and order, must be made within three days after the filing of the transcript. 26 A. 311, *Francis v. Lavine et als.* See III. (a), No. 10.

6. A motion to dismiss, on the ground that a suspensive appeal having been dismissed for want of a proper bond, no devolutive appeal could be taken, must be made within three days after filing of the record. 24 A. 335, *Mark & Co. v. Hermann*.

7. A motion to dismiss an appeal, on the ground that the appellant has acquiesced in the judgment before appealing, is not one based on any informality or irregularity in bringing up the appeal and may be made at any time; this issue will be referred to the lower court. 23 A. 37, *James v. Fellowes*; 29 A. 576, *Evans & Taylor v. Succession Etheridge*.

8. A motion to dismiss the appeal on the ground that the appellant has failed to make a necessary party to the appeal, comes too late after three judicial days. 18 A. 191, *Murison & Co v. Butler*; C. P. 886, 890; 2 A. 138; 3 A. 326; 4 A. 514; 11 A. 613; 12 A. 745; 7 N. S. 271.

9. A rule taken in the lower court to dismiss the appeal is waived, when it is not tried before the return day. 17 A. 188, *Wright v. Brander*.

(d) *Prayer for damages.*

1. Damages for a frivolous appeal must be claimed by an answer. 17 A. 126, *Pecoul v. DeMahey*.

2. Where the appellee does not claim damages for a frivolous appeal by his answer, none can be granted. 17 A. 18, *Cockburn v. Groves & Co.*; 134, *Frost v. Wynne*; 67, *Verges v. Noel*; C. P. 890; 4 A. 150; 5 A. 146; 8 A. 73; 17 A. 18, 10; 21 A. 8. See (c), No. 3.

3. See C. P. 890. The prayer for damages must be filed three days before that fixed for argument.

VII. OF THE EFFECT OF APPEAL.

(a) *In general.*

1. It is well settled that an appeal by the principal will not suspend the judgment as to the surety. 22 A. 263, *State ex rel. Wilson v. Judge Seventh District Court.*

2. Articles 580 and 1059 of the Code of Practice and 1113 of the Civil Code are applicable when successions are opened to be administered, and the controversy is between two or more persons claiming the right of preference to the appointment for administration, but not when the principal question is succession or no succession. A suspensive appeal lies from a judgment rendered upon such issues. 22 A. 24, *State ex rel. Marin v. Judge of Plaquemines.*

3. The appeal being properly granted, the lower court has no authority to execute the judgment, and the consent of parties is ineffectual to dismiss the appeal without the action thereon of the Supreme Court. 24 A. 598, *State ex rel. Graham v. Judge Eighth District Court.*

4. The appeal being granted and pending in the appellate court, the lower court could not pass upon its validity. 24 A. 600, *State ex rel. Dubuclet v. Judge Eighth District Court.*

5. The appeal from a judgment ejecting the tenant, having been taken and the bond furnished, all objections to the bond being waived, the lower court was without jurisdiction to entertain subsequent proceedings. 25 A. 622, *State ex rel. Silverstein v. Judge Fifth District Court.*

6. When the appeal is once granted, the judge can only decide on the solvency of the surety. 27 A. 684, *State ex rel. Ribet v. Judge Third District Court.*

7. The judgment on a rule to show cause why the report of experts, appointed to find the state of accounts between plaintiff and defendant, should not be homologated, having been suspensively appealed from, divested the lower court of jurisdiction, and no execution could issue on said judgment, which after all, cannot be the final judgment in the case; the report could only have been used as evidence on the trial of the case. 29 A. N. R., *State ex rel. McClelland v. Judge Sixth District Court*; C. P. 456, 457; 11 A. 474; 13 A. 334.

8. During the pendency of a suspensive appeal from the order of sale, the power of the district court to execute the same is superseded; any sale made during the interval, is void. 15 A. 254, *Smetser v. Blanchard.*

9. The lower court is without jurisdiction to order the sale of the property, even if the keeping exceeded the value of the property, when a suspensive appeal has been taken from the judgment dissolving the injunction. The injunction bond answered for damages. 25 A. 666, *State ex rel. Mahan v. Judge Fifth District Court.*

10. After granting an appeal the jurisdiction of the district court was divested, except as regards the sufficiency and legality of the bond. 27 A. 684, *State ex rel. Ribet v. Judge Third District Court.*

11. Where the suspensive appeal taken by defendant is dismissed, because the appeal bond is not good, and execution is thereupon issued and the money collected, and the suspensive appeal taken in the same case by an intervenor is still pending, the lower court has no jurisdiction to grant an injunction to prevent the payment of the money realized, to plaintiff. The injunction should be dissolved with damages. 28 A. 772, *Nancy Lottspeich, tutrix, v. John T. Diboll.*

(b) *Time allowed for suspensive appeal, and amount of the bond.*

1. If the appeal be taken more than ten days after the signing of the judgment, the appeal will not suspend the execution. 23 A. 183, *Irby, McDaniel & Co. v. J. E. Flore.*

2. By agreement the delay for a suspensive appeal may be extended. 28 A. N. R., *Mrs. Ellen Murray v. Pontchartrain Railroad Company*; 27 A. 697,

State ex rel. Pontchartrain Railroad Company v. Judge Superior District Court. See APPEAL, I. (f), 1), No. 15; 2).

(c) *Reversal of the judgment.*

1. A voluntary execution of the judgment, from which a devolutive appeal is subsequently taken, and the judgment appealed from reversed, does not entitle the defendant to an action for the repetition of the sum paid in satisfaction of the judgment. 25 A. 476, *Winston v. Nunez, administrator.*

2. The judgment cannot be amended as between appellees. See JUDGMENT, XV. (c), 2), No. 3.

VIII. OF THE DIFFERENT MODES OF BRINGING UP THE APPEAL AND INFORMALITIES IN SO DOING.

(a) *In general.*

1. Where an appeal has been brought up informally as to one appellant, but he has been made an appellee by his co-appellant, the appeal will not be dismissed. 15 A. 529, *Cox v. Bradly.*

2. Where defendants in the same case, take separate appeals and file distinct bonds, one transcript will suffice, a doubtful error in the record, not on an essential matter, will not be sufficient ground for dismissal. 15 A. 156, *Baham v. Langfield.*

3. The terms of the Code of Practice might perhaps authorize the transmission in the record of the original petition of appeal, but the purpose is substantially complied with, by the transmission of a duly authenticated copy. 24 A. 476, *Burns v. Naughton.*

4. The appeal will not be dismissed because the transcript contains a document not offered in evidence. 24 A. 341, *Walters v. Cruickshank.*

5. Where there is no assignment of errors, no statement of facts, special verdict or bills of exception in the record, and it appears from the certificate of the clerk, that through the negligence of the appellant, a portion of the evidence on which the case was decided in the lower court, is not contained in the record, the court will *ex officio* dismiss the appeal. 15 A. 708, *Morton v. Steamboat Chamette.*

6. Where the certificate of the clerk does not show that the record is complete, and there is no assignment of error, bill of exception or statement of facts, the appeal will be dismissed. 20 A. 21, *Roumige v. Durrie & Co.*

7. Where the testimony is not taken in writing, and no statement of facts has been made by the parties or by the court, there being neither assignment of errors nor bill of exception, the appeal will be dismissed. 21 A. 458, *Melson v. Sandel.*

8. Where there is no certificate of the judge or clerk, that the transcript contains all the evidence on which the case was tried, no special verdict, bill of exception, statement of facts nor assignment of errors, filed within the prescribed time, the appeal must be dismissed. 20 A. 141, *Patterson & Co. v. Owen et als.*

9. Where there is no bill of exception, no assignment of errors, nor any statement of facts, the appeal must be dismissed. 23 A. 746, *Lockwood v. Zunts.*

10. When the record contains no note of the evidence offered on the trial, no statement of facts agreed on by the parties or made by the judge, no bill of exception, nor assignment of error, the appeal must be dismissed. The certificate of the clerk in the usual form is not sufficient to maintain the appeal. 29 A. 71, *Cooley v. Broad*; 9 R. 478.

11. Where several of the litigants appeal from the same judgment, their appeal may be embraced in the same transcript. 28 A. N. E., *Murphy v. Factors' and Traders' Insurance Company.*

12. The clerk shall not be required to deliver the transcript of the record before his fees for preparing the same have been paid. 28 A. 580, *State ex rel. Richard v. Robertson, clerk.* *Contra*, see CLERKS OF COURT, Nos. 2 and 3.

13. If the transcript be not made according to the rules of the court, a new

transcript may be ordered at the expense of the clerk. 29 A. 501, *Todd v. Gordy, sheriff*.

14. The transcript of appeal from an order of seizure and sale need not contain the proceedings on an injunction thereagainst. 30 A. 604, *Doble v. Delavallade*.

(b) *Assignment of error.*

1. The provisions contained in articles 896 and 897 of the Code of Practice, relative to the assignment of errors on appeal to the Supreme Court, are not applicable where the record is certified to contain all the testimony adduced on the trial. 15 A. 420, *State v. Giffin*.

2. When the record does not contain all the evidence upon which the lower judge acted, and the appellant has not filed an assignment of errors within ten days after the filing of the record, *ex proprio motu*, the appeal will be dismissed. 20 A. 161, *Lanfear v. Durand*.

3. An assignment of error is not necessary when the transcript contains "all the proceedings had, all the evidence and testimony adduced and all documents filed." 18 A. 261, *Bossier v. Carradine*.

4. Nothing can be assigned as an error of law which could have been cured by evidence legally admitted at the trial. 25 A. 580, *Succession Bailey*; 338, *Carlton & Destez v. Cheval*.

5. When the appellant does not point out any defect in the judgment which seems to be correct, the judgment will be affirmed with costs. 20 A. 357, *Avendano Brothers v. Ohmstede*.

6. New points cannot be made on appeal when there has been no formal assignment of errors. 19 A. 47, *Blanchard v. Luce*; 15 A. 575.

7. When the certificate of the clerk is complete, no assignment of error is needed. 28 A. 815, *Warfield v. Hamlet, sheriff*.

8. Where the appellant does not appear, nor state specially any error of law appearing on the face of the record, the appeal will be dismissed. 17 A. 37, *Kenion v. Harves*.

9. Where the allegations of the petition are not traversed by the answer which simply avers that they are not sufficient in law to maintain the injunction, and by direction of appellant's counsel all the evidence offered is omitted from the transcript, the decision must be based upon the face of the papers. 29 A. N. R., *Marcotte v. Messick, sheriff*.

10. Questions presented by the assignment of errors cannot be considered in the Supreme Court of the United States unless the record shows that they were brought to the attention of the court below. 92 U. S. (Otto's) 90, *Walker v. Sauvinet*.

(c) *Statement of facts.*

1. A statement of facts should be made before the appeal. 20 A. 253, *Logan v. Winder*; 8 N. S. 304; 3 L. 455; 16 L. 236.

2. No evidence, statement of fact or assignment of error is necessary to enable the court to pass upon a judgment dissolving the injunction on the face of the papers. 26 A. 42, *Walker v. Villavaso*.

3. A statement of facts signed by counsel after a writ of error has been sued out cannot be regarded as part of the record. 12 Wall. 275, *Kearney v. Case*.

(d) *Time within which the transcript must be filed; and its extension.*

1. A devolutive appeal was made returnable on the first Monday of November, and a motion for an extension of time was filed on the nineteenth of the same month; *Held*: That where a party takes a devolutive appeal, and fails to file the transcript by the return day, if it appears that no fault was imputable to him, he is entitled to an extension of time. 15 A. 692, *Massey v. Helme*.

2. Where a transcript is filed on the fourth judicial day after the return day, and exclusive of that day, the appeal will be dismissed. 15 A. 712, *Rhen v. Steamer John Simonds*.

3. If the transcript of appeal be filed after three judicial days from the return day, the appeal will be dismissed. 24 A. 126, *Farmers', etc., Associa-*

tion v. Strawbridge; 19 A. 122, *Police Jury v. Garrett*; 21 A. 210, *Cousin v. Johnson*; 213 *City v. Merchants' Mutual Insurance Company*; 20 A. 229, *Morière v. Robinson et als.*; 18 A. 651, *Dalton v. Viosca et als.*

4. The act of March 22, 1866, which extended the time for filing the transcripts, where appeals had been taken since June, 1860, and lost, is constitutional. 21 A. 673, *Arceneaux v. St. Clair de Benoit*.

5. It is sufficient if the transcript of appeal be filed on the first day of the first meeting of the court after the taking of the appeal. 21 A. 663, *Lefevre v. Haydel*; 669, *Walker v. Simon, Jr.*

6. The return day being a Sunday, the appellant has the whole of the next day to file the transcript. 24 A. 333, *Luling v. Judge Fourth Judicial District Court*.

7. The failure of the clerk to enter an order granting an extension to file the transcript, cannot prejudice the appellant. 25 A. 583, *Succession Hart*.

8. The order extending the time for the return day, granted by the district judge, is an absolute nullity. 22 A. 449, *State ex rel. Belden v. Mahan*.

9. An order making the appeal "returnable according to law," may be sufficient, but if an extension of time is not applied for before three judicial days have elapsed, from the time the law makes such appeal returnable, it should be dismissed. 23 A. 373, *Redmond v. Marin*.

10. The absence from the State of his counsel when known to the appellant, is no excuse for not filing the transcript within the legal delay. 17 A. 188, *Wright v. Brander*.

11. An appeal from a judgment in an intrusion suit, will not be dismissed where the appellant is not in fault, and when it is impossible to transmit the transcript to the Supreme Court in ten days. The order of appeal fixing the return day to a longer period under such circumstances, is valid. 22 A. 33, *State v. John Lewis, judge*.

12. Where the record in an incomplete state was filed and taken back to the lower court to be completed, and, nevertheless, is not made complete, the appeal will be dismissed. 28 A. 44, *De St. Rome v. Carondelet Canal Navigation Company*.

13. The appellant on discovering that the judgment against him, instead of being for the tax claimed, one thousand eight hundred and sixty dollars, was only for one hundred and eighty-six dollars, thereupon abandoned her appeal; one year and eight months thereafter, appellee discovering the error, filed the transcript in the appellate court, and prayed for an amendment of the judgment; *Held*: That the appeal had lapsed and the appellee had no right to file the transcript. 28 A. 15, *City of New Orleans v. Mrs. C. Adams*.

14. In a contest for office, the appeal will be maintained, if the transcript be filed within ten days after the rendition of the judgment, whether brought by appellant or any other interested party. 30 A. 70, *State ex rel. Duffel v. Marks*.

(e) Certificate of the judge and clerk.

1) In general.

1. The appeal can be maintained although the clerk does not certify that the transcript contains all the evidence adduced, if it contains a bill of exception. 16 A. 84, *Martin v. Blanchin*.

2. When the transcript is duly certified, the court is enabled to pass on the whole case; and a motion to dismiss because the record does not show what evidence was adduced will be denied. 20 A. 213, *Cammack v. Gordon*; C. P. 896; 5 L. 293; 6 L. 211; 16 A. 84; 18 A. 262, 282.

3. When the clerk certifies the transcript to contain "all the evidence adduced except what was offered on the first trial," the case may be examined. 20 A. 234, *Wells v. Turnage*.

4. Clerks of district courts may certify the record of appeal from the parish courts. 21 A. 394, *Succession Young*.

5. Where the certificate of the clerk is regular, and the record shows nothing to prove it untrue, the appeal will not be dismissed. 21 A. 134, *Louisiana State Bank v. Cammack*.

6. Where the certificate of the clerk is not in due form, the appeal will not be dismissed under acts 82 and 16 of 1866, p. 154. 22 A. 246, *Flint & Jones v. Peck*.

7. If the transcript of appeal does not contain all the evidence, and the clerk of the court *a qua* in answer to a *certiorari*, certifies that the testimony cannot be found, the case should be remanded for a new trial. 23 A. 28, *Martinez v. New Orleans C. R. R. Co.* See (f).

8. The signature of the clerk not being affixed to the certificate, and appellee having joined in the appeal, of their own motion, the Supreme Court will order the clerk to affix his signature. 27 A. 173, *Michel v. Meyer*. See 2), No. 11.

9. A deputy clerk may sign the certificate of a transcript of appeal. 27 A. 507, *Burton v. Hicks*; 3 A. 247; 15 L. 33.

10. A defect in the certificate of the clerk is no cause for a dismissal of the appeal. 27 A. 507, *Burton v. Hicks*; R. S. 36.

2) Requisites of the certificate.

1. "I do hereby certify that the foregoing — pages contain a true and correct transcript of all the documents filed, testimony, and evidence adduced, and all proceedings had upon the trial of the suit," is a sufficient certificate to the transcript of appeal. 16 A. 84, *Barnabé v. Snaer*.

2. The clerk should certify unqualifiedly, in conformity to article 896 C. P., that the transcript contains all the testimony adduced. If the clerk cannot so certify, and there has been no statement of facts prepared, no bill of exception or special verdict taken, and no assignment of errors filed, the appeal must be dismissed. 16 A. 98, *Watson v. Jones*; 11 A. 604.

3. Where the certificate to the transcript gives the court full "knowledge of the matters argued and contested below," the appeal will not be dismissed. 17 A. 318, *Kearney v. Nixon*.

4. Where the certificate shows the transcript to contain all the documents offered, and on file, the appeal must be dismissed. 19 A. 261, *Carrollton v. Magee*.

5. Where the transcript contains all the proceedings had, documents filed and evidence adduced on the trial, the Supreme Court may pass on the merits of the case. 21 A. 336, *State ex rel. Hero v. A. Pitot et al.*

6. A certificate that the foregoing is a true copy of all the proceedings had, all documents filed and evidence adduced in the case, is sufficient. 21 A. 462, *Gillis & Ferguson v. Cuny*.

7. A certificate of the clerk showing the transcript to be a true and correct copy of "all proceedings had, and all the evidence adduced and filed in the matter," is erroneous, and the appeal must be dismissed. 23 A. 83, *Succession Sanderson*.

8. "A true copy of all the proceedings had and all the testimony taken on the trial, etc.," is sufficient. 25 A. 211, *Succession Waterer*.

9. If the absence of any proceeding is not shown and the certificate of the clerk to the transcript omits, "and all proceedings had," the appeal will not be dismissed, nor the case continued. 28 A. 343, *Benham v. Carroll*.

10. The proceedings of the court below on a rule to dismiss the appeal are not a part of the record of appeal and need not be copied in the transcript; O. B. 46, *Hays v. Vidou*, not reported.

11. The appeal should not be dismissed for omission on the part of the clerk to sign the certificate appended to the transcript. 28 A. 576, *Penn v. Evans, Jr.* See 1), No. 8.

(f) Diminution of record and correction of errors.

1. Where a diminution of the record is suggested, the Supreme Court will order a *certiorari* to perfect it, although the case has been submitted for judgment. 15 A. 717, *Trudeau v. Jackson Railroad*.

2. If the transcript does not contain all the evidence, appellant must apply for a *certiorari*, else, if the case be thus submitted, the appeal must be dismissed. 27 A. 68, *Radovich v. Frigerio*.

3. Where the certificate of the clerk of the inferior court showed that documentary and record evidence which the parties were to furnish was not embraced in the transcript, because it was not furnished to the clerk, and a portion of the omitted evidence was offered by the appellant; *Held*: That appellants were in fault for not furnishing a complete record; that a motion to dismiss must prevail. 16 A. 40, *Clark & Co. v. Gormley et als.*

4. The appeal will be dismissed where documents offered in evidence are not to be found in the record, although the certificate of the clerk is regular and complete. 17 A. 130, *Hall v. Beggs.*

5. Where it does not appear from the transcript that any evidence was adduced, the appeal will not be dismissed. 19 A. 292, *Bethancourt v. Stephens.*

6. Where a motion for continuance, affidavit and bill of exception have been lost, and the record is consequently defective, the case will be remanded for a new trial. 16 A. 183, *Abat & Générés v. Harris*; 11 R. 477; 5 A. 602; 12 A. 83.

7. One who offers a record should procure and file copies in due time; if the clerk certifies the transcript to contain all documents filed when a record offered is not included, the fault not being imputable to appellant the case will be remanded at the costs of appellee. 18 A. 483. *Marchand v. Coyle*; C. P. 906; 16 A. 183, *Abat & Générés v. Harris*; 11 R. 477; 5 A. 602; 12 A. 83.

8. The case must be remanded, if without appellant's fault the transcript does not contain all the evidence adduced. 18 A. 278, *Succession Sheean.*

9. If the record does not contain all the evidence adduced, the court cannot review the case. 11 A. 72; 16 A. 40; 18 A. 232, *Succession Clew*; 8 A. 433.

10. Appellant whose duty it was and who fails to bring up all the evidence, cannot profit by his own wrong to have the judgment reversed to the prejudice of appellee; the appeal must be dismissed. 18 A. 229, *Succession Clew.*

11. The appeal will not be dismissed because the record is incomplete by the fault of the clerk. 25 A. 336, *Baltimore v. Parlange.* See CERTIORARI.

12. Where the record does not contain all the facts necessary for the appellate court to determine the litigation, the case will be remanded. 20 A. 505, *Golding v. Petit.*

13. The appeal will not be dismissed where the clerk in answer to a mandate to amend his certificate under articles 898, 899, C. P., answers: that on the second trial the attorneys of defendants withdrew in open court and declined acting further, and plaintiff's counsel required no note of evidence to be taken, and that it is not within his knowledge that any more evidence was introduced than is contained in the transcript. 21 A. 278, *Lee v. Goodrich.*

14. When the record is not complete and such as to allow the court to pass on the merits of the case, the appeal will be dismissed. 21 A. 299, *Ruleff v. Nugent.*

15. When the certificate of the clerk below shows that a portion of the evidence adduced, has been lost and is not contained in the record of appeal, the case will be remanded. 22 A. 11, *Mulligan v. City of New Orleans.*

16. The appeal will not be dismissed although it is made to appear by the certificate of the clerk that several documents are missing from the transcript, if these were not offered in evidence in the proceedings to obtain the judgment appealed from. 22 A. 95, *Succession Peter Williams.*

17. When the record is incomplete because part of the evidence used in the court below was missing at the time the record was made out, the case should be remanded. 5 A. 602; 12 A. 83; 25 A. 216, *Meyer v. Dupré.*

18. The substance of the testimony of a witness, not reduced to writing and bearing merely to an incident of the trial, but brought up in a bill of exception, is not a good ground for the dismissal of the appeal. 25 A. 563, *Rogers & Wordale v. Gibbs.*

19. Where the certificate of the clerk is full, excepting the proceedings on an intervention dismissed and from which no appeal is taken, the appeal will be maintained. 27 A. 202, *Lane v. Clarke.*

20. Where the record of appeal is not complete, in consequence of the failure of the plaintiff to file with the clerk certified copies of records offered

in evidence, a writ of *certiorari* will not enable the defendant, who is appellant, to complete the record, and in such case the judgment of the lower court will be reversed and the cause remanded for new trial. 15 A. 63, *Hagan v. Gaunt*.

21. The appeal will not be dismissed if the certificate to the transcript is in due form, but all the evidence has not been brought up; appellee, who complains, should move for a writ of *certiorari*. 27 A. 444, *Choppin v. Wilson*.

22. Where the transcript is incomplete by the fault of appellee, who has withdrawn the instrument on which was founded the action, the cause must be sent back for a new trial. 16 A. 374, *Hagan v. Cox*.

23. Where the transcript is not complete, because appellee has withdrawn from the court certain documents which could not be copied in the transcript, the appeal will not be dismissed. 27 A. N. R., *Durbridge v. Smith*.

24. Where the transcript of appeal is not complete by the fault of appellee, who did not file with the clerk the record offered in evidence, the case will be remanded. Not reported, *St. Romes v. Her Creditors*.

25. Where no suggestion of diminution of record is made and no motion to dismiss is filed, the case will be remanded at the costs of appellant, if the transcript be incomplete. 18 A. 146, *City v. Lacroix*.

26. If the missing evidence would not effect the decision, the appeal should not be dismissed. 27 A. 547, *Succession Gayle*.

27. Where the certificate of the clerk shows that the transcript contains all the evidence adduced and there is no note of evidence in the record showing that the act of mortgage alleged to be annexed to the petition, was offered in evidence, but from the judgment rendered, it appears that the act was before the judge, the case should be remanded. 21 A. 135, *Smith v. Morrison*.

28. Where there is no suggestion or diminution of the record, attributable to appellant, the motion to dismiss must be refused. 28 A. 52, *State ex rel. Eager, Ellerman & Co. v. Chas. Clinton*.

29. Where the record is defective and no effort is made by appellant to have the same corrected, the appeal will be dismissed. 27 A. 105, *Charbonnet v. Dupasseur*; 7 A. 443; 8 A. 433; 17 A. 130; 21 A. 299; 18 A. 231.

30. If the clerk leave out of the transcript words that he did not understand in the judge's opinion, this is no cause to dismiss the appeal. 28 A. N. R., *Marquez & Co. v. Bernard*.

31. For defect in the evidence adduced and answer to *certiorari*, see (e). 1), No. 7.

IX. OF THE JUDGMENT ON APPEAL.

(a) *In general.*

1. In a redhibitory action where the judgment of the district court awarded to the plaintiff the price he had paid for the thing affected with the redhibitory vice, but did not rescind the sale, and the defendant appealed; *Held*: That the plaintiff, the appellee, could not throw upon the defendant the costs of the appeal by a prayer to amend the judgment by rescinding the sale, even if the judgment be modified in no other respect. 15 A. 658, *Boulin v. Maynard*. See *infra*, Nos. 13 and 16.

2. The record will be examined, when filed by appellee, in the same manner as if the transcript had been filed by appellant. 19 A. 34, *Easterling v. Thompson*.

3. When the appellees have not appeared and prayed for judgment, the appellate court cannot settle their rights, *inter se*. 20 A. 159, *Moore v. Moore*.

4. Where it appears by the record that the claim is prescribed and nothing shows that the debtor is dead, that his succession was ever opened and that his heirs have ever accepted the succession and taken possession of it, a judgment for plaintiff against the heirs will be reversed and the case remanded to be proceeded with according to law. 21 A. 112, *Britton & Co. v. Scott*.

5. The Supreme Court remanded this case for the purpose of ascertaining the value of the slaves sold and rendered executory upon the land the balance of the price. 22 A. 259, *Meritt v. Merle et als.*

6. Where a case has been improperly transferred from the district to the parish court, and the latter is without jurisdiction *ratione materiae*, the Supreme Court will remand the case to the district court. 22 A. 133, *Ogier v. Marchand*; 81, *Heirs Chaney v. Williams, administrator*.

7. Where the defendant moved to dissolve the writ of sequestration and dismiss the suit on the face of the petition and the motion was maintained, the Supreme Court, if the petition disclose a cause of action, will remand the case. 21 A. 516, *Hastings v. Brantley*.

8. The judgment, on the original demand, in favor of one who appealed from the reconventional demand only, cannot be amended on the prayer of appellee. 21 A. 714, *Westermuir v. Street*.

9. The judgment cannot be amended as between appellees, without appeal on their part. 25 A. 508, *Gantt v. Eaton & Barstow*; 23 A. 146, 36, 456; 26 A. 542, *Deblanc v. Levasseur*; 16 A. 195, 313; 15 A. 448, *Burton v. Davis*.

10. No amendment can be made to the judgment in favor of appellee who has neither appealed nor answered to the appeal, praying for such amendment. 26 A. 450, *Succession Ostrander*.

11. The plaintiff, appellee, in favor of whom a joint judgment is given, cannot have the obligation declared a solidary one, if he does not pray for the amendment. 25 A. 487, *Seyburn v. Dayries*.

12. The court will presume that in rendering the judgment appealed from the lower court proceeded on proper evidence where no note of evidence appears in the record. 23 A. 504, *Simmons v. Howard, Preston & Barret*; 22 A. 118, *Citizens' Bank v. Bringier*; 23 A. 446, *State v. Campbell*; 26 A. 148, *Heffner v. Hesse et al.*; 734, *State v. Monasterio*; 22 A. 73; 23 A. 393.

13. Plaintiff having appealed from a judgment dismissing a part of his claim, the Supreme Court dismissed the whole, but allowed him the costs of appeal. 25 A. 226, *Martin v. Cannon*. See *ante*, Nos. 1 and 16.

14. The court will *ex proprio motu* notice the want of jurisdiction *ratione materiae* in the lower court and dismiss the suit. 26 A. 603, *Tessier v. Littell*; 28 A. 640, *Dartez v. Légy, administrator*.

15. If the injunction be bonded contrary to law, the appellate court can simply annul the order setting aside the injunction. 26 A. 604, *Simon v. Walker*.

16. The judgment for taxes being more than the tax bill, will be reduced on appeal at the costs of appellee. 27 A. 470, *City of New Orleans v. City Hotel et als.*

17. Where the judgment contains an error in the surname of the defendant, the Supreme Court will correct the error if the defendant by his judicial admissions, is estopped from denying that he is the party condemned at the trial. 27 A. 491, *Formento v. Robert*.

18. Judgments of the Supreme Court, how executed. See CLERKS OF COURT, No. 14.

19. For want of legal service of citation the case will be remanded. See CITATION, II, No. 5.

20. For costs of appeal, see COSTS, III. (e), No. 1.

21. The presumption is in favor of the tax judgment when the evidence on which it was obtained was not offered in evidence. See EVIDENCE, III. (d), No. 5.

22. Where the court below knew the parties, etc., the damages given for a malicious prosecution will not be disturbed. See MALICIOUS PROSECUTION, No. 15.

23. Where the citation has been served on an agent whose authority is not alleged, see PLEADING, V. (a), 3), D. No. 1.

24. Where the report of two sets of commissioners are widely different, in a matter of expropriation, the case will be remanded. See THINGS, II. (b), 2), No. 3.

(b) *Consideration due to the verdict of the jury, or judgment of the court.*

1. Where the verdict of the jury is contrary to the admissions in the answer, the case will be remanded. 21 A. 587, *Bancker & Co. v. Marti et al.*

2. In setting aside the verdict of the jury, the Supreme Court should declare that their finding was erroneous. 25 A. 374, *Halliday v. Lanata*.

3. Where the damages assessed by the jury appears too large, the Supreme Court will reduce the amount. 27 A. 111; *Teutonia National Bank v. Loeb & Co.* See OFFENSES AND QUASI OFFENSES, II. (g), 2), A. No. 1.

4. Where the conclusion of the Supreme Court, from conflicting evidence varies little from the verdict of the jury, the verdict will not be disturbed. 28 A. 823, *Morgan v. Sheldon*.

5. Any ambiguity in the language of a witness will be interpreted so as to sustain the action of the judge *a quo*. 21 A. 629, *Campbell v. Thibodeaux*.

6. In cases of fraud great weight is attached to the opinion of the judge. 21 A. 297, *Gogreve v. Windhart*.

7. So also on questions of fact. 23 A. 253, *Laforet v. Weber*.

8. For effect and avoidance of the verdict, see JURY, IV. (c).

9. In an action for slander the verdict being set aside, the case should be remanded. See LIBEL AND SLANDER, No. 14.

(c) *Laches of parties; errors of counsel; and defective pleadings or evidence.*

1. Where the proceedings are so irregular that the court cannot render a decree, the case will be remanded. 19 A. 187, *Walker v. Acklen*.

2. Where the proceedings are irregular and not such as to permit the court to render definitive judgment, the case will be remanded. 20 A. 376, *Succession Rohlfing*.

3. Under our system of appeals, the whole testimony is brought up and the entire case is before the Supreme Court, and when the pleadings and evidence fully sustain the verdict, it would be a vain thing to remand the cause for speculative errors on the part of the judge who tried it. 22 A. 604, *Howell v. St. Charles Street Railroad Company*.

4. Where defendant cited individually and in a fiduciary character, and answers only in one capacity and there is no issue joined in his other capacity, the case will be remanded. 17 A. 176, *City of Jefferson v. Kaiser*.

5. The certificate of notice of protest showed to what postoffice the notice was sent to the indorser but did not specify that it was the nearest post office to defendant's residence, neither was plaintiff put on his guard that the post-office mentioned in the notice was not the nearest one; no other evidence that the certificate of notice was offered on that fact, the case should be remanded. 29 A. N. R., *Hibernia National Bank v. Watson*.

6. Where there is an utter absence of citation, the case will be remanded. 18 A. 336, *Johnson's executor v. Shepherd Brown*.

(d) *Errors below in matters relating to the evidence or trial by jury.*

1. Where justice requires it, the judgment confirming a default will be set aside for want of proper evidence, and the case dismissed. 20 A. 547, *Pike v. State*.

2. When the Supreme Court has all the facts before it, and is passing on the merits of the case, they will not notice irregularities in the charge to the jury. 21 A. 330, *Malony v. Rugely*; 4 M. 327; 7 N. S. 198; 4 L. 76.

(e) *Failure to apply for a new trial; and of the rule "de minimis non curat lex."*

1. Because no motion for a new trial has been made, for the reversal of the verdict, this is not a good ground to dismiss the appeal, but might be a good reason to affirm the judgment. 17 A. 78, *Lefrance v. Martin*.

2. The court cannot enter into the consideration whether the error in the judgment was committed by the appellant's counsel, so as to save appellees their costs. The latter should have applied to the lower court for a correction. 16 A. 178, *Johnson v. His Creditors*.

3. Where it appears that no effort was made in the lower court to correct a supposed error in the judgment with regard to the costs, and the plaintiff has judgment for a part of his demand, the Supreme Court will not disturb that part of the judgment which awards him his costs. 15 A. 294, *Blanc v. Cousin*.

4. Before appealing from the verdict, an attempt should be made to obtain a new trial. 17 A. 78, *Lefrance v. Martin*; 15 L. 466; 17 L. 336; 9 M. 285; 1 N. S. 713; 2 N. S. 388; 5 L. 446; 3 R. 429; 5 R. 127; 6 R. 362.

5. The maxim "*de minimis*," etc., does not apply to appeal bonds. See APPEAL, III. (c), No. 13.

(f) *Damages on appeal.*

1. In cases involving questions of facts, and where, usually, the evidence does not fully concord, no damages, as for a frivolous appeal, can be allowed. 16 A. 218, *Austin & McWilliams v. Moore*.

2. Where a judgment bears eight per cent. interest, only five per cent. damages will be allowed for a frivolous appeal. 17 A. 77, *Lamothe v. Lamarque*.

3. Where the note and judgment bear eight per cent. interest, no damages will be allowed for a frivolous appeal. 17 A. 169, *Saloy v. Gubernator*.

4. Damages will not be allowed on appeal except on moneyed judgments. 19 A. 327, *Arrowsmith v. Rappolge*.

5. When the appeal is frivolous, damages will be awarded. 20 A. 225, *Spencer & Co. v. Bloomfield & Steele*; 376, *Mithoff v. Weiss*; 21 A. 50, *Williams v. Woodman*; 22 A. 70, *Steamer Quitman v. Packard*.

6. Where no bill of exception, no assignment of errors and no note of evidence are annexed to the record, damages will be awarded for a frivolous appeal. 22 A. 197, *Uter v. Dumonteil*.

7. Where the appellant has not filed any brief and the court is unable to see any error in the judgment, damages should be awarded. 22 A. 256, *Lusse v. Mische & Co.*

8. No damages for a frivolous appeal can be allowed when the appellee joins in the appeal. 26 A. 476, *Whetstone, adm'r v. Rawlins*; 626, *Thomas v. Fuller*; 27 A. 96, *Mahan v. Michel*.

9. Where plaintiff is not delayed in the execution of his judgment, damages for a frivolous appeal will not be allowed. 26 A. 727, *Crofts v. Monyhan et al.*

10. An appeal will not be dismissed because frivolous. 27 A. 112, *Reiners v. St. Ceran*.

11. To condemn an administrator to damages for a frivolous appeal would be to render a judgment against the creditors and heirs of the succession. This ought not to be done. 28 A. 626, *Girouard v. Broussard, adm'r*.

(g) *Matters and pleas not acted upon below, nor embraced in the appeal.*

1) In general.

1. Where the judgment is null by reason of defective citation, the case will be remanded. 20 A. 75, *Michie v. Brown & Co.*

2. Issues of facts, not raised in the district court, will not be passed upon by the Supreme Court. 19 A. 169, *Montgomery v. Barrow*.

3. The Supreme Court cannot notice a *remittitur* which is not included in the transcript, although it appears by a document attached to appellee's answer to the appeal. 25 A. 509, *Gantt v. Eaton & Barstow*.

2) Applications and claims, defenses and exceptions, not made below or waived.

1. A final judgment cannot be rendered on an appeal taken from a judgment rendered on a peremptory exception filed after issue has been joined by default, where the plaintiff did not treat such exception as an answer in the lower court. Such a case will be remanded, to be proceeded with according to law and the exception permitted to stand as an answer. 15 A. 159, *Lea v. Terry*.

2. Where the case has not been put at issue by answer or default as to one of the sureties, and part of the evidence referred to by both parties has not been copied in the transcript, the case will be remanded. 16 A. 357, *City v. Odier & Co.*

3. Where the cause was tried upon its merits and the case is decided upon a plea of prescription in favor of defendant, in dismissing the plea, the Supreme

Court will give judgment on the merits. 24 A. 223, *Levi & Co. v. Weil & Brother*.

4. Where the case has not been tried on its merits and no evidence offered, the Supreme Court cannot pass on the merits in reversing the judgment dismissing the suit. 27 A. 99, *Smith v. Donnelly*.

5. The judgment dissolving an injunction on an *exception which must also be considered as an answer*, averring that all the matters set up in the petition existed and were known to plaintiffs before judgment, will be affirmed, when there is no note of evidence in the record. 25 A. 339, *Cheval v. Destez*.

6. Where prescription is pleaded for the first time in the Supreme Court, the case will be remanded at the request of the other party. 27 A. 432, *Nicholson & Co. v. Jennings*; 20 A. 410, *Bernstein v. Ricks*. See PLEADING, VI. (c), 4). PRESCRIPTION, I. EXECUTORY PROCESS, II. (a), Nos. 8, 9.

7. Points presented for the first time in a petition of appeal will not be passed upon by this court. 23 A. 246, *Slocumb v. Williams*.

8. An item of the account of an administrator, not opposed in the lower court, will not be passed upon by the Supreme Court. 20 A. 86, *Succession Perret*.

9. Objection to trial on a *certiorari* will not be noticed if not made below. See COURTS, II. (e), No. 27.

3) Evidence.

1. Where the evidence does not sustain the verdict of the jury, it will be set aside. 21 A. 219, *Cardaillac v. Duthu*; 24 A. 629, *Haselmeyer v. McLellan*.

2. The evidence, by its conflict, leaving the matter in doubt, the case should be remanded for a new trial. 22 A. 242, *Campbell v. Clark*.

3. Where the report of the experts which form the basis of the judgment has not been offered in evidence, the case will be remanded. 20 A. 107, *Gubernator v. City of New Orleans*.

4. The verdict of the jury, if not sustained by the evidence, will be set aside and such judgment rendered as conforms to the evidence adduced. 24 A. 629, *Haselmeyer v. McLellan*.

5. For want of evidence, the Supreme Court in its discretion, may remand the cause. 18 A. 455, *Letten v. Spearing*; 560, *Cane v. Hart*.

6. In a question of damages where private property is taken for public use, if from the testimony, the court is unable to do justice between the parties, the case will be remanded for the purpose of ascertaining the *quantum* of damages. 19 A. 271, *Bailey v. City of New Orleans*.

7. Where the record does not show that the parties opposing the probate of the will are the heirs, and the fact is denied before the Supreme Court, the case will be remanded. 21 A. 502, *Succession King*.

8. Where the defendant in a rule to dissolve an injunction fails to offer evidence in support of his objections to the seizure and sale, the judgment dissolving the injunction, will be affirmed. 17 A. 168, *Wheeler v. Stewart*.

9. Where the plaintiff in injunction failed to offer evidence of the seizure, the case will be remanded. See INJUNCTION, VII. No. 20.

(h) *Form and effect of judgment; and by which of the judges it may be rendered.*

1. Where only one of two defendants perfected his appeal, the other became an appellee, and the judgment could not be amended as to him. The error in inserting the word defendants in the decretal part of the judgment did not affect the judgment against said appellee. 28 A. 99, *Howard v. Waggaman et als*.

2. If one of the judges, who concurred in the judgment, was absent when the judgment was pronounced, and two of the judges present dissented, the judgment is valid. 28 A. 848, *Howard v. Walsh*.

(i) *Re-hearing; and amendment of judgment.*

1. Where the court decided the case on its merits, overlooking a motion to dismiss, and it appears that the motion was filed more than three days after the filing of the transcript, and no brief was filed by appellee, a re-hearing will

not be granted for the purposes of examining the motion to dismiss. 19 A. 188, *Hutchinson v. Richardson*.

2. The omission to insert the credit of a partial payment made on a note may be corrected without granting a re-hearing. 22 A. 265, *Succession Markey*; 433, *Smith v. McWaters*.

3. A second re-hearing cannot be applied for. 29 A. N. R., *Succession Milton Taylor*; *ib.*, N. R., *Summers & Brannins v. Clarke*.

4. If the delays allowed by the court elapse, before the filing of the grounds in support of the application for a re-hearing, the application will be refused. 29 A. 366, *Succession Lacroix*.

5. No re-hearing is permissible on a judgment rendered on an application for a mandamus. 18 A. 113, *State v. Judge Fourth District Court*. See MANDAMUS, II. No. 12.

6. The application for a re-hearing filed by an *amicus curiæ* should be acted upon before the expiration of the six judicial days, else the judgment becomes final. 30 A. 611, *Lessassier & Binder v. Board of Liquidation*.

APPORTIONMENT.

See OBLIGATIONS, VIII. (f). POSSESSION, II. (c). PUBLIC LANDS, III. (b), 2), D. TAXES, (b), 2), 3).

APPRAISEMENT.

1. See EXECUTION, V. (b); (d), 3). MINORS, III. (g), 3), 5). SUCCESSION, VIII. (e), 4). PARTITION, (b). WATER WORKS, No. 2.

2. For second appraisalment of succession property, see INVENTORY.

3. The charge for appraisers' fees in execution sales is prohibited, by art. 671 C. P.; 25 A. 337, *Baltimore v. Parlange*.

4. The law fixes appraisers' fees in succession matters. See SUCCESSION, VIII. (c), 4), No. 9.

APPRENTICE.

See LEASE, II. (c), 1).

APPROPRIATION.

1. See LAWS, I. (a). PAYMENT, III.

2. General appropriation, 1870, E. S. p. 77; 1871, p. 177; 1872, p. 63; 1873, p. 108; 1874, p. 99; 1875, p. 39; 1876, p. 61; 1877, E. S. p. 75; 1878, p. 212. Deficiencies, 1878, pp. 242, 131.

APPURTENANCE.

See ACCESSION, II. (b). EXECUTION, V. (d), 12). MORTGAGE, VI. (b). SALE, III. (b), 2), B.; VIII. (c). THINGS, II. (a).

ARBITRATION.

I. IN GENERAL.

II. OF THE APPOINTMENT, POWERS AND DUTIES OF REFEREES; THE VALIDITY AND EFFECT OF THEIR AWARD.

III. OF THE PROCEEDINGS TO RENDER THE AWARD EXECUTORY.

I. IN GENERAL.

1. An agreement to submit the pending litigation to arbitrators, did not of itself, divest the court of jurisdiction; and defendant having refused to abide by the result plaintiff had a right to confirm his default. 20 A. 51, *Fielding v. Westermier*.

2. If the submission is not limited as to time, the power of the arbitrators continues during three months, unless the parties agree to revoke it. 18 A. 320, *St. Martin v. Mestayé*.

II. OF THE APPOINTMENT, POWERS AND DUTIES OF THE REFEREES; VALIDITY AND EFFECT OF THEIR AWARD.

1. An award of arbitrators, when acquiesced in by both parties, has, as to them, the effect of a final judgment. 15 A. 679, *Peniston v. Somers*.
2. Plaintiff and defendant having submitted their differences to arbitration, in writing, and having bound themselves within a fixed delay to comply with the award in a penal sum, are bound thereby; both the award and the penalty for non-compliance may be exacted. 28 A. 500, *R. Hunt v. James E. Zunts*.
3. WYLY, J., *dissenting*: The penalty stipulated for non-compliance only, can be exacted, not the amount of the award. *Ib.*

III. OF THE PROCEEDINGS TO RENDER THE AWARD EXECUTORY.

1. See C. P. 441, *et seq.*; C. C. 3104, *et seq.*
2. A direct action in nullity is the only remedy to correct an error in an award of arbitrators. See JUDGMENT, XI. (a), No. 1.

ARGUMENT OF A CASE.

See CRIMINAL LAW, XIII. (d).

ARKANSAS AND DELTA RAILROAD COMPANY.

1871, p. 23.

ARMS.

See constitution of the United States, article 2, of amendments of 1791. See CRIMINAL LAW, IX. (d).

ARREST

I. IN GENERAL.

II. OF THE RIGHT TO ARREST.

III. OF THE AFFIDAVIT AND BOND.

IV. OF THE IMPRISONMENT; BAIL; AND SURETY FOR DEBTOR'S RELEASE.

(a) *In general.*

(b) *Surrender of principal; surety's liability how fixed; its extinction.*

I. IN GENERAL.

1. If there is an utter want of probable cause for the arrest of the debtor, damages will be awarded to him. 23 A. 165, *Mortimer v. Thomas & Harrell*.
2. In an action for damages based on a wrongful arrest, the defendant will not be exempted by a plea of want of malice, or that he meant to do no harm. 25 A. 307, *Rogay v. Juillard*; 16 A. 387. See *infra*, IV. (a).
3. The allegation that plaintiff was arrested on an affidavit made by defendant, that he was discharged by the examining magistrate *ex proprio motu*, but clearly with the knowledge and silent acquiescence of the prosecutor, that the prosecution is at an end, and that the prosecutor acted without probable cause, and in legal intentment, maliciously, gives the right to an action for damages. 15 A. 337, *Burkett v. Lanata*.
4. Damages given by a jury for a false arrest will not be set aside if all be shown, that is essential to maintain the action. 24 A. 330, *Litzler v. Huntington*.

II. OF THE RIGHT TO ARREST.

1. Where no attempt has been made by the vendee to sell or dispose of the property purchased without paying his vendor, or to conceal or cover the same so as to defeat the latter's recourse thereon, the case does not fall within the purview of the tenth section of the act of 1840, which provides for the incarceration of the vendee in cases of fraud. 15 A. 8, *Milttenberger v. Burgess*.

III. OF THE AFFIDAVIT AND BOND.

1. It is necessary for the arrest of a foreign debtor, that the creditor should

take an oath that the debtor absconded from his place of residence. R. S. 1870, section 87; 23 A. 165, *Mortimer v. Thomas & Harrell*; 20 A. 552, *Levi & Navra v. Levy*; 19 A. 512, *Graham v. Noble*.

2. It is not sufficient that the creditor, in a proceeding to arrest a debtor, should swear that all the facts and allegations in the petition are true to the best of his knowledge and belief; he must swear *positively* to the specific claim on which he sues, and to his belief of the truth of the other allegations in his petition. 15 A. 261, *Herwig v. Beach*.

3. Bond made in favor of the clerk, 1871, p. 18.

IV. OF THE IMPRISONMENT; BAIL; AND SECURITY FOR DEBTOR'S RELEASE.

(a) *In general.*

1. If no probable cause be shown for an arrest, malice will be presumed. 20 A. 338, *Hayes v. Hayman*; 9 R. 387, 418; 9 A. 216; 13 A. 274; 28 A. 243, *King v. Dietrich*. See *infra*, IV. (b).

2. No damages should be awarded where the arrest was not made maliciously. 27 A. 339, *Gourgues v. Howard*; 6 A. 577.

3. The damages occasioned by an illegal arrest, are left to the discretion of the judge. 18 A. 417, *Block v. McGuire et al.*

4. Where there is probable cause for the arrest, no damage will be allowed. 28 A. 325, *Hopkins v. Garthwaite, Lewis & Miller*. See *ante*, I. No. 2; *infra*, (b), No. 1.

(b) *Surrender of principal; what must be shown to fix surety's liability; and its extinction.*

1. Plaintiff who has been arrested, has a right of action *ex contractu*, under the bond given, to obtain the writ; hence it is not necessary, in order to entitle a party to recover special damages resulting from his illegal arrest, that he should allege and prove malice and want of probable cause. 16 A. 387, *Phillips v. Bonham & Ivens*; 15 A. 133. See *ante*, (a).

2. To recover exemplary damages, plaintiff must prove both malice and the absence of probable cause. 16 A. 387, *Phillips v. Bonham & Ivens*.

3. It is not conceded that a surety on a bond given to procure the arrest of a debtor, can, when sued as such, be mulcted in vindictive damages. 16 A. 388, *Phillips v. Bonham & Ivens*.

4. The surety bond of arrest cannot escape responsibility, because his principal has put himself beyond the reach of the court, by leaving the State. 25 A. 307, *Rogay v. Juillard et al.*

5. When the defendant, who has been arrested, departs from the State within three months from his arrest, the surety on his release bond will be held liable for the judgment. The bankrupt law did not change plaintiff's rights. 28 A. 885, *Gottschalk v. Meyer*.

ARSON.

See CRIMINAL LAW, IX. (a).

ASSESSMENT.

See TAXES, III. NEW ORLEANS, I. II.

What property shall be assessed, 1878, p. 229. Mode of assessment, 1877, E. S., No. 96; amended 1878, p. 234.

ASSIGNEE AND ASSIGNMENT.

For assignment of incorporeal and litigious rights, see SALE, VIII. MANDATE, V.

For assignment of mortgages and leases, see MORTGAGE, VI. LEASE, I. and II.

For assignment of property to creditors, see BANKRUPTCY. INSOLVENCY. ATTACHMENT, VII. OBLIGATION, VI. VII., and TRUST, II.

For assignment of shares in corporations, see CORPORATIONS, VI.

For assignment of policies of insurance, see INSURANCE, I. II. III.

For the name in which assignee sues or issues execution, see PLEADING, I. EXECUTION II.

For assignees of bills and notes, see BILLS and NOTES, IV. SALE, IV.

For assignment as collateral security, see NOVATION, II. PLEDGE, I. MANDATE, V. PRIVILEGE, III. INSURANCE, II.

For assignment of bonds taken in judicial proceedings, see EXECUTION, V. (d). ARREST, IV. SHERIFF, I.

For assignment of error on appeal, see APPEAL, VIII. CRIMINAL LAW, XVI. See also DONATIONS. REGISTRY. SUCCESSIONS, V. SALE, III. EXECUTORY PROCESS, II. COMPENSATION. EVIDENCE, XV. XVI. JUDGMENT, XV.

ASSUMPSIT.

See PLEADING.

For agreements, express or implied, see OBLIGATIONS, III. QUASI CONTRACTS.

ASYLUM.

Relative to the building of the deaf and dumb asylum, 1870, p. 50.

ATLAS COMPANY.

1870, p. 99.

ATTACHMENT.

I. IN GENERAL.

II. OF THE RIGHT TO ATTACH.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>Nature and origin of the debt.</i></p> | <p>(c) <i>Debtor's residence; existence and term of the debt; and character of the property.</i></p> <p>1) <i>Residence and partnership.</i></p> <p>2) <i>Existence and term of the debt.</i></p> |
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III. OF THE AFFIDAVIT.

IV. OF THE ATTACHMENT BOND AND SURETY; AND DEFENDANT'S DAMAGES FOR ILLEGAL ATTACHMENT.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>Necessity, sufficiency and validity of the bond.</i></p> | <p>(c) <i>The damages.</i></p> |
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V. OF THE ORDER TO ATTACH; PETITION, CITATION AND APPEARANCE OF DEFENDANT AND OF ATTORNEY TO REPRESENT HIM.

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| <p>(a) <i>In general.</i></p> | <p>(b) <i>Citation; and also of the attorney appointed to represent defendant.</i></p> |
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VI. OF THE MODE AND NECESSITY OF ATTACHMENT; PROPERTY ATTACHABLE IN CHARACTER; ITS SEIZURE AND THE SHERIFF'S RETURN.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>Stock and partnership property.</i></p> <p>(c) <i>Bills and notes; judgments; obligations of plaintiff.</i></p> | <p>(d) <i>Property subject to another jurisdiction; or fraudulently obtained.</i></p> <p>(e) <i>Real estate and sheriff's return.</i></p> |
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VII. OF THE CONFLICT BETWEEN ATTACHING CREDITORS AND THIRD PERSONS.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>Consignees, pledgees and others claiming for advances.</i></p> <p>(c) <i>Assignments and sales by debtor, and property fraudulently acquired.</i></p> | <p>(d) <i>Stipulations pour autrui or property of debtor appropriated or consigned for benefit of third persons.</i></p> |
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VIII. OF THE MOTION TO DISSOLVE.

IX. OF THE RELEASE ON BOND.

(a) *In general.*(b) *Proceedings to fix the surety's liability; its extent and extinction.*

X. OF GARNISHEES.

(a) *In general.*(b) *Answers to interrogatories.*

XI. OF THE EFFECT OF THE ATTACHMENT AND PRIVILEGE IT CONFERS.

I. IN GENERAL.

1. A writ of attachment in the case of an absentee, is not a remedy incident to a main action, but is the foundation of the action; and an order setting aside the attachment terminates the suit, unless an appeal is taken from it. 15 A. 709, *Watson v. Simpson*.

2. The right of a purchaser to recover damages for the value of animals which have contracted a redhibitory disease, from those which were purchased, arises *ex delicto* and cannot form the basis of a suit by attachment. 15 A. 512, *Childs v. Wilson*.

3. An attachment being merely a conservatory remedy, should be issued by the court having jurisdiction of the person. 10 L. 471; 24 A. 311, *Rochereau v. Guidry*. See EXECUTION, V. (a), 3), D. § 1.

4. Plaintiff in attachment is estopped from denying defendant's title to property attached. See ESTOPPEL, No. 36.

II. OF THE RIGHT TO ATTACH.

(a) *In general.*

1. Vessels and steamboats employed in navigation in and out of the waters of the State, are, like other property, subject to the law of attachment for debts not yet due; but all contracts made with the owners and employees of vessels, the obligees knowing them to be thus navigating, cannot be enforced by the process of attachment before the maturity of the obligation. 16 A. 47, *Nimick v. Tehuantepec Company*.

2. It is the disposal with *intent to defraud* which gives a right to the attachment. 25 A. 500, *Frère v. Perret*. See *infra*, (b), Nos. 4, 5.

3. The United States, having the right to sue in our courts, may use the writ of attachment, as being an accessory to the main action. 18 A. 306, *United States v. Murdock*. See *infra*, VII. (c).

4. An attachment is properly levied where the debtor gives an undue preference to some of his creditors, to the injury of others. 27 A. 617, *Schulz v. Morgan*.

5. When an attachment may issue before a justice of the peace. 1877. E. S., p. 178.

(b) *Nature or origin of the debt.*

1. An attachment will lie in an action for damages arising *ex contractu*, when the claim does not rest upon such uncertain elements of damage as absolutely to preclude the plaintiff from making an affidavit as to the amount of the debt. 15 A. 1, *Hide & Mackie v. Higgins*.

2. An attachment will not lie in a case sounding in damages for a tort. 18 A. 630, *West, Renshaw & Cammack v. Chew, executor*; 22 A. 389, *Young v. Ship Princess*; 2 A. 943; 3 A. 436; 12 A. 110.

3. State courts are without jurisdiction in an attachment suit whereby the absent defendants are brought into court through their property, on a claim for damages arising *ex delicto*. 22 A. 389, *Young v. Ship Princess Royal*.

4. An attachment will lie when the defendant is about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors. 24 A. 128, *Wetherow v. Croslin*.

5. In such cases the intention to defraud must be clearly proven. 24 A. 269, *Hoy & Co. v. Weiss*. See *infra*, VII. (c); *supra*, (a), No. 21.

6. Where the claim, although unliquidated, arises *ex contractu*, an attachment may issue. 29 A. 88, *Miller v. Chandler*.

(c) *Debtor's residence and term of the debt; character of the property.*

1) Residence and partnership.

1. The court having jurisdiction of the main action, should issue the attachment. See *ante*, I. No. 3.

2. The right of a creditor to attach the boat, is in no wise impaired by a sale of a part thereof to a resident of this State. 23 A. 434, *Stevenson v. Prather*.

3. If an attachment of a steamboat be bad as to some of the owners, on the ground that they are residents of this State, it must be set aside *in toto*. 15 A. 433, *Converse v. Steamer Lucy Robinson*.

4. Where an affidavit is made, that a debtor has left the State with the intention not to return, his subsequent return will, not alone, be sufficient to dissolve a writ of attachment, where there are circumstances which render it probable that the original intention was not to return. 15 A. 425, *Simons v. Jacobs*.

5. A writ of attachment will not be maintained, where the defendant left the State temporarily and did not acquire a domicile elsewhere. 19 A. 102, *Clark v. Pratt*.

6. A residence of a year in this State is not required to protect a defendant's property from attachment. 19 A. 136, *Lurty v. Skilton*.

7. Plaintiff is entitled to an attachment in all cases where the defendant resides out of the State; the law makes no distinction. 18 A. 526, *Sandel v. Emmet George*.

8. The creditor must show that the resident debtor is about leaving the State permanently to entitle him to an attachment. 21 A. 173, *Schorten v. Davis*.

9. An attachment will lie against defendant who leaves his dwelling house and furniture, declaring that it was his intention to be absent from the State for two years or longer, traveling for pleasure and health, without leaving an agent upon whom citation could be served. 27 A. 523 *Leathers v. Cannon & Bell*.

2) Existence and term of the debt.

1. No judgment can be rendered on notes not yet due, at the time of filing the petition, unless the affidavit is made in conformity to law. 17 A. 169, *Osborne & Tolle v. Powell & Co*.

2. The creditor has clearly a right to attach his debtor's property, although his debt is not due, when the debtor is about to leave permanently the State, without leaving sufficient property to pay his creditors' claims. C. P. 242; 22 A. 473, *Hathcock v. Gray*.

3. A prayer for a judgment of three thousand five hundred dollars, or such amount as shall be found due, sworn to, is sufficient for an attachment. 27 A. 104, *Belden v. Read & Hunt*; 12 L. 345.

III. OF THE AFFIDAVIT.

1. The affidavit that the defendant had already disposed of the notes by pledge, and will further assign and convert them into money with intent to place them beyond the reach of petitioner, who is a creditor, is sufficient. 25 A. 500, *Frere v. Perret*.

2. WILY, J., *dissenting*: Will convert is not equivalent to is about to assign, and therefore not sufficient; moreover, the pledging was done by the plaintiff herself. *Ib*.

3. An affidavit that "all the allegations of the petition are true," is sufficient for an attachment where the petition shows a cause of action *ex contractu* and the non-residence of defendant. 29 A. 89, *Miller v. Chandler*. See *ante*, II. (c), 2), No. 3.

4. Annexing documents and swearing to petition, see PLEADING, V. (a), 4).

IV. OF THE ATTACHMENT BOND AND SURETY, AND DEFENDANT'S DAMAGES FOR ILLEGAL ATTACHMENT.

(a) *In general.*

1. The maxim *de minimis non curat lex*, applies to a case where the attachment bond is less by about one dollar than one-half over and above the amount of the debt alleged to be due. 25 A. 499, *Bodet & Geydan v. Nibourel*.

(b) *Necessity, sufficiency and validity of the bond.*

1. The United States need not give bond. 18 A. 306, *United States v. Murdock*.

2. The bond should be made payable to the clerk. 23 A. 690, *Thomas & Co. v. Scott*. Acts 1871, p. 18.

3. A bond exceeding *by* one-half the amount sued for, is sufficient for an attachment. 29 A. 90, *Miller v. Chandler*. See *ante*, (a).

(c) *The damages.*

1. The measure of damages to be recovered on an attachment bond, is the actual expense and loss resulting from the levying of the attachment, including the fees of the attorney. 20 A. 66, *Dickinson v. Maynard*.

2. Where an attachment has wrongfully issued, the defendant is entitled to recover the actual damages proved. 20 A. 66, *Dickinson v. Maynard*.

3. The damages for a wrongful attachment are the expenses incurred and profits lost. 27 A. 191, *British and American Steamship Navigation Co. v. Sibley, Guion & Co.*

4. The fees of counsel should be allowed as damages for the wrongful issuance of an attachment. 28 A. 60, *Gerard Brandon v. Allen & Co.*

5. The wrongful issuance of an attachment entitles defendant to damages. 28 A. 309, *Bridge v. Eunis*.

6. The attachment being maintained, it cannot give rise to damages. 28 A. N. R., *Jesse K. Bell v. Thos. P. Leathers*

V. OF THE ORDER TO ATTACH; PETITION; CITATION; APPEARANCE OF DEFENDANT AND OF ATTORNEY APPOINTED TO REPRESENT HIM.

(a) *In general.*

1. A party's appearance by attorney to move for the dismissal of an attachment, and to except to the jurisdiction of the court over him cannot be construed into a submission to the jurisdiction which would authorize a judgment *in personam*. 15 A. 624, *Billin v. White*. See *infra*, (b), No. 3.

2. The defendants having appeared in an attachment suit, are bound by the personal judgment rendered against them. 28 A. 530, *Wm. J. Taylor v. Kehler, Updike & Co.*

3. When the petition may be amended, see PLEADINGS, IX. (c), 3), No. 1.

4. Where a defendant, non-resident, dies pending the action, leaving no succession to be opened here, the probate court has no authority to appoint a curator *ad hoc* to represent the defendant's succession. The court wherein the suit is pending, can alone make such an appointment. 30 A. 26, *Bussey & Co. v. Nelson*.

(b) *Citation; attorney to represent defendant.*

1. The attachment and citation served on the absentee, by posting at the door of the courthouse, is not valid; they should be posted on the door of the room where the court in which the suit is pending is held. C. P. 254; 3 R. 232; 12 R. 462; 9 A. 550; 24 A. 512, *Connell v. Medlock*.

2. The construction of the courthouse was such that the posting of the citation on a movable bulletin board, standing at one of the main entrances to the stairs leading from the hall or passage, on the ground floor, to the courtroom on the second floor, was legal. 25 A. 590, *Connell v. Medlock*.

3. The appearance of the non-resident simply for the purpose of setting aside the attachment does not subject him to the jurisdiction of the court;

a curator *ad hoc* should be appointed, contradictorily with whom the proceedings are to be carried on. 26 A. 740, *Meritz v. Marks*. See *supra*, (a).

VI. OF THE MODE AND NECESSITY OF ATTACHMENT; PROPERTY ATTACHABLE IN CHARACTER; ITS SEIZURE AND THE SHERIFF'S RETURN.

(a) *In general.*

1. The knowledge of the payee that a draft is drawn by the owner against funds in his hands, does not transfer the ownership to the drawee, and the funds are subject to attachment by the drawer's creditors. 27 A. 90, *Block, Britton & Co. v. Barton, Miller & Co.*; 15 A. 545, *Robertson v. Scales*.

2. An attachment may be levied on any property of the defendant, in whatever hands they may be found. 22 A. 525, *Troustein v. Rosenham*.

3. In proceedings against an absentee, actual seizure of property alone, is the basis of the attachment and the jurisdiction of the court. 26 A. 688, *Scott v. Davis*.

4. Where cotton is shipped in this State, under an agreement whereby certain advances were made to the shipper, the cotton may be attached before an actual or constructive delivery to the consignee. 26 A. 749, *Bancker & Co. v. Brady et al.* See ABSENTEES, II.

(b) *Stock and partnership property.*

1. The attachment in this State, of the interest of a non-resident, in the property of a foreign commercial firm, for a debt due a citizen of this State, is not forbidden by any law, or opposed by any consideration of public policy, but on the contrary, is recommended as a matter of remedial justice in favor of our own citizens. 28 A. 530, *Wm. J. Taylor v. Kehler, Updike & Co.*; 14 A. 140.

(c) *Bills and notes; judgments; obligations of plaintiff.*

1. Where the holder of a draft, having placed it in the hands of an agent for collection, transferred the receipt of such agent to a third person, and after such third person had notified the agent of the transfer, but before the delivery of the draft, or notice of transfer had been given to the debtor, the creditors of the holder brought a suit by attachment against the agents, and by process of garnishment caused the draft to be seized; *Held*: That the attachment must be maintained, and the rights of the creditors, to an amount sufficient to satisfy their claim against the transferer, recognized as against the transferee. 15 A. 654, *Hill v. Hanney*.

2. In a suit by attachment, the garnishee in his answer having acknowledged himself indebted to the defendant in the amount of sundry notes and judgments, which were not seized, being in the State of Mississippi, the plaintiff instead of having judgment entered up against the garnishee for the amount claimed in his petition, obtained judgment against the defendant, with privilege on the property attached and under a writ of *fieri facias* caused the right, title and interest of the defendant in the notes and judgment to be seized and sold; *Held*: That the sale was null for want of an actual seizure by the sheriff of the notes and judgment. 15 A. 379, *Anderson v. Valentine*.

3. Evidence is admissible to show that the note belongs to the defendant, so as to maintain an attachment, without making party the pretended owner. 28 A. 242, *Penn v. Fahrenburg*.

(d) *Property subject to another jurisdiction or fraudulently obtained.*

See *supra*, I.; *infra*, VII. (c).

(e) *Real estate; the sheriff's return.*

1. To constitute a valid seizure under an attachment or *fi. fa.*, of a plantation cultivated and occupied, the sheriff must take possession thereof; the return must show this fact; it is not sufficient if the return only shows the property to have been "attached according to law." 22 A. 209, *Kilbourne v. Frellsen*; 23 A. 550, *Dewille v. Hays, sheriff*.

VII. OF THE CONFLICT BETWEEN THE ATTACHING CREDITORS AND THIRD PERSONS.

(a) *In general.*

1. The sale of personal property is void as to creditors, unless possession is given before they acquire rights on the same; and if personal property be transferred by contract, but not delivered, it is liable in the hands of the obligor to seizure and attachment in behalf of his creditors. This rule of law extends to the sale of a promissory note or bill of exchange. 15 A. 654, *Hill v. Hanney*. See SALE, III. (b), 4), B. See *infra*, (b).

(b) *Consignees, pledgees, and others claiming for advances.*

1. Cotton seized before delivery of the bill of lading to the consignee, can be attached by the consignor's creditors. 26 A. 185, *Delop & Co. v. Windsor & Randolph*. See *ante*, (a).

(c) *Assignment and sales by the debtor; property fraudulently acquired.*

1. The plaintiff who obtains an attachment by alleging that the defendant had made a simulated transfer of his property for the purpose of defrauding his creditors, must prove fraud, else the attachment will be dissolved. 24 A. 82, *Lefevre v. Landry*.

2. The remedy by attachment is *stricti juris*; and proof of a specific act of immorality would not even be received to impeach the credibility of a witness, much less should it be permitted to influence the court upon the question whether the defendant was about to convert his property into money or evidences of debt, with intent to place it beyond the reach of his creditors. 24 A. 484, *Lyons & Co. v. R. B. Lignoski*.

3. To maintain an attachment, the evidence must make it clear that the defendant was about to convert his property, etc. 26 A. 258, *Bussey & Co. v. Rothchilds*.

4. An attachment sued out on paragraphs 4 and 5 of article 240, C. P., should be maintained, when defendant who is sued on an undisputed debt, transfers his property before gathering a growing crop and just as a judgment by default was about to be made final against him, in part payment of a debt due another creditor, and receives cash enough to pay the suing creditor, but fails so to do and removes to another State. 26 A. 621, *Goodwell & Webb v. Minchew*.

5. Proof that defendant confessed judgment in two suits and made a *dation en paiement* to his wife and caused to be recorded her legal mortgage, will not be sufficient to sustain an attachment issued on the ground that defendant disposed of his property with intent to defraud his creditors. 26 A. 641, *Wilson v. Chalaron*.

6. One not a creditor of the vendor, cannot contest the sale, and the purchaser has a right to damages for the wrongful attachment of his property. 27 A. 254, *Moore v. Pope*.

7. The defendant as a witness denied generally that he intended to dispose of his property to defraud his creditors; plaintiff testified to particular acts; *Held*: That the attachment should have been maintained. 24 A. 128, *Wetherow v. Croslin*.

8. The intent to defraud is the essential ingredient to obtain a writ of attachment. 28 A. 819, *Abney, Love & Co. v. Whitted*; 30 A. —, *Augé v. Variol*.

9. An unfair preference given by an insolvent to one creditor and his misrepresentations, to others intentionally made, to lull them into a deceptive sense of security, will justify them in attaching their debtor's property. 29 A. 635, *Stevens v. Helpman*.

10. The fraudulent intention necessary to support an attachment, is not shown by the mere fact that a merchant is selling and paying off his debts, including that of plaintiff. 30 A. 394, *Hermann & Vignes v. Amédée*.

(d) *Stipulation pour autrui or property of debtor appropriated or consigned for benefit of third persons.*

1. A third person for whose advantage a stipulation is made, is entitled to an equitable action to support the stipulation; and where the proceeding against the surety on a bond for the release of property attached is not by rule under the act of 1839, but by a direct action on the bond, the assignment of the bond to the plaintiff by the sheriff is not essential. 16 A. 126, *Wright v. Oakley*. See OBLIGATIONS, VI. (b), 2).

VIII. OF THE MOTION TO DISSOLVE.

1. On a rule to dissolve an attachment, the allegations of the petition are to be taken for true. 27 A. 104, *Belden v. Read & Hunt*; see *infra*, No. 6.

2. After an affidavit has been made for an attachment, some *prima facie* proof must be made by the defendant that the facts sworn to are untrue, in order to throw the burden of proving their verity on the plaintiff. The affidavit has a greater effect than merely enabling the party to obtain process against defendant. 15 A. 425, *Simons v. Jacobs*.

3. A writ of attachment may be dissolved by exception; a rule is not necessary. 26 A. 306, *Poutz v. Reggio*.

4. The giving of a bond is no waiver of a party's right to show that the facts on which an attachment has been obtained are unfounded, or that the property attached does not belong to the defendant. 22 A. 146, *Bauer v. Antoine*. See *infra*, IX. 2.

5. The surety on the bond may show such fact when attempted to be made liable. *Ib.*

6. On the trial of a rule to dissolve an attachment, the truth of the allegations of the petition cannot be inquired into. 29 A. 88, *Miller v. Chandler*. See *supra*, No. 1.

7. On a rule to dissolve an attachment on the ground that the allegations of the petition are not true, no proof contradicting the allegations is admissible. The only fact susceptible of proof on the rule, if specially set at issue, is the fact of non-residence. 29 A. 88, *Miller v. Chandler*.

8. An attachment having been set aside for illegality, new proceedings were had to renew the same, and at the same time an appeal was taken from the judgment dissolving the attachment; *Held*: That the proceedings to renew the attachment were null because pending the appeal the lower court was divested of jurisdiction. 28 A. 826, *Phelps & Co. v. Boughton*.

9. The defendant may, by rule to dissolve, put at issue the particular facts alleged to obtain an attachment. 30 A. 393, *Hermann & Vignes v. Amélie*.

10. The burden is on the defendant to disprove the sworn allegations made to obtain a writ of attachment. *Ib.*

IX. OF THE RELEASE ON BOND.

(a) *In general.*

1. A motion to bond, made by defendant, does not prevent him from taking a rule to dissolve the attachment. 21 A. 349, *Avet & Cambon v. Albo*. See *supra*, VIII. No. 1.

2. Defendants in bonding, do not waive their rights to have the attachment set aside as wrongfully issued. 22 A. 335, *Edwards v. Prathers*. See *supra*, VIII. No. 4.

3. The bond given by an intervenor claiming property attached, is a substitute for the property with regard to plaintiff in attachment, but not as to third persons claiming the property after its release. 16 A. 25, *White v. Hawkins*.

4. Where the defendant releases the property on bond, he undertakes to make a successful defence to the action, and if he fails, his liability upon the bond becomes irrevocably fixed by the final judgment, so too, with the intervenor. 16 A. 126, *Wright v. Oakley*.

5. The intervenor has no right to release the property on bond and such bond is not a judicial one. 22 A. 536, *Dawson v. Marton & Williamson*. But see acts. 1876, p. 92, giving such right; see (b), Nos. 6, 7, 8.

6. A forthcoming bond may be transferred by a deputy sheriff to the parties in interest. 28 A. N. R., *J. B. Hubbard v. S. D. Moore, Day & Egan, sureties.*

7. In a two-fold action by attachment against the debtor, and to set aside the sale of the property attached, and where the property was bonded by the vendee; *Held*: That the plaintiff's remedy was two-fold; against the bond by means of the attachment, and against the property through the revocatory action. 15 A. 423, *Ranlet v. Constance.* See OBLIGATIONS, VII. (b), 2), B. § 1.

8. The surety on a bond given to release an attachment against a partnership, cannot be held liable, where the judgment was obtained against the firm without making the representatives of the partner, who died before judgment, a party to the suit. 29 A. 141, *McCloskey, Bigley & Co. v. Wingfield & Bridges.*

9. Intervenor's cannot claim a privilege on goods attached, or sequestered after their release on a forthcoming bond and removed out of the jurisdiction of the court. 28 A. 792, *Wallace & Co. v. Burnham*; 863, *Phifer v. Maxwell.*

10. See PLEADING, VIII. (e), Nos. 19, 20, 21, 22.

11. Intervenor's right to bond, 1876, p. 92.

(b) *Proceedings to fix surety's liability; its extent and extinction.*

1. Where a party brought a suit by attachment against a vessel for damage done to freight, and the attachment was released upon the execution of a mortgage by the master of the vessel upon the ship to secure the payment of such judgment as might be rendered in the suit; *Held*: That the acceptance of the mortgage instead of the bond which should have been given to release the attachment, deprived the attaching creditors of their remedy upon the vessel in the hands of *bona fide* purchasers for value and without notice, since the mortgage was a nullity under the laws of Louisiana. 15 A. 715, *Hunter v. Bennett.*

2. The surety on the forthcoming bond cannot be allowed to gainsay the recitals of their bonds after their liability has been fixed by the judgment and return of execution against their principals. 16 A. 78, *Price & Smith v. Kennedy & Co.*

3. Proceedings against the surety on the forthcoming bond may be immediately commenced, when by reason of defendant's discharge in bankruptcy no judgment could be obtained against him. 27 A. 468, *Sweitzer v. Zeller et. als.*; 21 A. 284, *Noble & Kaiser v. Warner.*

4. By bonding the property, the intervenor has removed it from the jurisdiction of the court, and is bound for whatever judgment is rendered against the defendant. He cannot be heard to construe his obligation so as to defeat the law. 17 A. 314, *Ledda v. Maumus.*

5. A bond taken in pursuance to an order of court which determines its conditions before execution, and being conditioned to pay any judgment which might be rendered against the obligor, cannot be sued upon, until the condition happen. 16 A. 311, *Yale & Co. v. Hoopes & Co.*

6. The release bond given by an intervenor is not a judicial bond and no recourse can be had thereon. 28 A. 244, *Meyer & Brother v. Mary S. Johnson*; 25 A. 535, *Dawson v. Morton & Williams.* See SURETYSHIP, I. (a), No. 2; ante (a), No. 5.

7. An intervenor who claims the property attached, but being unable to bond the same, consents to its sale by the sheriff and agrees that the money shall remain subject to the decision of the court, and whose title is afterwards recognized, has recourse on the forthcoming bond given by the plaintiff in attachment, who withdrew the money and went away with it, when the surety who signed the bond was aware of the reason of giving it and that no law authorized the bonding. 29 A. 295, *Slawson v. Robert J. Ker.*

8. An intervenor who bonds property without right, is with his surety, liable on the bond which is not a judicial but a conventional obligation. 29 A. 500, *Todd v. Gordy, sheriff.*

9. For jurisdiction of federal courts on attachment bonds taken therein, See COURTS, II. (b), No. 19.

10. To bond, an intervenor must be in possession as owner. See PLEADING, VIII. (d), 1), No. 8.

11. See also SEQUESTRATION, II. (d), 1).

X. OF GARNISHEES.

(a) *In general.*

1. Garnishees cited through their agents, cannot be made liable. 18 A. 564, *Lewis v. Franks*; 6 A. 562; 7 A. 490; 3 N. S. 57.

2. The attorney at law of the judgment debtor may be garnished. 20 A. 188; 22 A. 139, *Daigle v. Bird*.

3. Notice of the seizure of assets in the hands of the garnishee, to the judgment debtor, is not necessary. 5 A. 656; 6 A. 535; 21 A. 291; 22 A. 139, *Daigle v. Bird*.

4. If the attachment be dissolved, the garnishment made thereunder is of no validity. *Sublato fundamento, cadit opus*. 24 A. 82, *Lefèvre v. Landry*; C. P. 204, § 4.

5. A garnishee may except to interrogatories and the exceptions being overruled, may answer. 28 A. 69, *Maduel, ex. v. Monsseaux*.

6. No judgment can be rendered against the garnishee, before judgment is obtained against the creditor in the attachment suit. 21 A. 7, *Collins & Leake v. Friend et als.*

7. The liability of a garnishee in an attachment suit, cannot extend beyond the amount of funds in his hands belonging to the defendant. 16 A. 48, *Peet v. Whitmore*.

8. A garnishee cannot accept service of the interrogatories. 18 A. 479, *Schindler v. Smith, Bullins & Co.*; 16 A. 105, *Rightor v. Phelps*; 9 A. 311; 21 A. 380.

9. The attachment must be effected upon the party having in his possession the property of the debtor; therefore garnishment on the auctioneer holding property for sale, under the orders of the debtor's agent, will be effectual, whereas a garnishment upon the agent is of no effect. 18 A. 349, *Grieff & Byrnes v. Betterton*.

10. A garnishee who pays over the funds attached in his hands to the sheriff after the return of the writ of attachment, without an order of court, or the consent of the plaintiff, does not thereby release himself from the plaintiff's claim. 15 A. 63, *Yale v. Whitmore*.

11. After garnishment has been properly served, one claiming the property attached by virtue of an order from the defendant, cannot defeat the seizure. 20 A. 561, *Lucien Harris v. Andrews & Co.*

12. A garnishee may be cited before a court of a parish other than that of his residence, under an attachment proceeding. 29 A. 194, *Marquez & Co. v. Leblanc*.

13. See EXECUTION, V. (a), 3), D., §§ 1, 2.

(b) *Answers to interrogatories.*

1. When answers are really responsive to the interrogatories, although they might have been more comprehensive, and where there is no charge of fraud, evasion or deceit, an amendment to such answers may be allowed, provided they do not impair or divest the jurisdiction of the court. 22 A. 42, *Tapp, Kennedy & Walsh v. Green & Brother*. See EXECUTION, V. (a), 3), D. §§ 1 and 2; APPEAL, I. (b); 28 A. 691, *Maduel, executor v. Monsseaux*.

2. Errors in the answers of garnishees may be shown by additional interrogatories put to himself as well as by testimony of other witnesses or by written evidence. 24 A. 90, *Ober, Nanson & Co. v. Matthews*.

3. The answers must be traversed within twenty judicial days. 1877, E. S., p. 45.

XI. OF THE EFFECT OF THE ATTACHMENT; AND THE PRIVILEGE IT CONFERS.

1. In case of proceedings for the distribution of the proceeds of a steamer, the suit of the attaching creditor is not stayed by order of the judge, nor by operation of law; nor is the creditor actually enjoined from proceeding to

judgment against his debtor, and acquiring a right of privilege on the proceeds of the property attached; nor from proceeding to execution and sale of the property itself for the satisfaction of his debt. In all such cases, the property is not vested in the creditors, but remains in the debtor subject to seizure, attachment and execution. 15 A. 22, *Owens v. Davis*.

2. An attachment in the hands of the warehouseman was sufficient, and gave the attaching creditor a privilege on the property seized. 22 A. 525, *Troustein v. Rosenham*.

ATTORNEY.

I. IN GENERAL.

II. OF ATTORNEYS AT LAW.

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| (a) <i>Their authority.</i> | (b) <i>Their liabilities.</i> |
| 1) In general. | (c) <i>Their fees and proof of services.</i> |
| 2) Presumption, proof and denial of their authority. | (d) <i>The license to practice and proceedings against attorneys.</i> |
| 3) Extent and termination of their authority and ratification of their acts. | (e) <i>In general.</i> |

III. OF DISTRICT ATTORNEYS; ATTORNEY GENERAL; CITY ATTORNEY AND PARISH ATTORNEY.

I. IN GENERAL.

1. The attorney must follow the instructions of his principal and cannot under an agreement to receive money, in full satisfaction of a judgment, transfer it to a third person. 23 A. 237, *Draughton v. Quillen*.

2. A procurator to an attorney at law, giving him general powers, will authorize him to sue. 21 A. 468, *Williams v. Douglass*.

3. An attorney employed to enforce the collection of a judgment, cannot legally purchase the same when sold under execution at the suit of a third person. If he does so purchase, the client may at his election, treat the act as done for his own benefit. 11 H. 232, *Stockton v. Ford*.

4. Capacity to testify. See EVIDENCE, XVI. (b), 6).

II. OF ATTORNEYS AT LAW.

(a) *Their authority.*

1) In general. •

1. An administrator cannot, on appeal, have a judgment apparently regularly rendered, homologating an account of his administration, set aside, on the ground that the attorney who filed such account was unauthorized to act for him; he should resort in such a case to the action of nullity. 15 A. 200, *Succession of Sullivan*.

2. An attorney at law has no authority to receive confederate money in payment of a judgment. 19 A. 196, *Garthwaite, Wheeler & Co. v. Wentz et als.*; 3 R. 278; 2 A. 328; 19 A. 172.

3. Where the attorney representing appellant, has without authority and after his discharge, moved to dismiss his appeal, on a rule the appeal will be reinstated. 28 A. N. R. *Smith v. Durbridge*.

4. The fact that an attorney has entered an appearance for a party in a suit, does not conclude the party from showing that the attorney was without authority to represent him. 6 H. 163, *Shelton v. Tiffin*.

5. An attorney's receipt is not binding on his client, unless the former actually received the money. See PAYMENT, I. No. 5.

6. An attorney at law has no authority as such, to recognize claims against the succession nor bind the same by filing a tableau of distribution when there are no funds to distribute. 30 A. 703, *Succession Winn*.

2) Presumption, proof and denial of their authority.

1. Where a party denies under oath that a plea filed in his name by an attorney was filed with his authority, and the allegation is borne out by the

proof, the act of the attorney is not binding. 15 A. 569, *Decuir v. Lejeune*.

2. The authority of the attorney at law will be presumed unless denied upon oath. 20 A. 204, *Succession Patrick*.

3. A dispatch addressed to another than the attorney prosecuting, is not sufficient evidence to show his want of authority, when he proves that he has been employed. 24 A. 237, *Succession Massieu*.

4. The authority of an attorney who confesses a judgment should be denied under oath. 26 A. 302, *Dockham v. City*; 8 N. S. 232.

5. The authority of an attorney at law to confess a judgment should be denied on oath before defendant can be required to prove it, and the judgment will be upheld. 27 A. 73, *Dockham v. Potter*.

6. Prohibition to appoint counsel for the State officers, not applicable to the governor. See CONSTITUTION, II. (d), No. 10.

3) Extent and termination of their authority and ratification of their acts.

1. Where an attorney entrusted with notes for collection, becoming unable to attend to it himself, placed them in the hands of another lawyer at the same bar, who instead of prosecuting the suit on the notes to judgment against the maker and his sureties, received from the maker other notes in the place of these, on which last notes suit was instituted and judgment recovered in the name of the plaintiff, who received nearly the whole amount of the notes originally entrusted; Held: That these proceedings constitute a ratification of the acts of the sub-agent, and the attorney originally employed is not liable. 15 A. 461, *Bean v. Drew*.

2. A release of the call in warranty given by the attorney, to restore the competency of the witness, is not valid. 18 A. 54, *Succession Weigel*.

3. Any agreement to receive payment in anything but legal currency, on the part of the attorney is not binding on the client. 19 A. 173, *Railey & Campbell v. Bagley*; 196; 3 R. 278; 2 A. 328.

4. An attorney at law cannot be permitted to prosecute to judgment a suit which has been compromised by his client, for the purpose of enforcing a privilege upon it for his services. 24 A. 571, *Rind v. Hunsacker*.

(b) Their liabilities.

1. Where attorneys at law are employed to prosecute a suit and they employ another, the client of the first is in no way responsible to the latter for his fees. 22 A. 85, *Voorhies v. Harrison*.

(c) Their fees and proof of services.

1. Attorney's fees cannot be recovered as damages, in a redhibitory action. 15 A. 517, *Burnham v. Hart*.

2. The attorney's fees cannot be recovered from an adjudicatee at succession sale, against whom a suit has been filed to compel him to comply with his bid. 28 A. 878, *Merrick, executor v. North*.

3. A compromise between plaintiff and defendant, whereby the latter obligates himself to pay the fees of plaintiff's attorney, does not release the plaintiff from this obligation. 23 A. 382, *Safford v. Carroll*.

4. Attorney's fees form no part of law charges, proper in a succession. 22 A. 266, *Succession Markey*.

5. The stipulation in the act of mortgage of five per cent. to cover attorney's fees in case of suit, is not usurious. 21 A. 8, *Siegel v. Drumin*. See No. 27.

6. A lawyer employed by the regular attorney during his absence, is entitled to his fees, unless it be shown that he consented to serve for the benefit of the regular attorney. 24 A. 625, *Waples v. Southern Bank*.

7. The contract of an attorney to receive any portion of the property in dispute as his compensation, is null and void and in flagrant violation of law. Statute of 1808; Bullard and Curry's Digest, 21; 2 M. 281, *Livingston v. Cornell*; 25 A. 281, *Mazureau & Hennen v. Morgan et al.*

8. An attorney who obtains three orders in a succession before the probate court, without opposition, in a matter which is not difficult and does not

involve any great responsibility, is entitled to no more than one hundred and fifty dollars. 25 A. 291; 328, *Lartigue v. White*.

9. The court is authorized to determine the value of the services of attorneys. 25 A. 647, *Succession Caballero*.

10. The attorney for absent heirs is entitled to one hundred dollars, when the attorneys for settling the estate are allowed five hundred. *Ib.*

11. The fees of the attorneys must be reduced to correspond with the means of the succession. 18 A. 44, *Succession Virgin*.

12. When an attorney brings a suit in his own name, he cannot recover counsel fees. 19 A. 21, *Ealer v. McAllister*.

13. Where attorney's fees, placed on the administrator's account are opposed, the amounts received by them previous to the filing of the account must be deducted from the amount placed thereon. 19 A. 258, *Succession Fink*.

14. Attorney's fees will be reduced to their exact value. 20 A. 86, *Succession Perret*.

15. In fixing the value of the services rendered by an attorney, the court will look into the whole record and form an estimate founded on the usual charges made for such services as appear to have been rendered. 21 A. 687, *Cullom v. Mock*.

16. The Supreme Court will fix attorneys' fees without regard to the opinion of witnesses. 27 A. 467, *Randolph, Singleton & Brown v. Carroll*.

17. An attorney should not recover for entering "upon the business of securing evidence for a contemplated separation between husband and wife." 28 A. 183, *Succession Hampton Elliott*.

18. Under a contract that the attorney should only receive his fees when the claim should be collected, if he refuses to issue execution on the judgments obtained by him, plaintiff has a right to employ other attorneys without paying any fee or commission to the lawyer first employed. 28 A. 293, *Rousseau v. Marrienneaux*.

19. In a suit for damages for injury done to the person and property of plaintiff, evidence is admissible to prove the attorneys fees as a part of the damages. 29 A. 213, *Cooper v. Capel*; 5 A. 521, 522.

20. The attorney, under his agreement to retain for services one-half of the net amount recovered, may retain the same. 29 A. N. R., *Société de Bienfaisance, etc. v. Morris & Co.*

21. For fees on attachment suits, see ATTACHMENT, IV. (c), Nos. 1, 4.

22. The fees stipulated in an act of mortgage are collectible with the principal. See MORTGAGE, III. (e), No. 4.

23. The city attorney who obtains the judgment is entitled to the fees, although his successor in office enforced its collection. 15 A. 7, *Commandeur v. City of Carrollton*. See III. No. 16.

24. Attorneys' fees may be allowed as damages for a wrongful seizure. See OFFENSES AND QUASI OFFENSES, II. (f), No. 5.

25. Also as damages for a wrongful sequestration. See SEQUESTRATION, II. (c), 2), No. 1.

26. For fees of counsel in successions, see SUCCESSION, VIII. (f), 8), B.

27. The attorney's fees stipulated in an act of mortgage may be recovered, without proof that they were "incurred and paid." 30 A. 398, *Renshaw v. Richards*.

28. Attorneys' fees are measured by the extent and kind of their services, and the ability of the party to pay. 30 A. 338, *Breaux, Fenner & Hall v. Franke*.

29. The opinion of the local bar will be a guide to value attorney's fees, in the absence of specific evidence as to the extent of their services and of any special agreement. 30 A. 463, *Succession D. P. Jackson*.

(d) *The license to practice; proceedings against them.*

1. A lawyer is liable for a license. 27 A. 151, *Howell v. McVea*; — A. —, *City of New Orleans v. Robert*.

2. A mere resolution of the board of administrators of the University of Louisiana, granting the degree of bachelor of laws, directing the president

to confer the degree and to give the usual diploma, is inchoate; it does not, without the diploma, confer the qualifications requisite for a district judge, although its beneficiary practised thereunder for more than two years, and even filled the position of district attorney. 30 A.97, *State ex rel. Duffel vs. Marks*.

3. DEBLANC and SPENCER, JJ., *dissenting*: The resolution is sufficient. *Ib.*

4. Attorneys, how admitted, 1873, p. 66.

(e) *In general.*

1. An attorney should be excused from answering interrogatories, when he declares on oath that he cannot answer the same without disclosing matters confided to him by his client concerning business about which he was retained. 15 A. 330, *Shaughnessy v. Fogg*.

2. An attorney may be asked through whose agency, in what manner, or at what time, he was retained. 15 A. 330, *Shaughnessy v. Fogg*.

3. Continuance for absence of counsel, see CONTINUANCE, III. (a).

4. On a rule for a new trial, evidence is admissible to prove that counsel was in the building and should have been sent for. See NEW TRIAL, I. No. 1.

5. Police juries may employ attorneys without providing for their fees. See POLICE JURY, No. 10.

III. OF DISTRICT ATTORNEYS; ATTORNEY GENERAL; CITY ATTORNEY AND PARISH ATTORNEY.

1. Under the act of 1855, p. 162, the district attorney is not entitled to any part of the fines collected by the recorders of the city of New Orleans. 20 A. 22, *Foute v. City*.

2. In case of vacancy by death or otherwise of a district attorney previous to the adoption of the constitution of 1864, the governor had the right to appoint a successor, without the concurrence of the senate; their session after appointment, did not vacate the office. 18 A. 185, *State ex rel. Walsh v. Knickerbocker*.

3. The act No. 44, of 1874, makes a change in the manner of appointing district attorneys, but does not affect appointments previously made, under the act of 1868. 26 A. 549, *State ex rel. Claiborne v. Parlange*; 21 A. 482.

4. WYLY, J., *concurring*: Act 44 of 1874 is unconstitutional, because its object is not contained in its title. The law intended to change the manner of filling the vacancy in the office of district attorney *pro tem.* and its title is to abolish the office. 27 A. 439, *Seale v. Crawford*. See *infra*, No. 7.

5. The term of the district attorney, and consequently of the district attorney *pro tem.*, is four years ending on the first Monday in November; consequently the term of office of such officer elected in 1868 ends in November, 1872. 25 A. 138, *Gorham v. Montgomery*.

6. Within thirty days after the promulgation of act No. 120 of 1868, the parish judge or police jury may appoint the district attorney *pro tem.*, and the party which first exercises the power, exhausts it. *Ib.*; 23 A. 786, *Rills v. Lynch*; *Cooley's Constitutional Limitations*, 77.

7. The act of 1874, page 81, repealed sections 1178, 1179, 2760 and 2761 of the Revised Statutes of 1870, relative to the appointment of district attorneys *pro tem.*, the other clauses of the act giving to the governor power to appoint, are not covered by the title, which is too vague. The governor, however, derives his power to appoint, in case of vacancy in the office, from the general law. R. S. 1577; 29 A. 638, *State ex rel. Farrar v. Garrett*. See *supra*, No. 4; 30 A. 659, *State ex rel. Rills v. Barrow*.

8. The office of district attorney *pro tem.* has not been abolished by the act of 1874. 26 A. 548, *State ex rel. Farrar v. Garrett*; 29 A. 706, *State ex rel. Vaughn v. Richmond, sheriff*.

9. The district attorney in case of refusal, may be compelled by mandamus to bring a suit under the intrusion act, to test the right to an office. 21 A. 656, *Hayes v. Thompson*; 23 A. 786, *State ex rel. Rills v. Lynch*; 24 A. 149, *Behl v. Fisk*.

10. The conduct of a district attorney who moves to dismiss an appeal taken by the tax-payers from a judgment against the parish, when he has himself been inactive, is reprehensible, and the more so, when there is a good defense to the action. 27 A. 320, *Flagg v. Parish of St. Charles*.

11. The attorney general has the right to designate an attorney at law to assist the attorney of the State or to prosecute alone in certain cases. 1872, pp. 61 and 62; 26 A. 68, *State v. Russell*.

12. The attorney general whose term of office is about expiring has no right to make an agreement precluding his successor from taking an appeal to protect the State. 25 A. 434, *State ex rel. Nixon v. Graham*.

13. Under section 2761, district attorneys are not entitled to any commission in a case where no money is involved; their yearly salary was given for the express purpose of attending said suits. 26 A. 21, *Fish v. Police Jury Jefferson*.

14. The district attorney may be compelled by mandamus to bring a suit under the intrusion act. See MANDAMUS, I. (a), 4, No. 1.

15. For appointment of the city attorney, see NEW ORLEANS, II. (g), 5), No. 6.

16. The city attorney who obtained the tax judgment is entitled to the fee. See ATTORNEY, II. (c), No. 23. NEW ORLEANS, II. (g), 5), No. 8.

17. Further, see NEW ORLEANS, II. (g), 5).

18. The attorney general and district attorney may employ associate counsel and entrust him with the exclusive conduct of the case. 29 A. 774, *State v. Anderson*.

19. The correspondence between the district attorney and attorney general cannot be used by third persons. See EVIDENCE, XXI. (a), No. 1.

20. Police juries may contract with the parish attorney for extra fees. See POLICE JURY, No. 11.

21. The police jury cannot cancel their election of the district attorney *pro tem*. See POLICE JURY, No. 43.

22. Fees of district attorney tenth judicial district increased, 1870, E. S., p. 195; repealed, 1875, p. 86; recognizing A. P. Field, attorney general, 1873, p. 37; room for attorney general, 1873, p. 59; ordering Belden to turn office over to Field, 1873, p. 107; assistant attorney general, 1874, p. 73; 1877, E. S., pp. 12, 106; district attorney *pro tem*, 1874, p. 81; fees district attorney first judicial district, 1876, p. 51; authorized to employ an assistant, 1878, p. 48; a clerk for the attorney general, 1877, p. 28; district attorney in what cases recused, 1877, p. 35; attorneys admitted in other States, not admitted here, 1877, p. 71; those admitted in France, Germany or England, may practice here, 1877, E. S., p. 122; better qualifications, 1877, E. S., p. 207.

AUCTIONEER.

1. The deduction made by newspapers on the advertisements, enure to the benefit of the principal for whom the advertisements are made. 24 A. 319, *Succession of Cordeviollé*.

2. When there are several pieces of property sold at the same sale, in the same succession, a separate procès verbal for each piece of property, is a useless and unauthorized increase of expense. *Ib*.

3. An auctioneer is simply the agent of the owner who has the right to withdraw his property from sale at any time before its completion. The law does not authorize a charge for commissions, unless a sale is effected at public auction. 13 L. 270; R. S., p. 37, § 160; 24 A. 286, *Girardey v. Stone*.

4. An auctioneer is not the agent of the buyer, nor can he be sued as depository of money paid to him for purchases made at succession sales to pay debts. 24 A. 311, *Lara v. Nash*.

5. The tax of one-half of one per cent. imposed on auction sales, is a charge imposed for the services of the auctioneer, and does not come within the purview of article 118 of the constitution of 1868. 28 A. 717, *Boyé v. Girardey*; 30 A. — *Wintz v. Girardey et als*.

6. For auctioneer's authority, see SALE, VII. (b).

7. He may retain his commission out of the proceeds. See SUCCESSION, VIII. (f), 8), A. No. 4.

8. How act 1869, p. 45, applies to sureties. See SURETYSHIP, III. (a), No. 1.
9. The surety cannot set up that the auctioneer had not qualified. See SURETYSHIP, IV. No. 5.

AUDITORS.

1. See EXPERTS AND AUDITORS.
2. State auditor; for his duty and power to compute a tax, see MANDAMUS, I. (b), No. 26. TAXES, I. No. 6.
3. He cannot refuse to issue a warrant for a valid claim. See MANDAMUS, I. (b), No. 28. OFFICE AND OFFICER, No. 31.
4. When certain claims against the State should be audited. See SHERIFF, III. No. 14.
5. Fees defined, 1872, p. 61; 1873, p. 125; clerks and their fees, 1873, p. 57; 1877, p. 29; to enter up cash balance of treasurer January 1, 1877, 1878, p. 58.

AVOYELLES.

See POLICE JURY, No. 1; additional justice, 1872, p. 103; two additional justices' wards, 1877, p. 69.

BABCOCK ENGINES.

See CORPORATIONS, X. (1), No. 1.

BAIL.

1. For bail bonds, see CRIMINAL LAW, V.
2. For release of debtors arrested in civil proceedings, see ARREST, IV.
3. See also SURETYSHIP.

BAILMENT.

See DEPOSIT. LEASE. LOAN. MANDATE. PLEDGE. SHIPPING.

BANKS.

1. For banks or moneyed corporations, see CORPORATIONS, I. No. 12. DEPOSIT, II. III.
2. For bank notes, see BILLS AND NOTES, XV. XVII.
3. For bank book kept by administrators, syndics, etc., see SUCCESSION, VIII. (d). INSOLVENCY, X. (b).
4. For banks of rivers, see ACCESSION, II. (b). NEW ORLEANS, I. (a); II. (d), 2). THINGS, I. (b).
5. National banks are subject to the jurisdiction of State courts. See COURTS, II. (a), No. 26.
6. For relations between banks and depositors, see DEPOSIT, II. No. 1.
7. For payment of a check not made to the payee, see PAYMENT, V. No. 4.
8. For bank capital, see TAXES, I. No. 3; II. (a), No. 3.
9. The certificate of the comptroller of currency, that a banking corporation has complied with the act of congress, cannot be collaterally questioned. 94 U. S. (Otto's) 680, *Casey v. Galli*.
10. The certificate of the comptroller of currency, that the shareholders of a national bank, shall be assessed the par of their stocks to pay the debts, is conclusive. 8 Wall. 498, *Kennedy v. Gibson et als.*; 94 U. S. (Otto's) 681, *Casey v. Galli*.
11. Bank statement to be published; 1874, p. 162; 1877, E. S., p. 129.

BANKRUPTCY.

I. IN GENERAL.

II. OF THE APPLICATION TO BE DECLARED BANKRUPT.

III. OF THE DECREE AND PROCEEDINGS SUBSEQUENT TO THE APPLICATION AND PRIOR TO THE DISCHARGE.

(a) *In general.*

(b) *Adverse interests touching the property surrendered; jurisdiction of the Federal and State courts; what passes to the assignee, and sale of assets.*

IV. OF THE DISCHARGE AND THE CERTIFICATE.

I. IN GENERAL.

1. Rights vested in creditors by a *cessio bonorum*, so far as they relate to the property ceded, are unaffected by subsequent proceedings of the insolvent, in causing himself to be declared a bankrupt under the act of congress of August 19, 1841. The 8th section, art. 1st., of the United States constitution, provides that congress shall have the power to establish "Uniform laws on the subject of bankruptcy throughout the United States." This power was specially delegated to congress, and only reserved by the several States in so far, and so long as congress did not see fit to exercise it; the moment congress exercised the power, the State laws on the subject became inoperative, and were suspended. 15 A. 601, *Beath v. Miller*.

2. The enactment by congress of the bankrupt law, had for effect, to suspend the insolvent laws of each State. 19 A. 497, *Meekins, Kelly & Co. v. Their Creditors*; 4 Wheaton, 122; 5 R. 27; 15 A. 602. See CORPORATIONS, VIII. (a), Nos. 4, 5.

3. Proceedings commenced under our insolvent laws are unaffected by the subsequent enactment of the bankrupt law. 20 A. 20, *Longis v. His Creditors*.

4. A suit commenced in a State court before bankruptcy, in which the title to the property surrendered by the bankrupt is in controversy, will not be abated by the bankrupt proceedings. 1 Woods, 68, *Hewett, ex'r v. Norton, assignee*.

5. A State court cannot, by its process, take property surrendered by a bankrupt, from the possession of the assignee in bankruptcy. *Ib.*

6. When any question is made as to the validity of the judgment under which proceedings are being had, the bankrupt court is the appropriate tribunal to investigate it; and proceedings under the judgment will be restrained as a matter of course, until that question is settled. 1 Woods, 258, *Goddard, assignee v. Weaver*.

7. The word "insolvency," as used in the fifty-second section of the currency act (13 Statutes, 115; Revised Statutes, section 5242) is synonymous with the same word as used in the bankrupt act. 2 Woods, 23, *Case, receiver v. Citizens' Bank of Louisiana*.

8. To make transfers, assignments, deposits and payments void under said section, it is only necessary that the insolvency should be in the contemplation of the bankrupt making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they are made. *Ib.*

9. Damages for a tort are not provable against a bankrupt's estate until they have been liquidated. 2 Woods, 222, *In re Bailey & Pond*.

10. Defendant is not estopped from disputing plaintiff's claim to the property because it was not surrendered in bankruptcy. See ESTOPPEL, No. 50.

11. The enactment of the bankrupt law had no effect on proceedings of respite, commenced before its enactment, but culminating into an insolvency afterwards. See RESPITE, No. 1.

II. OF THE APPLICATION TO BE DECLARED BANKRUPT.

1. The bankrupt court, in a proceeding by two partners in a firm of three, to have the partnership adjudicated bankrupt, has jurisdiction over the partnership property, although the third partner, in a proceeding in a State court to settle the partnership and to obtain a decree for the amount due him from

his copartners, has had himself appointed receiver and is in possession of the partnership assets. 2 Woods, 73, *In re Hathorn & Batchelor*.

2. In such a case the bankrupt court may enjoin such third partner from disposing of the assets of the partnership, or from any interference with them until the question, whether or not the firm is bankrupt, can be tried. *Ib.*

III. OF THE DECREE; THE PROCEEDINGS SUBSEQUENT TO THE APPLICATION AND PRIOR TO THE DISCHARGE.

(a) *In general.*

1. The judgment being rendered after the commencement of bankruptcy proceedings, but previous to the discharge, can be enjoined and stayed until the bankrupt court passes on the discharge, which if granted, discharges the debt, and if refused, authorizes execution. 27 A. 572, *Keeting v. Arthur, Stone & Co.*

2. The assignee of the bankrupt may become a party to a suit for a personal judgment against the bankrupt, but he is not bound to appear. 29 A. 19, *Sierra e Hijo v. Hoffman & Co.*

3. A bankrupt, sued in a State court, may obtain a stay of proceedings until his application for a discharge has been passed upon by the bankrupt court; the jurisdiction of the court is not divested; the plaintiff may apply to the bankrupt court for leave to prosecute his suit to fix the amount in dispute; he can issue no execution until the discharge is refused; if the defendant does not apply for a stay of proceeding, the suit may proceed to judgment. 29 A. 21, *Sierra e Hijo v. Hoffman & Co.*; 91 Otto, 521, *Eyster v. Gaff*.

4. If the assignee of the bankrupt appear, he has no right to demand a stay of the proceedings. 29 A. 23, *Sierra e Hijo v. Hoffman & Co.*; sections 32, 34, 5114, 5119, U. S. Revised Statutes. See *infra*, III. (b), No. 5.

5. A suit pending in a State court against a party at the time he is adjudged a bankrupt, may, after due notice to his assignee, be prosecuted to final judgment against the latter in his representative capacity, where he makes no objection to the jurisdiction, and the bankrupt court does not arrest the proceedings. 93 Otto, 355, *Norton, assignee v. Switzer*.

6. Such judgment may be filed with the assignee as an ascertainment of the amount due to the creditor by the bankrupt and as a basis of dividends, but it is effectual and operative for that purpose only. 93 Otto, 355, *Norton, assignee v. Switzer*.

7. A purchase by the brother of a bankrupt and the transfer to him of a large part of the claims against the bankrupt and the satisfaction at a large discount of other claims by the bankrupt himself for the purpose of assuring the acceptance of a composition proposed by the bankrupt, constitute no reason why the composition should not be confirmed by the court, when it was made to appear that excluding the brother and the claims held by him more than two-thirds in number, and a majority in value of the creditors had assented thereto, and that the evidence of these transactions of the bankrupt and his brother was open and accessible to the assenting creditors. 2 Woods, 225, *In re Walshe*.

8. After a motion to confirm a compromise had been brought on for a final hearing before the bankrupt court, the judge had the power to refer the matter back to the register to report all the facts of the case touching the proposed compromise. *Ib.*

9. The presence and vote of a creditor who is not lawfully to be accounted such, in favor of a composition, should not nullify the proceeding unless the absence of his vote would change the result. *Ib.*

10. One of the members of a bankrupt firm had been the guardian of his own children. The firm was indebted to the children in a large sum, for which the guardian held its notes payable to himself as guardian, but not indorsed by him to his wards. Under these circumstances; *Held*: That the children, having become *sui juris* were competent to vote as creditors of the firm in favor of a composition proposed by it. 2 Woods, 222, *In re Bailey & Pond*.

11. One of the said children, being a married woman, voted for and signed the resolution for the composition without producing the authority of her husband therefor; but the husband afterwards made and filed an affidavit that he had given her his authority, and that her vote had his approval; *Held*: That such affidavit was both a ratification and estoppel, and made good the wife's act. 2 Woods, 222, *In re Bailey & Pond*.

12. Citation on the bankrupt, to revive a judgment, does not interrupt the prescription of the judgment. See JUDGMENT, XVI. Nos. 12, 13.

(b) *Adverse interests touching the property surrendered; jurisdiction of the Federal and State courts; what passes to the assignee and sale of the assets.*

1. An assignee in bankruptcy may sell without an order of court; but in such case, he sells subject to any and all lawful incumbrance on the property. 24 A. 509, *King v. Bowman*.

2. A creditor whose debt is secured by mortgage, does not abandon or forfeit his security by proving his claim and voting for an assignee, before the bankrupt court, unless he proves the same as unsecured. 24 A. 509, *King v. Bowman*.

3. The provisions of the bankrupt act of 1841 were similar to those now in force. The bankrupt's property may be sold free of incumbrances. 5 R. 27, 49; 6 R. 159; 3 How. 296, 426; 6 How. 486; 25 A. 601, *Willard v. Brigham*, (carried by writ of error to the United States Supreme Court).

4. The mortgage creditors must be properly notified and summoned to appear and protect their interest, in default whereof the incumbrance will not be transferred to the proceeds. *Ib.* See MORTGAGE, VIII. (c), Nos. 8, 9.

5. The State court having obtained lawful jurisdiction over the parties and subject matter, could not be divested thereof by the bankruptcy proceedings. 27 A. 25, *Switzer v. Heinn*; Bump on Bankruptcy, 6th ed., pp. 187, 198, 199. See *supra*, (a), Nos. 1, 2, 3, 4, 5.

6. Although district courts of the United States, sitting in bankruptcy, have power to order a sale of the mortgaged property of the bankrupt, in such a way as to discharge it of all liens, and although as a general thing, it they order a sale so that the purchaser shall take a title so discharged, the purchaser will have a title wholly unincumbered; yet to pass in this way an unincumbered title of property previously mortgaged, it is indispensable that the mortgagee have notice of the purpose of the court to make such an order; or that in some other way he have had the power to be heard, in order that he may show why the sale should not have the effect of discharging his lien. If a sale be made without any notice to him, his mortgage is not discharged. 23 Wall. 128, *Ray v. Norseworthy*.

7. A person who intends to bid at a cash sale of a bankrupt's estate may agree, in case he becomes the purchaser, to sell to another person at a fixed price on terms of credit, when he has no notice, that such second person has any purpose to bid at the sale, or has the means to make his bid good. Such an agreement will not avoid the sale. 1 Woods, 80, *Citizens' Bank v. Ober*.

8. A sale of a bankrupt's estate made to a solicitor of the assignee, retained generally in the bankruptcy, will be set aside as against public policy. *Ib.*

9. A sale of a fraudulent judgment at a public sale of a bankrupt's effects does not confer upon an innocent purchaser the right to enforce payment of the judgment. 1 Woods, 188, *Noyes v. Willard*.

10. The assignee of a bankrupt is not the assignee of his creditors; he takes only the bankrupt's interest in the property; he has no right or title to the interest which others have therein, nor any control over it further than is expressly given to him by the bankrupt act, as auxiliary to the preservation of the bankrupt's interest for the benefit of his general creditors. 1 Woods, 257, *Goddard, assignee v. Weaver*.

11. If at the commencement of proceedings in bankruptcy, the bankrupt has possession of property subject to certain fixed liens, the assignee succeeds to his possession, and may discharge the liens and dispose of the property for the benefit of the general creditors; or, perhaps he may sell the property before

discharging the liens, and distribute the proceeds in the order of priority of the claims upon them. *Ib.*

12. When divers persons have divers interests in the same thing, neither has a right to do what will injure the others; and each must submit to judicial restraint imposed for the protection of the others' interest. *Ib.*

13. Property under seizure by the sheriff cannot be surrendered in bankruptcy unless the debt be paid. See EXECUTION, V. (a), 6), A., Nos. 7, 8, 9, 10, 11.

14. A mortgage given by a bankrupt cannot be cancelled without making the mortgagee a party. See MORTGAGE, VIII. (c), No. 1.

IV. OF THE DISCHARGE AND THE CERTIFICATE.

1. The validity of a decree by the United States court, giving a discharge in bankruptcy to a debtor, under the act of congress, approved August 19, 1841, cannot be questioned, if the certificate has not been impeached for fraud, and the debt in question is not of that fiduciary class which is saved from the operation of the act. 15 A. 601, *Beach v. Miller*.

2. A discharge in bankruptcy releases all personal indebtedness by judgment or otherwise, and no collection can be made by seizure under a writ of *fi. fa.* 22 A. 441, *Murphy v. Smith & Nicholson*.

3. The mortgagor being a discharged bankrupt, and resident of another State, when suit was brought against him to enforce the act of mortgage, was no longer a party in interest. The appointment of a curator *ad hoc* to represent him was a nullity and citation on him, did not interrupt prescription. 25 A. 556, *Kennedy, Jr., et als. v. Rust et als.*

4. Factors who sell goods consigned to them, on commission, are acting in a fiduciary capacity within the meaning of the thirty-third section of the bankrupt act of 1867, and are not relieved by a discharge in bankruptcy. 27 A. 257, *Banning v. Bleakley & Co.*; 28 A. 870, *Brown v. Garrard & Craig*.

5. The defendant being discharged from his debts, by decree of the United States District Court, sitting in bankruptcy, no judgment can be rendered by the State court except one of dismissal. 22 A. 218, *Viosca v. Weed & Co.*; 21 A. 58, *Fox v. Weed*.

6. The defendant cannot, for the first time, plead his discharge in bankruptcy before the Supreme Court. 29 A. 23, *Hijo v. Hoffman & Co.*; 3 R. 327; 12 R. 540; 5 R. 487; C. P. 901; (*overruling* 21 A. 58; 23 A. 218).

7. A discharge in bankruptcy is a complete bar to any suit brought against a bankrupt in a State court, to enforce a debt extinguished by the discharge. 29 A. 89, *Miller v. Chandler*.

8. A certificate of discharge in bankruptcy, made according to the forms prescribed in the bankrupt act, is admissible in evidence to prove the fact of the discharge and its regularity. 29 A. 89, *Miller v. Chandler*.

9. A debt to the United States, though it be by one who owes it as a surety alone, is not barred by the debtor's discharge under the bankrupt act of 1867; although the United States may prove its debt and has priority of other creditors; and though the act provides in general terms that the certificates shall release the bankrupt from all debts, claims, liability and demands, which were or might have been proved against his estate in bankruptcy, and that it may be pleaded as a full and complete bar of any such debts, claims and liabilities or demands. 20 Wall. 251, *United States v. Heron*.

10. The United States seized and filed a libel against a steamboat and cargo, as liable to forfeiture for violation of the rules of war. The claimant gave bond for the property, and made an unsuccessful defense against the libel, but set up as a defense to a judgment against him on the bond his discharge in bankruptcy; *Held*: That the debt evidenced by the bond, was not created by fraud within the meaning of the thirty-third section of the bankrupt act, even though the claimant used the evidence of false witnesses, and swore falsely himself in making his defense. 1 Woods, 42, *United States v. Rob Roy and Cargo*.

11. When the claim evidenced by such bond was not reduced to judgment

until after the adjudication of bankruptcy and the final dividend; *Held*: That it was not provable against the bankrupt estate, and consequently was not barred by the bankruptcy. *Ib.*

12. A discharge in bankruptcy does not bar debts due the United States. *Ib.*

13. Where a composition proposed by a bankrupt has been accepted by his creditors and approved by the court, the bankrupt is thereby discharged only from the claims of the creditors, whose names, addresses and debts are placed on the statement produced at the meeting of creditors. 2 Woods, 173, *In re Becket*.

14. In such a case, no discharge is necessary or proper. *Ib.*

15. A discharge in bankruptcy, like prescription, does not extinguish an obligation, but merely bars a recovery; if it is not specially pleaded, it will not be noticed. 29 A. 719, *Ludeling v. Felton*. See INJUNCTION, II. (b), 2), No. 5.

16. A discharge does not extinguish the judicial mortgages. See MORTGAGE, VI. (c), 1), No. 2.

17. A composition under the amendatory bankrupt act of 1874, does not discharge a fiduciary debt. 30 A. 76, *Succession Bailey*.

18. The State courts may determine whether the discharge in bankruptcy is complete. 30 A. 76, *Succession Bailey*.

BANQUETTE.

See NEW ORLEANS, II. (d), 2); 3); (e). OFFENSES AND QUASI OFFENSES.

BARRATRY.

See INSURANCE, III. (c), No. 7.

BASTROP.

1. The incorporation act of the town of Bastrop, and the amendments limiting the tax to be levied to one thousand five hundred dollars, refers to property, and not licenses. 18 A. 534, *Blanks & Co. v. Corporation of Bastrop*. See INCORPORATION, I. Bastrop.

2. 1860, p. 110; 1861; 1868, p. 51; 1875, pp. 78, 79.

BATON ROUGE.

1. 1853; 1856; 1874, pp. 11, 191; 1878, No. 44; sale of ferry, 1875, p. 31; Hook & Ladder Company, 1876, p. 18; memorial to congress to re-build State House, 1877, E. S., p. 110.

2. Judicial functions of mayor, see CONSTITUTION, II. (c), 3), B., No. 1.

3. Board of selectmen, see ELECTION BY THE PEOPLE, No. 16

4. See also INCORPORATION, I. Baton Rouge.

● EAST BATON ROUGE.

1. See POLICE JURY, No. 9.

2. To consolidate indebtedness, 1877, E. S., p. 189.

BATTURE.

1. See ACCESSION, II. (b). NEW ORLEANS, I. (a), II. (d), 2).

2. The batture is held in fee simple by the city of New Orleans. see CORPORATIONS, II. (b), Nos. 1, 2, 3.

BAYOU.

Castor and Dugdemona, survey of, 1860, p. 18; Vermilion, improved, 1870, p. 22; Teche, 1870, p. 28; Bartholomew, 1870, p. 87, 1871, p. 137; Bayou Castaing Navigation Company, 1870, p. 125; right to navigate Dugdemona, 1870, E. S., p. 211; D'Arbonne and Carrie, 1871, p. 83; Courtableau, 1871, p. 155; Portage and Mayers, 1871, p. 173; Lafourche, 1876, p. 25; 1877, E. S., p. 26; Bœuf, 1877, E. S., p. 112; Teche, 1877, E. S., p. 190.

BAYOU SARA.

Acts 1874, p. 133; 1876, p. 119.

BETTING AND GAMING.

See ALEATORY CONTRACTS.

BIENVILLE.

Special tax, 1878, p. 130.

BILLS OF EXCEPTION.

I. OF MATTERS RELATING TO EVIDENCE.

II. OF OTHER MATTERS.

I. OF MATTERS RELATING TO EVIDENCE.

See EVIDENCE, V.; CRIMINAL LAW, XVI.

II. OF OTHER MATTERS.

1. A bill of exception must state the grounds of the objection. 20 A. 138, *Pickens v. Preston*; 21 A. 635; 16 A. 285.

2. The Supreme Court must be guided by the bill of exception as to the objections made and the grounds of the ruling. 24 A. 157, *Whittington v. Whittington*.

3. A bill of exception not urged before the Supreme Court, is waived. 20 A. 156, *Gauche v. Goudran*; 14 A. 721; 16 A. 87.

4. A bill of exception is not the proper mode to object to the locking up of the jury during a Sunday. 26 A. 69, *State ex rel. v. Judge Fourth District Court*.

5. A bill of exception, to the charge of the judge to the jury, must be drawn in due time, otherwise it will not be noticed on appeal. C. P. 517; 22 A. 472, *Hatchcock v. Gray*.

6. No notice will be taken of an amended answer disallowed by the court, if no bill of exception be taken. 23 A. 206, *Silliman v. Mills et als.*

7. Where plaintiff discontinues the case as to one of the defendants who has taken bills of exception, but who does not appeal from the order allowing the discontinuance, although he appeals from the final judgment against the other defendants, no mandamus will lie to compel the judge to sign the bills of exception taken previous to and against the discontinuance. Not reported; O. B. 38, fo. 220, *State ex rel. Sharp & Gillen v. Judge Sixth District Court*.

8. Necessity of a bill for refusal of a continuance. See CONTINUANCE, I. No. 2.

9. If defendant does not object to the admissibility of evidence taken out of court, to confirm a default, due effect will be given thereto. See JUDGMENT, IX. No. 10.

10. A party requiring the reporter or clerk to take down his objections to the evidence, needs not take a formal bill. 1877, E. S., p. 176.

11. The judge may be compelled to sign a bill of exception. See MANDAMUS, I. (a), 2), No. 7.

12. See EVIDENCE, V.

13. When the judge refuses to sign a bill of exception which contains facts at variance with his recollection, he is justified in his refusal to sign the bill and to hear evidence to contradict his recollection. 30 A. 536, *State v. Gunter*.

14. The appellate court cannot review the correctness of the judge's refusal to sign a bill of exception on another bill taken to said refusal; the proper proceeding is by mandamus. 30 A. 536, *State v. Gunter*.

BILLS OF LADING.

See SHIPPING, X. (b), 2).

BILLS OF EXCHANGE AND PROMISSORY NOTES.

I. IN GENERAL; THEIR NEGOTIABILITY AND LAW BY WHICH THEY ARE GOVERNED.

II. OF THE GENERAL OBLIGATIONS OF THE PARTIES.

III. OF THE RIGHTS AND OBLIGATIONS OF PARTIES AS SURETIES, AND WHEN THEY WILL BE SO REGARDED.

IV. OF THE CONSIDERATION, TITLE AND TRANSFER.

- (a) *Sufficiency and failure of consideration.*
- (b) *When and by whom a consideration must be proved.*
- (c) *Title before transfer.*
- (d) *Transfer by indorsements and delivery.*
 - 1) In general.
 - 2) Indorser's obligation.
 - 3) Effect of indorsement upon the title; interest it passes and defects of title.
- (e) *Transfer as affecting the legal or equitable defenses of the obligor.*
 - 1) In general.
 - 2) Transfer for value; after maturity or dishonor; with notice; and circumstances sufficient to put holder on inquiry.
 - 3) Execution sales.
- (f) *Transfer without indorsement.*

V. OF THE ACCEPTANCE AND NON-ACCEPTANCE.

- (a) *In general.*
- (b) *Presentment for and necessity of acceptance.*
- (c) *Obligation or promise to accept; what is an acceptance; acceptances general or qualified.*
- (d) *Obligations created by the acceptance.*
- (e) *Pleadings and evidence.*

VI. OF THE PRESENTMENT FOR AND DEMAND OF PAYMENT.

- (a) *Necessity, place and mode of the demand.*
 - 1) In general.
 - 2) Place when designated.
 - 3) Place when not designated.
 - 4) By and from whom and how the demand is to be made.
- (b) *Time of presentment and maturity of bills and notes.*

VII. NOTICE OF DISHONOR.

- (a) *Form of notice, to and by whom to be given.*
- (b) *Time of notice.*
- (c) *Where notice must be sent; with whom left and how addressed.*
 - 1) In general.
 - 2) Notice by mail.
- (d) *Necessity and waiver of notice.*
 - 1) In general.
 - 2) Waiver.
 - 3) Bills drawn for drawer's accommodation, or without funds in drawee's hands.

VIII. OF THE PROTEST, NOTARIAL CERTIFICATE, PROOF OF DEMAND AND NOTICE.

- (a) *In general.*
- (b) *Formalities of the protest and certificate; by whom to be made, and their admissibility in evidence.*
- (c) *Interpretation of the protest and certificate; their statements, sufficiency and effect as evidence.*
- (d) *Parol proof of demand and notice and admissibility of parol to contradict or aid the protest or certificate.*

IX. OF THE DISCHARGE BY INDULGENCE AND RELEASE OF THE PARTIES AND SECURITIES.

X. OF ERASURES AND INTERLINEATIONS.

XI. OF THE PROMISE AND LIABILITY TO PAY AFTER DISCHARGE.

XII. OF THE PLEADINGS AND EVIDENCE.

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| (a) <i>In general.</i> | (e) <i>What must be alleged; what proved and by whom.</i> |
| (b) <i>Competency of witnesses.</i> | 1) <i>In general.</i> |
| (c) <i>Admissibility of evidence to explain or vary bills or notes.</i> | 2) <i>Signatures of the parties; denial of the signatures; filling up and striking out of indorsements.</i> |
| (d) <i>Admissibility of evidence under the pleadings and variance.</i> | |

XIII. OF PAYMENT AND RENEWAL.

XIV. OF INTEREST, DAMAGES AND COSTS.

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| (a) <i>In general.</i> | (b) <i>Time from which interest runs, rate of interest and damages, and laws by which they are governed.</i> |
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XV. OF FORGED BILLS AND NOTES.

XVI. OF BILLS AND NOTES LOST OR STOLEN.

XVII. OF BANK NOTES AND MUNICIPAL CURRENCY; CERTIFICATES OF INDEBTEDNESS.

I. IN GENERAL AND HEREIN OF THEIR NEGOTIABILITY, AND THE LAW BY WHICH THEY ARE GOVERNED.

1. The marked characteristic of a promissory note is, that payment of a determinate sum of money is promised to be made at a time definite and fixed, and when the conditions of the obligation are both potestative and casual, the obligation can only give rise to a personal action, C. C. 2508, and the prescription of ten years applies thereto. 22 A. 452, *Thompson v. Simmonds*. See SHIPPING, X.

2. An obligation to pay money to one of two persons named, on a day fixed, although it contains stipulations authorizing execution to issue in case it is not promptly paid at maturity, falls under the denomination of a promissory note and is prescribed by five years. 22 A. 180, *Fort v. Delu & Reily*.

3. A document made in the form "good for ten thousand dollars, payable five years after my death to ———," dated and signed, is neither good as a promissory note, a donation *inter vivos*, or an onerous contract. 22 A. 358, *Farrar v. Michoud*. See IV. (a), No. 21.

4. The additional clause, in a promissory note, to pay ten per cent. as lawyers' fees in case of suit, does not change the character of the instrument. 23 A. 767, *Dietrich v. Bayhi & D'Aquin*.

5. Due to ——— six thousand dollars, subject to their draft at not less than sixty days, is a promissory note. 26 A. 496, *Spearing v. Succession Zacharie*.

6. The third holder of a State warrant, which is not negotiable, is not covered by the law merchant. 23 A. 270, *State v. Dubuclet*.

7. An indorsement extending the time for the payment of a note, made after its maturity, does not invest it with its original negotiability. 18 A. 223, *Morcal v. Melliet*.

8. A certificate of indebtedness of the city of New Orleans is transferable, but the transferee obtains only the rights of the transferor. They cannot be classed as negotiable commercial paper. 25 A. 50, *City v. Strauss*.

9. The New Orleans city waterworks bonds are negotiable, and if acquired before maturity and in due course of business cannot be recovered from the *bonafide* owner, although they may have been stolen from plaintiff. 28 A. 552, *Consolidated Association of the Planters of Louisiana v. J. N. Avegno*. See BONDS, No. 28.

10. The commercial code was never adopted by the legislature, and the general principles of the Civil Code in regard to joint obligations and obligations *in solido* are applicable to commercial paper. 15 A. 474, *Shreveport v. Gooch*.

11. Checks, when payable to a particular person, are not negotiable; payable to order they are negotiable by indorsement, and payable to bearer they are negotiable by mere delivery. 25 A. 49, *Crescent City Bank v. Joseph Hernandez*.

12. State warrants are not commercial paper, and a forged indorsement conveys no title. If the parties in whose favor they were drawn were really creditors of the State, payment of the warrants would not discharge the debt. 25 A. 164, *State ex rel. Strauss v. Dubuclet, treasurer*.

13. Notes secured by mortgage are negotiable, and no equities can be pleaded as against a holder in good faith, for a valuable consideration, before maturity. 27 A. 562, *Gardner & Co. v. Maxwell*. See *infra*, IV. (e), 1), No. 2. MORTGAGE, IV. (c), 3), No. 4.

14. A police jury may issue negotiable paper in payment of its legal debts, but the paper so issued cannot be subjected to the rules of commercial paper, and any equity may be set up against a *bona fide* holder. 29 A. 105, *Stevenson v. Weber, collector*.

15. The following instrument can only be considered as a promissory note or acknowledgment of debt: "Received, cash from Eliza B., in December, 1863, one-thousand dollars, and to be paid when called upon. Signed, W. J. Nash. The above is at eight per cent. interest per annum. Signed, W. J. Nash." 28 A. 590, *Baylies v. Nash*.

16. A written obligation to return certain bonds at a stated time with interest, is not a promissory note. 30 A. 714, *Blouin v. Liquidators of Hart and Hebert*.

II. OF THE GENERAL OBLIGATIONS OF THE PARTIES.

1. The commercial code was never adopted by the legislature, and the general principles of the Civil Code in regard to joint obligations and obligations *in solido* are applicable to commercial paper. 15 A. 474, *Shreveport v. Gooch*.

2. An accommodation obligor has no cause of action against the original obligees, until he has paid the note. 16 A. 96, *Price v. Emerson*.

3. Where plaintiffs, third holders of the note, acted merely as agents, in discounting the note and paying the same at maturity, they can only recover what the original holder was entitled to. 22 A. 201, *Sinnot & Adams v. Schlater*.

4. When a drawer gives two indorsers as co-sureties, the one who indorses first is liable to the other for the whole debt. 16 A. 109, *Connolly v. Bourg*; 6 N. S. 518.

5. Strong evidence is required to vary the legal liability of indorsers as fixed by the *lex mercatoria*. *Ib.*

6. Where the second indorser consented to indorse, upon condition that the defendant should become the first indorser, this agreement does not relieve the first of his liability to the second who paid the debt. 16 A. 205, *Hacker v. Lanards & Co.*

7. The holder of negotiable paper made or indorsed by a party as executor, may institute his action against such party individually, leaving to the latter the right to show that he is not personally responsible. 21 A. 286, *Livingston v. Gausson*.

8. To bind a corporation on a note drawn by a *manager*, it must be shown that the latter had special authority to draw the note, or that the giving of the note was necessary to effect the object for which he was appointed. 19 A. 203, *Culver, Simmonds & Co. v. Leovy et als.*; 6 L. 590; C. C. (2966).

9. Where the corporation, for whose account the note is drawn, is not responsible, the individual members who signed and indorsed the note are liable thereon, *jointly*. 19 A. 203, *Culver, Simmonds & Co. v. Leovy*; 3 L. 438; 4 R. 18.

10. One who indorses a check for the purpose of identifying the person who presents it, does not bind himself to indemnify the bank in case said person should not have authority to collect the check. 26 A. 744, *Commercial Press v. Crescent City National Bank*.

11. A compromise with the holder estops the drawer from contesting the title to the note. See *ESTOPPEL*, No. 3.

12. "We, or either of us," creates a joint obligation. See *OBLIGATIONS*, VIII. (e), No. 9.

13. But it does not; *ib.*, No. 10.

III. OF THE RIGHTS AND OBLIGATIONS OF THE PARTIES AS SURETIES ENOMINE; WHEN THEY WILL BE SO REGARDED.

1. It is the settled and uniform jurisprudence of this State, that when a person not a party to a note puts his name on the back of it, he is presumed to bind himself as surety. 1 A. 248, 275; 4 A. 273; 9 A. 533; 10 A. 98; 12 A. 517; 20 A. 348; 21 A. 25, *Field v. Delta Company*; 22 A. 41; 4 M. 639; 3 N. S. 659; 6 N. S. 517; 10 L. 374; 14 L. 386; 4 R. 161; 12 R. 183; 2 A. 592; 4th Pickering, 385; Story on Notes, §§ 133, 134, 268, 288, 292, 295. 367, 479, 480; 24 A. 468, *Rogers & Woodall v. Gibbs*; 14 A. 305; 16 A. 108; 12 Wendell, 118, *Keeler v. Bartine*; Chitty on Bills, 435; 1 Parson on Notes and Bills, 521, 525, 526, 629; 5 Howard, 278, *Phillips v. Preston*.

2. If the transferee gets the note from the maker, the indorser is then a surety. 19 A. 308, *Crane, ex. v. Trudeau*.

3. The transferrer of a note overdue, which becomes payable on demand and who indorses it after maturity, is not a surety, but simply an indorser whose liability must be secured by demand within a reasonable time and notice of protest. 20 A. 546, *Roquest v. Pickett*; 16 A. 179. See II. (b), No. 3.

4. The surety on a note is bound *in solido* with the drawers. See *OBLIGATIONS*, VIII. (e), No. 15. *PRESCRIPTION*, IV. (c), 1).

5. The surety on a lease who indorses the rent notes, is bound without protest and notice. 30 A. —, *Leblanc v. Selby*.

IV. OF THE CONSIDERATION, TITLE AND ITS TRANSFER.

(a) Sufficiency and failure of consideration.

1. Where money raised by contributions to relieve the sufferers from a destructive fire was loaned out by the committee to the sufferers without interest, for a certain period, they giving their notes payable to the holder; *Held*: That the makers of the note having made a special contract with the committee, could not plead want of consideration, and not being owners of the fund themselves, were precluded from enquiring how the committee obtained the money. 15 A. 233, *Bayou Sara v. Harper*.

2. Neither rendition of an account, nor giving of notes, can prevent the defendant from showing errors and enquiring into the consideration of the notes in a suit against him. If he had made payment, with a full knowledge of the errors, it would have been considered voluntary, and the money could not have been recovered back under the law then in force after the expiration of one year. 16 A. 240, *Payne & Harrison v. Waterston*; 13 A. 234, 413; 12 A. 20.

3. Where the note is not held by a third person before maturity, the drawer may show that the settlement of account for which the note was given, is erroneous. 26 A. 668, *Oglesby v. Renwick*.

4. Defendants having given their promissory note instead of paying over the proceeds of certain consigned goods, sold by them, received a valuable consideration. 27 A. 256, *Drake & Husband v. Hays et als.*

5. Where a note was given for a pre-existing debt, the original owner can recover no more than the debt, although the face of the note be larger. 18 A. 222, *Citizens' Bank v. Payne & Gilman*.

6. Where a note is given in part payment of an account, and the credit given the maker on the account is less than the note, he will be held liable only for the amount of the credit. 18 A. 544, *Robson & Allen v. McKoin*.

7. The indorsement in blank is *prima facie* evidence of a full consideration. 20 A. 141, *New Orleans Canal and Banking Co. v. Templeton*.

8. The consideration being given to an individual partner, whose firm carried on an illicit traffic, does not vitiate the loan. 20 A. 184, *Cooper v. Thompson et als.*

9. If a note be given in compromise of a previous litigation, this is a valid consideration. 22 A. 179, *Wiederecht v. Biegel*.

10. A note given to fulfill a simulated sale cannot be collected. 24 A. 276, *Succession of Pointer*.

11. The purchase of the privilege to carry on the same business in the same locality, from one who enjoys that sole right, forms a valid consideration to the note. 26 A. 477, *Trisconi v. Dumas & Victor*.

12. Want of consideration cannot be set up against the original drafts when suit is brought upon one given in satisfaction of the first. 29 A. 419, *Kaufman & Co. v. Barringer*.

13. Where defendant could have fulfilled the condition which formed the basis of the note, his plea of want of consideration will not protect him. 19 A. 498, *Pray v. Herber et al.*

14. Where notes have been given in payment for land and slaves, judgment will be recovered thereon for the proportion of the value of the land to the slaves. 21 A. 757, 771; 22 A. 153, 189, 215, 426, 427, 430, 433, 453; 23 A. 496; 25 A. 224; 20 A. 357. See OBLIGATIONS, III. (c), 1), Nos. 4, 5, 6. MANDATE, V. (a), No. 8. MINORS, III. (f), 1), No. 6. MORTGAGE, III. (c), No. 2. See *infra*, IV. (d), 1), No. 1; (e), 1), No. 13.

15. A note given for the hire of a slave, even after the labor has been performed, cannot be enforced judicially. 22 A. 300, *Cormier v. Bienvenu*.

WYLY, J., *dissenting*: The hire occurred before emancipation; the laws in force declared it legal. *Ib.*

16. A note given by a conscript in the so-called confederate army to another party to serve in his place as a substitute, is illegal, and no action lies to enforce it. 21 A. 628, *Heidenreich v. Leonard*; 656.

17. Payment of a promissory note given for a loan in confederate money, cannot be judicially enforced. 22 A. 132, *Durbin v. Michael*; 485, *Winter v. Jones*; 21 A. 305; 20 A. 138, 167; 19 A. 257, 269, 464. See CONFEDERATE MONEY. *Per contra*, see OBLIGATIONS, III. (c), 1), Nos. 27, 28, 29.

18. The extension of time for payment of a debt, is a valid consideration for a note. Usurious interest cannot be set up thereagainst. 27 A. 538, *Foster v. Wise*; C. C. 1900, 1767, 1885, 1896; *Willis v. John & Charles Chaffe*, N. R.

19. Interest due forms a valid consideration to a note which may in its turn bear interest. 25 A. 486, *Legburn v. Deyris*.

20. One of the universal legatees who purchases the share of her co-heirs and gives her notes for the commission of the executor, is liable thereon. 27 A. 624, *Wells v. Alexander*.

21. The moral obligation under which the drawer of a note feels bound to reward the faithful services rendered during a long period by his employee, salaried at low wages, is a sufficient consideration for a note payable at the drawer's death. Such note is valid. 29 A. N. R., *Succession J. Lacroix*. See I. No. 3.

22. The third possessor who gives a draft in payment of the hypothecary action, and whose land is seized and sold by reason of the non-payment of the draft, cannot be held liable on the draft. The debt was not due by him personally. 28 A. 621, *Littell v. Sylvester*.

23. For consideration of notes, see OBLIGATIONS, III. (c), 1), No. 14.

(b) *When and by whom a consideration must be proved.*

1. Unless want or failure in the original consideration is shown, the third holder of commercial paper, before maturity, is not compelled to prove that he gave a valid consideration in order to recover of the maker. 21 A. 513, *Union Bank v. Succession of Ross et als.* *Ib.* 624. See *infra*, No. 12.

2. As between the wife and her creditor it behooves the latter to prove the consideration of the note when denied, but the husband must show want of consideration to his own contracts. 16 A. 449, *Kennedy v. Bossière*. See MARRIAGE, VIII. (d).

3. Where the existence of the consideration is expressly put aside, and doubt or suspicion cast upon its reality, the burden of proving it is thrown upon the payee. 15 A. 41, *Martin v. Donovan*.

4. Where a suit is brought on a promissory note, and want of consideration is set up as a defense, if the note on its face purports to have been made for a valuable consideration, and it is shown that the parties have dealings together, and that the plaintiff lent money out on interest, the burden of proof rests upon defendant to show a want of failure of consideration. 15 A. 382, *Henderson v. Giraudeau*.

5. Where an account has been settled by a promissory note, the note is *prima facie* evidence of a lawful and valuable consideration, and if the note is given in error, or there is a total or partial failure of consideration, or the account for which it is given is tainted with usury or fraud, the burden of proof rests upon the maker of the note to establish any or all of these facts to rebut the legal presumption in favor of its validity. 15 A. 457, *Byrne v. Grayson*.

6. In an action against the acceptor of a draft, where the defense set up is want of consideration, the burden of proof rests upon the defendants to show such want of consideration. 15 A. 353, *Nevins v. Chapman*.

7. Defendant must prove want of consideration for the note. 20 A. 347, *Stephens v. Lanier*. See *infra*, XII. (e), 1), No. 3.

8. Where the promissory note is "for value received," the burden of proof is on defendant to show want of consideration. 21 A. 200, *Friedman & Co. v. Houghton*.

9. Where the evidence of want of consideration is conflicting, the presumption is in favor of the validity of the note. 28 A. 94, *Rodriguez v. D. Lopez*.

10. Illegality of consideration must be clearly established. 18 A. 95, *P. McGuigin v. Ocheglevich*.

11. Defendant must prove his plea of want of consideration. 20 A. 209, *Robinson v. Doherty*.

12. The holder of a negotiable note, before maturity, acquires a valid title to it, although the vendor had fraudulently disposed of the same. 29 A. 61, *Ogden v. Marchand*. See No. 1.

13. Consideration as between the creditor and married woman. See MARRIAGE, VIII. (d).

(c) Title before transfer.

1. The possession of a promissory note payable to bearer, is *prima facie* evidence of ownership, and the holder has a right to institute suit in his own name. 18 A. 565, *Booty v. Cooper*; 676, *New Orleans Canal and Banking Company v. Bailey*. See IV. (e), 1), No. 16.

2. Persons holding in fiduciary capacities, have no right to transfer notes without order of court; but such transfer is not an absolute nullity, and if the transfer be made in the interest of the party in whose favor the note is made, the holder may recover. 1 A. 222; 2 A. 577; 10 A. 210; 22 A. 295, *Woodbridge v. Pope et al.* See SUCCESSION, VIII. (c), No. 2.

3. A pledgee of unmatured notes, from a broker who holds the notes for discount, without notice of the nature of the broker's title, acquires a valid pledge even if the notes be given to secure the broker's individual previous indebtedness. 26 A. 19, *Giovanovich v. Citizens' Bank*. See IV. (e), 1), Nos. 9, 10.

4. The policy of the law favors the holder of negotiable commercial paper, and requires very cogent evidence to convict him of bad faith. 20 A. 141, *Canal Bank v. Templeton*.

(d) Transfer by indorsement or delivery.

1) In general.

1. Each indorsement being a new contract the right of the indorsee to recover against his indorser, cannot be defeated because the maker received a slave consideration for the note. 25 A. 477, *Duperrier v. Darby*; 24 A. 139. See *infra*, (e), 1), No. 4.

2. Where the drawees and acceptors who keep an account current with the drawers, reissue the drafts after maturity, the holders cannot recover thereon as against the drawers. 26 A. 165, *Walton v. Young*.

3. "I transfer the within note to J. Marks & Co., or order, payable on demand," signed by the payee, constitutes him an indorser to whom notice of dishonor must be given. 24 A. 335, *Marks & Co. v. Hermann*.

4. Executors, administrators, etc., cannot transfer negotiable assets without an order of court. See SUCCESSION, VIII. (c), No. 2. *Ante*, (c), No. 2.

2) Indorser's obligation.

1. The indorser who is secured by mortgage would have no cause of action until he had paid money on his indorsement; and the holder of the note, after judgment against the indorser, could claim no better right under the mortgage than the indorser possessed. 15 A. 646, *Bowman v. McElroy*.

2. The several indorsers are bound *in solido* towards the creditors. 19 A. 147, *Syme v. Brown*.

3. Every indorsement is essentially an original contract equivalent to a note in favor of the holder. 19 A. 307, *Crane, ex. v. Trudeau*.

4. An indorsee may recover from the indorser, although the note was given for a slave consideration. Every indorsement of a promissory note forms a new contract between the indorser and indorsee. 24 A. 139, *Succession Saml. Weil*; 25 A. 477, 319.

5. The indorsement in Kentucky of a note payable in New Orleans, constitutes a new contract which must be governed by the laws of Kentucky. 18 A. 257, *Trabue & Co. v. Short & Co.*

6. An indorsement made by the son of a person who does not know how to write, but who subsequently ratifies the act, will bind the indorser. 27 A. 274, *Lyle & Son v. Beals & Laine*.

7. Where a negotiable note has been indorsed in blank the law presumes that such indorsement was made on the day of its date. 20 A. 141, *New Orleans Canal and Banking Co. v. Templeton*.

8. As to third parties, the obligations of accommodation indorsers are co-extensive with those of indorsers of business paper. 19 A. 307, *Crane, ex. v. Trudeau*.

9. The indorser "without recourse" cannot be held liable, the more so where notice of protest is not served on him. 27 A. 622, *Rayne v. Ditto*.

10. The indorser of a check, is a surety and liable, although the check be not presented to the bank without delay. Indorsing a check is not usual and the surety must have known that the check was not drawn for immediate presentation at the bank. 28 A. 865, *Newman v. Kaufman et als.*

11. MORGAN and LEONARD, JJ., *dissenting*: The check was like all other checks and should have been presented within reasonable time, inasmuch as the drawer had funds in bank. *Ib.*

12. An agreement by which two indorsers agree to become joint sureties on a promissory note and to bear any loss resulting from their suretyship equally, has a good consideration and is binding. 5 H. 278, *Phillips v. Preston*.

13. What constitutes an indorser. See *supra*, (d), 1), No. 3.

14. Parol is admissible to prove a promise on the part of the second indorser to share equally with the first. See EVIDENCE, IX. (a), No. 27.

15. The two payees who are indorsers are bound jointly. See OBLIGATIONS, VIII. (e).

16. The maker and indorser are each liable for the whole of the debt although not technically bound *in solido*. See OBLIGATIONS, VIII. (e), No. 22.

3) Effect of indorsement upon the title; interest it passes; and defects of title.

1. The holder of a note made payable to the makers' own order, *by him indorsed*, and secured by a notarial and authentic act of mortgage, may recover without any authentic evidence of transfer further than that contained in the act itself. 15 A. 147, *Bischof v. Marks*.

2. A draft drawn by one who acts in a fiduciary capacity, to his own order, and indorsed with his name purely, must be considered as completed and indorsed, as drawn. 28 A. 665, *Lapeyre v. Weeks*.

3. A broker who sells a note, with a forged indorsement, and who does not disclose his agency, is liable in damages. See MANDATE, VI. No. 1.

4. See EXECUTORY PROCESS, II. (b), 2); 3).

(e) *Transfer as affecting the legal or equitable defenses of the obligor.*

1) In general.

1. An accommodation indorser who allows the note to be put in circulation before maturity, and pledged to one who advances money thereon, is bound to the pledgee, *at least* for the amount so advanced. 16 A. 202, *Jones v. Byrne*.

2. The mortgage note being paid before maturity, was lost and came into the hands of an innocent third holder; *Held*: That the holder might recover as against the drawer, under the law of merchants, but that the payment extinguished the mortgage. 20 A. 264, *Doll v. Rozetti*. See *supra*, I. No. 13. MORTGAGE, VI. (c), 3), No. 4.

3. The presumption is that the holder of the note acquired it in good faith. 20 A. 75. *Wheeler v. Maillot*.

4. Whether there was a consideration or not between the makers and the payee, the makers are liable to the indorsees who acquired the note before maturity, for valuable consideration. 25 A. 319, *Battalora v. Erath*. See *supra*, IV. (d), 1), No. 1; 2), Nos. 3, 4.

5. The holder of the mortgage notes given by the wife to commission merchants who discounted them before maturity, and applied the proceeds to a debt due by the husband, acquired a valid title both to the note and mortgage. 28 A. 294, *Mrs. Taylor v. R. S. Bowles et als.* See No. 15. MARRIAGE, VIII. (d).

6. Where defendant denies that plaintiffs are the owners of the draft sued on, and that a settlement was had with the real owner; and the evidence shows that the draft was stolen after maturity, plaintiffs cannot recover. 26 A. 555, *Davis, etc. v. Bradley, Wilson & Co.*

7. A *bona fide* holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties, if he takes it under an indorsement made before maturity, holds the title unaffected by these facts and may recover thereon. 26 A. 19, *Giovannich v. Citizens' Bank*.

8. When the defendant, the maker of a note, establishes a failure of consideration as between himself and his payee, amounting to a fraud, the holder by indorsement is obliged to show that either he or some preceding holder took it in good faith and for value. 21 A. 552, *Union Bank v. Ryan*.

9. A pawnee, before maturity, for a pre-existing debt, is a holder for a valuable consideration, in the sense of the rule applicable to negotiable instruments, although the note was given as collateral security. 23 A. 454, *Smith, Newman & Co. v. Isaacs et als.* See IV. (c), No. 3.

10. A party taking a note before maturity as a collateral security for money loaned, becomes the holder in good faith, for a valuable consideration. 21 A. 555, *Louisiana State Bank v. Gaienné*. See PLEDGE, I. (b), No. 8.

11. A third holder of a negotiable paper, before maturity, in good faith, for a valuable consideration, can recover thereon. 21 A. 624, *Coco v. Calliham*; 20 A. 327, *Knox v. White*.

12. The purchaser who assumes the payment of a note, secured by mortgage on the property purchased by him, may set up equities as against the third *bona fide* holder, before maturity, where part of the property purchased were slaves. 20 A. 254, *Brou v. Becnel*; 9 A. 195.

13. A third holder of a promissory note given for the price of a slave cannot recover, although he acquired the note in good faith, for a valid consideration, and before maturity. 21 A. 567, *Groves v. Clark*; 527, *Armstrong v. Lecompte*; 23 A. 444, *Baldwin v. Jewell*. Constitution, 1868, art. 127. See *supra*, IV. (a), No. 14.

14. The rule that *bona fide* third holders of the note, before maturity, for a valuable consideration, may recover, applies to negotiable paper only. 18 A. 223, *Marcal v. Melliet*; 21 A. 140; 23 A. 199; 19 A. 100; 18 A. 412.

15. The holder of a promissory note, for value, before maturity, signed by a married woman, is put on his guard, and to recover thereon, must prove that the debt inured to her separate benefit. 29 A. 123, *Conrad v. Leblanc, sheriff*; 5 N. S. 56; 5 A. 495; 15 A. 628; *ib.*, 621; 12 A. 853; 5 A. 173; 14 A. 172; *ib.*, 700; 22 A. 457; 23 A. 196; 24 A. 89. See No. 5.

16. The holder, transferee or pledgee before maturity, of a negotiable note, is to the extent of his debt entitled to all the rights of a *bona fide* holder and is for all practical purposes the owner. 29 A. 549, *Mechanics, etc. v. Ferguson*; 8 N. S., 370; 11 A. 664; 21 A. 555. See (f), No. 3; (c), No. 1.

17. Where several notes were illegally pledged for the same debt, the owners must share the loss ratably. See PLEDGE, I. (b), No. 8.

18. For rights of innocent holders of State bonds, see BONDS, Nos. 4, 33.

2) Transfer for value; after maturity or dishonor; with notice; and circumstances sufficient to put holder on inquiry.

1. One who acquires a note after maturity takes it subject to all defenses which the drawer might set up against the original payee, and if the note has been given between partners who owed nothing to each other, the holder can recover nothing. 23 A. 313, *Landry v. Landry*.

2. The rule of law that he who takes a note overdue and dishonored takes it encumbered with all the equities between the prior parties to it, is the law of Louisiana as well as of those States which have adopted the common law. 6 Wall. 492, *Foley v. Smith*.

3. Where the transferee acquired the note in good faith, after maturity, from a *bona fide* owner before maturity, and for a valuable consideration, want of consideration cannot be pleaded against him. 19 A. 507, *Cook v. Larkin*; 12 A. 126; 20 A. 282, *Cotton v. Sterling*.

4. An indorsee or pledgee of a note, is not bound to go to the notary's office to examine into the consideration of the note, although marked *ne varietur*. 20 A. 50, *Bank of Kentucky v. Goodale*; 12 M. 235; 1 N. S. 143; 16 L. 207; 5 A. 364; 14 A. 177.

5. The bank being made acquainted that the note pledged was accommodation paper, could not accept the same to cover the overdraft of the pledger, without the consent of the drawer, who is entitled to a return of his note by paying the principal debt due at the time of the notification. 27 A. 178, *Mechanics' and Traders' Bank v. Barnett*.

6. The transferee of drafts not negotiable occupies no better position than the original holder. 21 A. 140, *Marx v. Wheelis*; 18 A. 223; 23 A. 199; 19 A. 100; 18 A. 412.

7. The third possessor of a note who acquired it after maturity, is in no better situation than the original holder, and cannot recover where the note is an accommodation one, given as collateral security for a loan in confederate money. 23 A. 204, *Wynn v. Patrick*.

8. The note being paid at maturity and afterwards pledged by the commission merchant without authority from the drawer, is extinguished, and payment thereof cannot be enforced. 28 A. 248, *Halsey v. Lange*.

9. The factor into whose hands mortgage notes were deposited for safe keeping, had no right to transfer or pledge them for his individual debt. The notes being pledged after their maturity may be recovered from the pledgees, on proof of ownership. 28 A. 70, *Bird & Thompson v. Cockrem, receiver*; 28 A. N. B., *Home Mutual Insurance Company v. Horrell*.

10. Want of consideration is no defense to the title of a *bona fide* holder of a note for a valuable consideration, before maturity; one hundred dollars for a note of five thousand dollars is a valuable consideration. 27 A. 95, *Scott & Co. v. Seelye*.

11. The knowledge of want of consideration on the part of the attorney who receives notes before maturity, in pledge for his client, is the knowledge of his client. 28 A. 620, *A. C. Dumartrait v. W. P. Kemper*.

3) Execution sales.

See EXECUTION, V. (a), 3) A., No. 2; V. (a), 3) C., § 2. No. 2.

(f) *Transfer without indorsement.*

1. A mortgage note can be transferred without the necessity of indorsement or a written assignment. The general rule of evidence relative to contracts and obligations, established by article (2257,) applies as well to commercial paper, there being no law excepting it from the operation of this rule. 15 A. 487, *Griffin v. Cowan*.

2. The transfer of a note by letter is sufficient. 18 A. 527, *Sandel v. George*.

3. The pledgee of a promissory note, payable to the drawer's own order, and by him indorsed in blank, may sue and recover on the note without the indorsement of the pledger. 21 A. 555, *Louisiana State Bank v. Gaiennie*. See (e), No. 16.

4. A commercial firm holding a note in favor of one of its members without indorsement, given for money loaned by the firm, cannot set up that they are innocent third holders for value against the plea of failure of consideration. 21 A. 576, *Norton v. Pickens*.

5. Third persons can acquire no title to a note discounted from another than the payee, and who acts without authority. 27 A. 311, *Callender v. Golsan Bros.*

6. A notarial act of transfer by the payee has the same effect as would his indorsement. 28 A. 419, *Ducasse v. Keyser & McKenna*.

7. An admission in the answer that plaintiff received the note from the payee, supplies the proof of indorsement. See PLEADING, V. (b), 5), B. No. 5.

V. OF ACCEPTANCE AND NON-ACCEPTANCE.

(a) *In general.*

1. A bank incurs no liability to the holder of a draft, by refusing payment thereof, before acceptance. 23 A. 36, *Case, rec'r. v. Cannon & McCann*; 49, *Case, rec'r. v. Henderson*; 60, *Same v. Marchand*.

2. The consideration of the acceptance of a bill being the obtaining of a loan of money for the drawer, is sufficient. 27 A. 635, *Fuller v. Leonard*.

(b) *Presentment for, and necessity of, acceptance.*

See *infra*, (c).

(c) *Obligation or promise to accept; what is an acceptance; and acceptances general or qualified.*

1. In the absence of special notice brought home to the holder of a bill of exchange, as to the object for which a credit or authority to draw is given, it is no defense to an action on a bill drawn under an unconditional authority, that the authority was intended to have been used in a particular form. 15 A. 326, *Hutchinson v. Mitchell*.

2. Where parties extend credit or discount bills of exchange on the faith of a letter of credit, general in its terms, the parties giving the letter are responsible for the amount advanced on the faith of such letter of credit. 18 A. 678, *Union Bank of Tennessee v. Lockett*.

3. The plaintiff was notified by the defendant that he had placed — dollars to his credit, according to the instructions of a third party, but when sued, the defendant pleaded that the sum was confederate money; *Held*: That the plaintiff must have known that it was confederate money, and could not recover. 23 A. 409, *West v. Miltenberger*.

4. WYLY, J., *dissenting*: The plaintiff is not in any manner connected with the confederate transaction; there was no immorality on his part in accepting the letter of credit. *Ib.*

5. The certificate of the bank that the check is good, is equivalent to acceptance. 28 A. 520, *Peter Hellwege v. Hibernia Bank*; 10 Wallace 647. See *infra*, XV. No. 4.

6. The indorsers of a check certified by the bank, are liable to the holder when the bank fails to pay, and due notice of non-payment is given to the last

indorser, who in his turn notifies the one preceding him. The certification by the bank, renders it unconditionally liable for the amount of the check, but does not discharge the indorsers. 28 A. 933, *Mutual National Bank v. Ratgé et als.*

7. Under a letter of credit authorizing the bearer to draw a certain amount of money, in favor of his creditors, the payees will be bound on a draft drawn to the bearer's own order, and by him indorsed and discounted. 27 A. 653, *Talmadge v. Williams & Sons.*

8. HOWELL, J., *dissenting*: The draft should have been drawn in conformity to the letter of credit. *Ib.*

9. The defendants who authorize the drawing of drafts, on them, against shipments of cotton, and who paid large amounts of such drafts, will be condemned to pay any such drafts discounted in due course of the drawers' business with the drawees. 28 A. 140, *Johnson v. Blakemore & Co.*

10. Where the condition upon which the drafts were to be drawn was not complied with by the drawer, and the draft was not honored, the drawee will not be condemned to pay the same. 28 A. 88, *Philips v. Blakemore, Bros. & Co.*

11. A written promise to accept a draft, is equivalent to an acceptance. 18 Wallace, 421, *Miltenberger v. Cook.*

12. So is a verbal promise. See EXECUTION, V. (a), 3), D. § 1, No. 12.

13. Letters of credit given to a confederate agent to enable him to prosecute his mission abroad in aid of the confederate government, are to be considered as given in aid of the rebellion, and therefore void. 1 Woods, 221, *The confiscation cases.*

14. Where the drawees refuse to accept a draft made payable thus: "Your-selves being paid out of the proceeds of my rice, etc.," and in loose conversations with the holder have erroneously given to the payee assurance that the draft would be paid, they are not liable when the proceeds of the rice are insufficient to pay their own indebtedness. 30 A. 199, *Marqueze & Co. v. Fernandez & Co.*

(d) *Obligations created by the acceptance.*

1. An acceptance is an absolute engagement to pay a sum of money to the holder, whether the acceptors have or have not funds of the drawer in their hands. 15 A. 474, *Shreveport v. Gooch.*

2. The settlement of an acceptor with the drawers, without including or providing for the accepted bill, is at the acceptor's risk. The written promise to accept an existing bill is an absolute acceptance, and nothing but payment or a release can exonerate such acceptor. 23 A. 378, *Cook v. Miltenberger.*

3. The acceptor of a draft is bound for the whole amount of the draft. 23 A. 296, *Barns v. Bidwell.*

4. The bank is liable on a certified check for the whole amount raised after certification and discounted in due course of business. A line should have been drawn by the bank across the blanks left in the check. 28 A. 520, *Peter Hellwedge v. Hibernia Bank*; 10 A. 103; 28 A. 156, *Leon Godchaux v. Union National Bank*; 28 A. N. R., *Jacob Strauss v. Hibernia Bank.*

5. The drawee having certified the check good, after the amount had been raised, and having paid it to an innocent holder, cannot recover the amount overpaid. 28 A. 189, *Louisiana National Bank v. Citizens' Bank of Louisiana.*

6. The acceptors of a bill are liable *in solido* to the holder, but *inter se* their liability is joint. 27 A. 640, *McNabb v. Martin et als.* See OBLIGATIONS, VIII. (e), No. 1.

7. Where A has agreed in writing to accept the draft of B, in favor of C, for a specified amount upon the shipment by B to A of a certain quantity of cotton, and the cotton is subsequently shipped as contemplated, A will be considered as holding in his hands, for the account of C, the amount of the draft which he has agreed to accept, and no delay in the presentation of the draft will justify A in presuming that the draft has been taken up by B. The money must be held in trust for C until called for. 18 Wall. 421, *Miltenberger v. Cooke.*

(e) Pleadings and evidence.

1. Evidence is not admissible to show that when the drawee wrote his name on the back of the draft he refused to write above it "accepted." 20 A. 419, *Kaufman & Co. v. Barringer*.

2. Parol is admissible to prove the verbal promise of a third person to accept a bill of exchange, and that the goods were sold on the faith of such acceptance. The act of 1858 does not apply to such a case. 18 A. 637, *Crowell, rec'r v. Van Bibber & Co.* See EVIDENCE, V. (c), Nos. 8, 9, 10; IX. (a).

3. By the law of Louisiana a certified copy of a protest is sufficient without producing the original. 5 H. 53, *McAffee v. Doremus*.

VI. OF THE PRESENTMENT FOR, AND DEMAND OF, PAYMENT.**(a) Necessity, place and mode of the demand.****1) In general.**

1. In defense to a note, the drawer may set up the actual loss sustained by him by failure of the holder to present the note for payment at the place designated, where the money deposited to meet the payment was afterwards lost by failure of the bank. 21 A. 215, *Thiel v. Conrad*.

2. To bind the indorser, demand must be made of the drawer at maturity or as soon as practicable thereafter. 20 A. 149, *Labadiolle v. Landry*.

3. A waiver of protest by the indorser, written on the back of a promissory note, operates a waiver of demand. 20 A. 157, *Guyther v. Bourg*.

4. No recourse can be had against an indorser, until demand of the maker or his heirs, unless the demand be an impossibility. 26 A. 715, *Union Insurance Co. v. Rodd*.

5. If the drawer be absent from his office and no demand is made, the indorser is discharged. 20 A. 302, *Otto v. Belden*. See 2), No. 3; 4), No. 1.

6. How made and time of protest. 1876, p. 27.

2) Place when designated.

1. When a note is made payable at a particular place it is not necessary to allege or prove, in an action against the maker, that a demand of payment was made at the place designated in the note, to enable plaintiff to recover. The decisions in 5 A. pp. 61, 188, re-affirmed. 16 A. 252, *Letchford v. Starns*.

2. Where a promissory note is made payable at a particular place, in an action against the maker, it is not necessary to prove demand. 21 A. 214, *Thiel v. Conrad*.

3. Demand of payment of a promissory note must be made at the place of payment, and if made at any other place, will not bind the indorser. 22 A. 64, *Moore v. Britton*. See 1), No. 5; 4), No. 1.

3) Place when not designated.

1. A presentment at either dwelling or place of business of the maker, within reasonable hours, is sufficient, even if he be absent from both. 23 A. 767, *Dietrich v. Bayhi & D'Aquin*.

4) By and from, whom and how, the demand is to be made.

1. When the makers are not present, due enquiry should be made of the indorser to find out their domicile; in default of demand, the indorser will be discharged. 21 A. 280, *Mitchell v. Glynn*.

(b) Time of presentment and maturity of bills and notes.

1. A promissory note, falling due on the happening of an event, is not a conditional obligation. 20 A. 236, *Mortie v. Edwards*.

2. A note to become valid on the happening of a certain event, may be collected after the happening thereof. 23 A. 551, *Martin v. Singleton*.

3. The indorsement and transfer of a note overdue, is a renewal of the instrument, which is then declared by law payable within a reasonable time,

upon demand; and the indorser is bound only upon the same condition of demand upon the drawer and notice of non-payment, as any other indorser. 16 A. 179, *McCall v. Witkowski*. See III. No. 3; *infra*, No. 7.

4. A note drawn one day after the *treaty of peas* for the *jest* and full *some* of one thousand dollars, became due at the termination of the war. 18 A. 563. *Gaines v. Dorsett*.

5. The three days of grace are allowed by law to non-negotiable notes as well as to negotiable ones. 22 A. 479, *Dubuy v. Farmer*.

6. The holder and the drawer of the bill being in the federal and the other in the confederate lines, no demand could be made, but as soon as the latter returned to the city of New Orleans, demand should have been made. 24 A. 358, *Gayaré v. Sabatier*.

7. A note re-issued after maturity becomes due on demand within a reasonable time. 16 A. 179, *McCall v. Witowski*; 20 A. 546, *Roquest v. Pickett*. See No. 3.

8. The holder of a draft, keeping it over a month and a half, within which time the drawee failed, shows such laches that he cannot recover against the drawers where it is shown that the draft would have been paid if it had been presented sooner. 26 A. 667, *Müller v. Moseley*.

9. In the presentment of a bill of exchange to an acceptor for payment, it is only necessary that a demand should be made of a merchant acceptor at his counting room or his place of business, and if that be closed so that a demand cannot be made, or if the acceptor be not found at his place of business, no further enquiry is necessary. 23 H. 368, *Wiseman v. Chiapella*.

VII. OF THE NOTICE OF DISHONOR.

(a) *Form of notice; and to, and by, whom to be given.*

1. Where, in protesting a note, the notary declared that he presented it for payment through his deputy, and certified that he notified the indorser, by a letter to his address put into the postoffice, after vain attempts made to find him or his domicile, and the evidence showed that the indorser resided in the same city with the notary, and was a person well known, and that he or his residence might have been found by the notary; *Held*: That in such a case the indorser would not be liable, on account of the want of notice. 15 A. 694, *Heiss v. Corcoran*.

2. The drawers of a bill of exchange are bound to the payee who holds the first and second bills duly protested, and whose indorsement on the third has been forged and the bill negotiated. 19 A. 17, *Foltier v. Schroder & Schreiber*.

3. Demand and notice of dishonor may be made and given by any person lawfully in possession of the notes and competent to testify. 19 A. 66, *Jex v. Tureaud*; 5 A. 238; 11 R. 454; 15 L. 552; 3 How. 71. See No. 8.

4. The holder is only bound to notify the indorser whom he intends to hold liable. 19 A. 307, *Crane, executor v. Trudeau*.

5. The holder must prove notice of dishonor and due diligence to find the indorser. 20 A. 414, *Puig v. Carter*.

6. Service of notice of protest should be made on the executors, rather than on the son, when the estate is not liquidated. 20 A. 543, *Bird v. Doyal*.

7. No notice of protest is necessary to fix the liability of the acceptor of a bill. 27 A. 635, *Fuller v. Leonard*.

8. Demand may be made and notice of dishonor given by any competent witness. 20 A. 149, *Labadiolle v. Landry*; 19 A. 64. See No. 3.

9. Notice of protest served on the agent will not bind the indorser, unless the power of attorney expressly authorizes the agent to accept notice. 20 A. 541, *Bird v. Doyal*.

10. The holder of a bill must show that he used due diligence to find the residence of the indorser when it is unknown to him. 20 A. 543, *Bird v. Doyal*.

11. Service of notice of protest must be proven, to hold the indorser liable. 20 A. 372, *Abbat v. Borge*.

12. Where neither the holder, nor the notary knew that a petition for the

interdiction of the indorser had been filed, a few days previous to the protest, and there was as yet no legal representative appointed, service of protest at the domicile of the indorser is sufficient. 27 A. 130, *Weaver v. Penn.*

13. Notice of protest should be served on the liquidator of the partnership, where the firm had been previously dissolved. 21 A. 358, *Slocomb v. Lizardi.*

14. The indorsee of the payee on a draft must be notified in due time of the dishonor of the draft, else he is discharged. 28 A. 2, *Athens Manufacturing Co. v. Hunt.*

15. Service of notice of protest on the book-keeper in the indorser's office, or on his wife in his store, he not being in, is sufficient. 28 A. 48, *Aurianne v. Eschbacher.*

16. When the note is duly indorsed by the payee, and subsequent indorsers, and the evidence shows they intended to bind themselves as accommodation indorsers, although they may in one sense be sureties, they are entitled to notice. 21 A. 25, *Field & Co. v. New Orleans Delta.*

(b) Time of notice.

1. Notice of dishonor should be sent to the indorser as soon as demand can be made, after maturity. 24 A. 358, *Gayarré v. Sabatier.*

2. A bill of exchange transferred before maturity, protested five days after its maturity, where the acceptors, who failed previous to maturity, had sufficient moneys of the drawer in hands, to meet the same, and where the bill was an accommodation one for their benefit, will discharge the drawer. 16 A. 242, *Scott v. McCullough.*

3. A notice of protest served on the indorser at his residence in New Orleans, on the day after the protest, is sufficient. 15 A. 59, *Blackman v. Leonard.*

4. To bind the indorser, due diligence in making demand and giving notice must be shown. 19 A. 63, *Harp v. Kenner.*

5. Where the succession of the drawer was not opened, and commercial intercourse between the two sections in which the holder and indorser lived, had been prohibited, demand and notice are not required until a reasonable time after the appointment of an administrator and renewal of intercourse. 19 A. 66, *Jex v. Tureau.*

6. Where the confederate forces took the note away from plaintiff's possession, demand and notice of protest will be sufficient if made within a reasonable time after recovery of the note. 19 A. 72, *Union Bank of Tennessee v. Robertson.*

7. Due diligence in giving notice must be shown, to bind the indorser. 20 A. 548, *Cooley v. Shannon.*

(c) Where notice must be sent; with whom left and how addressed.

1) In general.

1. An indorser residing in the city where the note was protested, is entitled to notice of protest in person at his domicile; and where there is nothing to show that such domicile might not have been found on diligent enquiry, a note addressed to the indorser through the postoffice, is sufficient. 16 A. 10, *Miller v. Whitfield.*

2. Notice left at the bank where the note is made payable, is not notice to the indorser. 19 A. 90, *Greves, ex. v. Tomlinson.*

3. Notice of dishonor may be served at the place of business. 19 A. 184, *Knock v. Bringier.*

4. A notice of protest, delivered to a clerk at the place of business of the indorser, is sufficient. 20 A. 34, *Sullivan, Randolph & Brown v. Godwin.*

5. The indorser who has his office in one town and his domicile in another, may be served with notice of protest at either place. 20 A. 377, *Merz v. Kaiser & Wells.*

6. If the notice of protest cannot be sent by mail, the holder must use all other practicable means of bringing home notice of dishonor to the party whom he wishes to charge. 19 A. 43, *Citizens' Bank v. Pugh.*

7. To charge an indorser, the certificate of the notary need not show that notice of demand and non-payment was served on the indorser during business hours of the day after demand. If notice was served at any time during that day, it is sufficient. 2 Woods, 135, *Bonner v. New Orleans*.

8. Notice sent to another postoffice than that of drawer of the draft, will be of no avail. 21 A. 171, *Lafitte, Dufilho & Co. v. Perkins*.

9. Where the notice of protest actually reached the administrator of the succession, when addressed to the indorser, whose death was unknown to the notary and holder, at the post office of his usual residence, it will be equally binding as though addressed to the heirs by name. 22 A. 227, *Maspero v. Pedesclaux*.

10. An error in the return of the notary, as to the place of residence of the indorser, will not vitiate the notice when service was correctly made at the residence of said indorser. 25 A. 79, *Cadillon v. Rodriguez*.

11. A notice left in the hands of the son-in-law, at the office of the indorser, who resides in the parish, but who was temporarily absent and who never received the notice, is not valid. 25 A. 280, *Bank of New Orleans v. Millaudon*.

2) Notice by mail.

1. Notice of protest sent by mail to a post office in the parish of the indorser, is a good notice, in the absence of proof that there was another nearer post office. 19 A. 35, *Gallaher v. Tyson*.

2. Notice of protest deposited in the post office during interruption of postal communication, is not good. "Due diligence" must be shown in notifying the indorser after resumption of commercial intercourse. 19 A. 156, *Shaw v. Neal*; 43, *Citizens' Bank v. Pugh*; 20 A. 399, *Lapeyre v. Robertson*; 21 A. 548, *James & Co. v. Wade*.

3. The indorser being in the Confederate States at the time of the maturity of the note, notice put in the post office for him by the notary was sufficient, although he had been a resident of New Orleans for twenty years. 26 A. 63, *Jamison v. Pothaus*; 6 A. 364.

(d) Necessity and waiver of notice.

1) In general.

1. The drawer of a draft is discharged for want of timely presentment and protest. 18 A. 123, *Bridgeford & Co. v. Simonds et als.*

2. Where there is no evidence of service of notice of protest on the indorser, he will be discharged. 20 A. 213, *Cammack v. Gordon*; 1 A. 95.

3. The drawer of a bill of exchange is entitled to notice of protest upon the refusal of the acceptor to pay the amount, and cannot be held liable unless such notice is given. 15 A. 320, *Grieff v. Kirk*.

4. When the holder fails to demand payment and give notice of non-payment, he must, in order to recover, show that the drawer had no funds or effects in the hands of the acceptor, or that he had no reason to expect the draft to be paid. 22 A. 84, *Louisiana State Bank v. Buhler*.

5. A bought a tract of land from B, to whom he gave his mortgaged notes; B bought a tract from C, and gave in payment the notes received from A, after having indorsed them; notice of protest was not served on B; he was therefore released. 22 A. 432, *Smith v. McWaters*.

6. Where the drawers had reasonable ground to expect that their draft would be honored, they are entitled to notice of dishonor. 26 A. 154, *Eastin v. Succession Osborn*; 472, *Gardner & Co. v. McDaniel & Co.*

7. When a party indorses a note as surety, he is not entitled to notice; a protest is not necessary. 22 A. 41, *Adams & Co. v. Gordon & Denis*.

8. The drawer of a draft duly accepted, who has reasons to believe that the same will be paid, is entitled to notice of its dishonor, else he is discharged. 26 A. 689, *Johnson v. Flanagan et als.*

2) Waiver.

1. "We waive protest" signed by the indorser on the note, two or three hours before the time of protest, dispenses with the notice of dishonor. 21 A. 377, *Marsh v. Waterman*; 390, *O'Leary v. Martin, Cobb & Co.*

2. "Waiver of protest and notice of protest as indorsers," made at the place of payment, at the moment of maturity, dispensed with proof of other demand. 21 A. 390, *O'Leary v. Martin, Cobb & Co.*

3. The words "protest waived" written on the back of a promissory note, will not dispense the holder from making demand and giving notice to the indorser. 20 A. 538, *Wilkins v. Gillis & Ferguson.*

4. The drawer who notifies the drawee not to pay the draft, is not entitled to notice of dishonor. 21 A. 140, *Marx v. Wheelis.*

5. At maturity of the note, the indorsers waived protest and bound themselves for the amount, renewing the note for another period, to which arrangement the drawer was no party; *Held*: That it was not necessary to protest the note at the expiration of the extension. 28 A. 921, *Blanc v. Mutual National Bank.*

6. Under a general denial defendant cannot prove that his waiver was conditional and that the condition has not happened. See PLEADING, V. (b), 5), c., No. 8.

3) Bills drawn for drawer's accommodation, or without funds in drawee's hands.

1. Where the drawer had no funds or assets in the hands of the drawee, and no reasonable grounds to suppose that his draft would be paid, he is not entitled to notice of dishonor. 20 A. 43, *Blum v. Bidwell and Reddington.*

2. The drawer who had no funds in the hands of the drawee, and who promised to pay the drafts, with the knowledge that they had not been protested, will be held, without notice. 25 A. 562, *Louisiana Mutual Insurance Co. v. Walters & Elders.*

VIII. OF THE PROTEST, NOTARIAL CERTIFICATE, PROOF OF DEMAND AND NOTICE.

(a) *In general.*

1. Where the certificate of notice does not show the indorser to have been notified, and there is no other evidence fixing his liability, he will be discharged. 20 A. 228, *Crane, ex. v. Benit.*

2. Protests are to be taxed as costs. See EXECUTORY PROCESS, II. (b), 1), No. 3.

3. Liability of the bank for a failure to protest. See MANDATE, I. (c), No. 10; V. (b), 4), No. 8.

(b) *Formalities of protest and certificate; by whom made; their admissibility in evidence.*

1. No witness is required to a protest made by a notary. 18 A. 188, *Lallande v. Hope.*

2. Admissibility of foreign protests; and certificates of notices of protest. See EVIDENCE, XXVII. Nos. 2, 3.

(c) *Interpretation of the protest and certificate; their statements; sufficiency and effect as evidence.*

1. The certificate of service of notice of protest by the notary is evidence of all matters therein stated which it is his duty to certify, but not of extraneous facts, such as the agency of a party on whom notice is served. 18 A. 681, *Drumm v. Bradfute et al.*

2. The case will be remanded where the certificate of service of notice does not make full proof of all matters therein recited. 18 A. 681, *Drumm v. Bradfute et al.*

3. The facts within the personal knowledge of the notary or his deputy, stated in the certificate of notice of protest are evidence, subject to be contradicted. 17 L. 588; 19 A. 184, *Knock v. Bringier.*

4. A waiver of protest need not be in writing. 14 Wall. 361, *Pugh v. McCormick.*

(d) *Parol proof of demand and notice and admissibility of parol to contradict, or aid, the protest or certificate.*

1. Where the evidence of a deputy notary was introduced to explain a certificate of protest, and its admission was objected to; *Held*: That where the verity of the certificate is assailed, it is legitimate to use the statement of this witness to rebut the charge. 15 A. 396, *Manouvrier v. Marvel*.

2. A notary is a proper witness to prove the facts regarding the tender of collateral bonds, notwithstanding nothing was said about it in the protest, or any statement made at the time as a part of the *res gesta* in connection with the tender. 18 A. 336, *Butler v. Murison*.

3. Where proof of notice consists in the testimony of a witness who swears that he believed that the notice had been served, plaintiff's suit against the indorser will be dismissed as of *non suit*. 20 A. 138, *Letchford & Co. v. Richard & Co.*; C C. (2263), (2267).

4. The promise of the indorser to pay the note at all events, if the holder would not protest it, amounts to notice and may be proved by parol. 20 A. 417, *Helm v. Ducayet*; 2 N. S. 122.

5. It is competent for plaintiff to prove notice of dishonor by parol, although he alleged the fact to appear by protest and certificate of notice of protest, attached to his petition. 22 A. 479, *Dubuis v. Farmer*. See XII. (d).

6. Parol is admissible to prove the notice although it is otherwise alleged. See EVIDENCE, VII. No. 24.

IX. OF THE DISCHARGE BY INDULGENCE AND RELEASE OF PARTIES AND SECURITIES.

1. Where the holder consents to grant the maker a respite, provided that all his creditors would do the same, and the respite was never granted, this is no extension of time, and the indorser is liable. 22 A. 45, *Lamayer v. Uter*.

2. The creditor receiving collateral obligations to secure his debt, must use proper diligence to collect them, else he is liable therefor. 24 A. 550, *Succession John Liles*.

3. A surety who pays a note after prescription has accrued, cannot recover against the principal. 21 A. 722, *Hatchett v. Pegram*.

4. The extension having been agreed upon, the consent of the indorser, who at the same time waived demand, protest and notice of protest, will not affect his liability. 21 A. 209, *Walker v. Graham*.

5. Where the warrant held as collateral was given up without the consent of the indorser, the latter is released if the warrant was valid, and otherwise if not. 27 A. 202, *Union National Bank v. Cooley & Labat*.

6. The renewal of a note for a valuable consideration, without the consent of the surety, releases the latter. 27 A. 317, *Alter v. Zunts*.

X. OF ERASURES AND INTERLINEATIONS.

1. Whether the blank was filled fixing the rate of interest, after the signing, cannot affect the indorsers, who knew nothing thereof and who acted in perfect good faith, giving the indulgence and allowing the renewal upon the understanding that the notes were to bear the interest stipulated therein. 25 A. 319, *Battolara v. Erath*.

XI. OF THE PROMISE AND LIABILITY TO PAY AFTER DISCHARGE.

1. Where the holder of a draft seeks to recover on a subsequent promise, he must show that the promise was unconditional and made with a full knowledge of the discharge. 20 A. 43, *Blum v. Bidwell and Reddington*; 18 A. 363, *Butler v. Muson*; 22 A. 84, *Louisiana State Bank v. Buhler*; 19 A. 83, *Van Winckle v. Downing*; 21 A. 548, *James & Co. v. Wade*; 279, *Mitchell v. Glynn*.

2. A new promise to pay is not established by proof that defendant said first he thought the note had been settled, but if not, he would arrange it, and then, that he would see plaintiff and settle the amount of the note. 16 A. 255, *Penn v. Crawford*.

3. When the promise of the drawers to pay their drafts, after dishonor, is

accepted, but the condition attached to said promise is refused, the promise is of no effect. 26 A. 472, *Gardner & Co. v. McDaniel & Co.*

4. Although the note was executed between parties not competent at the time of the contract, the subsequent promise to pay, when the disability ceased, can be judicially enforced. 21 A. 130, *Ledoux v. Buhler*.

XII. OF THE PLEADINGS AND EVIDENCE.

(a) *In general.*

1. Plaintiff must prove his title to a note indorsed to a special indorsee, who does not appear to have parted with his ownership. 16 A. 255, *Penn v. Crawford*. See EVIDENCE, V. (c), No. 13.

2. It is not sufficient to deny the ownership of the note in plaintiff; defendant must aver that he has a good defense against the real owner; in default of such allegation, the court will refuse to compel plaintiff to answer interrogatories touching his ownership of the note. 18 A. 554, *Butler v. Stewart*; 30 A. 680, *Klein v. Buckner*. See *infra*, (c), 1), No. 6. MARRIAGE, XII. No. 3. PLEADING, I. (b), No. 2; II. (c), No. 2.

3. Defendant has no interest to contest plaintiff's ownership of the note, if he does not allege a good defense against the real owner, because judgment on the notes will be *res judicata* against any one who might afterwards claim an interest therein. 19 A. 182, *Ricard v. Harrison*; 18 L. 92.

4. The defendant cannot enquire into plaintiff's title to the note, unless he alleges that he has substantial grounds of defense against the true owner. 21 A. 732, *Case, receiver v. Watson & Dunham*; 226; 3 N. S. 291, 392; 4 N. S. 107; 2 L. 263; 4 L. 220; 14 L. 254; 2 A. 441; 11 A. 689; 19 A. 182; 20 A. 24; 18 L. 94; 27 A. 642; 24 A. 249, *Evans v. de Lisle*. See MARRIAGE, XII.

5. The testimony of the drawer of a draft in a suit against himself and first indorser, to the effect that the paper was accepted for their accommodation, is insufficient to charge the indorser. Such imperfect proof, tending to avoid the very promise of the drawees, implied by the acceptance in favor of the payee, could not have the effect of defeating the action. 16 A. 131, *Driver & Pierre v. Miller & Kirk*; 16 A. 131.

6. The holder of a promissory note, although he be only the agent of the owner, may sue and recover judgment in his own name. 19 A. 526, *Hunt v. Stone*.

7. The certificate of notice is not a part of the protest and should be specially offered in evidence, to hold the indorser; the court cannot otherwise take notice of the certificate although it be annexed to the protest. 23 A. 443, *Marchand v. Coffee & Wallace*.

8. Where the note is signed individually, no parol evidence can be offered to show that the drawer was acting as agent. 27 A. 38, *Fluker v. Kent*.

9. Possession is a presumption of ownership. See EVIDENCE, III. (c), No. 2.

10. When a jury may be ordered. See JURY, I. (c), Nos. 1, 2 and 4.

11. Plaintiff may sue on the consideration as well as on the note. See PLEADING, V. (a), 3). B., No. 5.

12. Annexing documents and swearing to petition. See PLEADING, V. (a), 4).

(b) *Competency of witnesses.*

1. Where the defense against a promissory note was, that plaintiff was not the *bona fide* holder of the note, that it belonged to the indorser, and had been transferred to plaintiff for the purpose of depriving the defendant of a good defense which he had against the indorser, namely, that the note had been given without consideration, and merely for the accommodation of the indorser, who was also payee; *Held*: That if this plea be true, the indorser would be liable to defendant for the reimbursement of whatever defendant was obliged to pay on the note; that this eventual obligation towards defendant created on the part of the indorser a direct interest in the event of the suit, and that at

least until defendant released the indorser from liability over to himself, he could not be allowed to testify in the cause. 16 A. 96, *Price v. Emerson*.

2. In a suit on a note against the maker, by a third holder, after maturity, the payee is a good witness to show an agreement between the drawer and the then holder, whereby the note is extinguished. 19 A. 165, *Nash v. East*.

(c) *Admissibility of evidence to explain or vary bills or notes.*

1. The want or failure of consideration of a note, or its illegality, may be established by parol, and the parties to the instrument have the right to enquire into the consideration. 15 A. 487, *Griffin v. Cowan*.

2. The want, failure or illegality of consideration may be established by parol between the parties to the note. 19 A. 165, *Reeve v. Doughty*.

3. Courts will not enforce payment when the consideration was confederate notes. *Ib*,

4. Under the allegation of want of consideration, defendant has the right to prove this fact by any legal evidence. 26 A. 361, *Pegram v. Cooper*.

5. Evidence to show want of consideration is not admissible, until it is shown that plaintiff is not a *bona fide* third holder. 26 A. 736, *Citizens' Bank v. Strauss*.

6. Parol is admissible to prove want of consideration. See EVIDENCE, XV. (d), 2), Nos. 1, 2.

7. Also to show how the note was given. See EVIDENCE, XV. (f), No. 3.

(d) *Admissibility of evidence under the pleadings, and variance.*

1. Where a party had given his note payable to bearer, and secured by mortgage, and upon suit being instituted upon it by a third person, had set up as a defense the want of consideration, and for the purpose of throwing the burden of proof on plaintiff, offered in evidence a notarial act passed between himself and the original holder of the note, wherein the receipt of the money was acknowledged, the loss of the note recited, reference made to the newspaper in which the loss was published, and the recorder was authorized to erase the mortgage; *Held*: That such an act was *res inter alios acta* as to plaintiff, and the recital therein contained could not be established by the instrument. 15 A. 348, *Hughes v. Carey*.

2. Where it is sought to prove payment of a promissory note, it is not necessary that the note be annexed to the commission in order to prove payment by the answers of the witnesses, whose depositions are to be taken. 15 A. 319, *Forbes v. Fahrmer*.

3. Extra judicial declarations by the payee and indorser are not admissible to defeat an action by a third holder, after maturity, against the maker. 19 A. 448, *Dowdy v. Sullivan*.

4. The note being a part of the petition, is admissible, although there is variance in its description. 25 A. 585, *Matthews v. Williams*.

5. A variance in the initials will be fatal. See EVIDENCE, VII. No. 8.

6. Variance as to manner of notice. See BILLS AND NOTES, VIII. (d), No. 5.

(e) *What must be alleged, what proved, and by whom.*

1) *In general.*

1. The drawer has no interest in raising the question of the right of the payee to indorse the note, as payment to the indorsee will discharge the drawer. 21 A. 665, *Taylor & Wife v. Littell*.

2. Where there is no evidence of notice of protest in an action against the indorser, the judgment will be one of non-suit. 20 A. 419, *Money v. Cosse*.

3. Where defendant pleads, even under oath, want of consideration for the note, the burden of proof is on him. 16 A. 367, *Pack v. Chapman*. See *supra*, IV. (b), Nos. 7, 8, 9.

4. The party who alleges the holder not to be the owner of the note, must prove it. 21 A. 731; 22 A. 457, *Miller v. Wisner, sheriff*.

5. The burden of proof rests on him who alleges the body of the check to have been forged, but admits his signature thereto. 28 A. 415, *Jean Mandin v. François Bonsignore*.

6. A defendant has no interest in raising the question of plaintiff's ownership of the notes and accounts sued upon, when by paying the same he is discharged. 27 A. 642, *Spears v. Spears*. See *supra*, (a), Nos. 2, 3, 4.

7. Under a general denial plaintiff must prove the date and waiver of protest. See PLEADING, V. (b), 5), B. No. 3.

8. Plaintiff must prove the authority of the agent to sign the note. *Ib.*, No. 4.

9. Under a general denial the indorser cannot prove that the post office to which the notice was sent, was not the nearest. See PLEADING, V. (b), 5), C. No. 4.

(2) Signature of the parties; denial of signature; filling up and striking out of indorsements.

1. An administrator may deny the signature of the deceased without incurring the penalty prescribed by art. 326, C. P. 1 A. 326, *Bradford v. Cooper, adm'r*.

2. The offering of a note in evidence upon the trial, without objection, dispenses with the necessity of proving the signatures, to charge the party against whom the note is offered. 15 A. 318, *Robertson v. Fullerton*.

3. Where a note payable to order is transferred by special indorsement, the party who sues on it must prove the special indorsement to entitle him to recover. 15 A. 257, *Talamon v. Myers*.

4. It is not incumbent on plaintiff to prove the signatures of the drawer and first indorser, when defendant is a subsequent indorser who transferred the note by indorsement, thus admitting the validity of his title. 19 A. 103, *Wolfe v. Poirier*.

5. The holder of a negotiable note, even during the trial, may strike out any indorsement not stated in the declaration. 20 A. 377, *Merz v. Kaiser & Wells*.

6. The genuineness of the signature to the note, denied by the drawer, must be proved, either by witnesses who have seen the defendant sign, or who declare that they knew it to be his signature because they have frequently seen him write and sign his name, or by experts and comparison of the writing. 21 A. 524, *Succession Leonard*.

7. The defendant is bound to acknowledge expressly or deny his signature, and if denied, the enquiry must be limited to its genuineness. C. P. 324; 22 A. 439, *Steele & Co. v. Hampton*; 24 A. 361, *Commercial Bank v. Harrison et als*.

8. Third persons who acquired the note by indorsement, to confirm their judgment by default against the drawer, should prove the signature of the indorsers. 24 A. 118, *Blum, Stern & Co. v. Sallis*.

9. Memoranda on the back of the notes are not admitted by a general denial. See PLEADING, V. (b), 4), No. 4.

10. The court will compare the genuine signature with the contested one, to ascertain the truth. 21 A. 385, *Glenn v. Ferguson*.

11. Plaintiff must prove the signature to the note where defendant denies the same under oath. 21 A. 148, *Huddleston v. Coyle*.

12. There are only three kinds of evidence to prove a signature: witnesses who saw the instrument signed; those who have often seen the party write and sign his name, and the comparison of handwriting. 29 A. 277, *Ticknor v. Calhoun*; 21 A. 148.

13. One may sign in Louisiana by making his mark as well as by writing his name, and the former style of signature is equally as binding as the latter. 12 P. 151, *Zacharie v. Franklin*.

14. When the note is signed by an agent, defendant may be allowed to deny the signature and urge other defenses. 29 A. 546, *Bayley & Pond v. Givens, Sr.*; 1 A. 325.

15. Defendant who denies his signature to the bond, can urge no other defense. See PLEADING, V. (b), 4), No. 6.

16. A general denial admits the signature. See PLEADING, V. (b), 5), B. Nos. 1, 2.

XIII. OF PAYMENT AND RENEWAL.

1. Payment in good faith to the holder of the note indorsed in blank, will discharge the drawer. 20 A. 24, *Davis v. Lusitanos Association*.

2. Money extorted by the commanding general of the United States army, from agents who indorsed a note merely for collection, did not extinguish the note, and the holders who have never received the amount may recover thereon. 20 A. 34, *Sullivan, Randolph & Brown v. Godwin*.

3. To grant an extension on a note, the one holding it for collection must be specially authorized by the owner. 20 A. 278, *Chappel et als. v. Raymond & Co.*

4. A note made payable in dollars, must be paid in lawful money. 22 A. 323, *Case, receiver v. Berwin*.

5. The drawer is bound to pay his note in legal currency, it matters not that it has been pledged to a bank whose notes were below par at the maturity of the note and sold by said bank thereafter. 22 A. 594, *Wynn v. Kelly & Co.*

6. The drawer of a note given to the city of New Orleans, who transfers the same, before maturity, is bound to pay the same, in legal money, and not "city money," to the holder. 22 A. 621, *Louisiana Mutual Insurance Company v. Cambon, Batts et als.*

7. A note given for batture property purchased from the city of New Orleans, and afterwards transferred to third parties, must be paid in legal currency, not in city money. 22 A. 321, *Case, receiver v. Berwin*.

8. The agent of the acceptor may offer to pay the bill of exchange, and the holder cannot object. 26 A. 453, *McStue & Value v. Warren & Crawford*.

9. A party paid a certain sum of money to obtain an extension of time on several notes; *Held*: That this money could not be pleaded in part payment of the notes. The notes formed one contract, the delay another, and the contract for delay was consummated, and could not be questioned in an action on the notes. 18 A. 715, *Walker v. Villavaso*.

10. Where the holder of a promissory note permits a payment to be indorsed on the note in confederate treasury notes, courts will not interfere, but will leave the parties where their conduct has placed them. 19 A. 493, *Luzenberg v. Cleveland*.

11. The owner of a note entrusting it to an unfaithful agent, who parts with it, cannot recover against the drawer who has paid the same in the hands of a *bona fide* third holder. 26 A. 741, *Floret v. Marchand*.

12. A bank can only be required to know the party to whom they pay, and the signature of the drawer; every indorsement need not be proven. 24 A. 220, *Lery & Solomon v. Bank of America*.

XIV. OF INTEREST, DAMAGES AND COSTS.

(a) *In general.*

1. When a note bears interest from maturity, the interest begins to run from the day of payment, without allowing days of grace. *Weems v. Ventress*, 14 A. 267, reaffirmed. 16 A. 252, *Leitchford v. Starns*.

2. Although the vendee may have good cause for suspending the payment of the price in order to relieve himself from the payment of interest, which was stipulated, he is required to make a deposit of the price. 15 A. 256, *Brother v. Cronan*.

3. The act of the 20th of March, entitled "an act relative to the rate of interest," had in view the sale of notes and other written obligations, their discount or sale for the purpose of raising money, and nothing more. The words interest or discount, in the sense in which they are taken in the act are synonymous, meaning the percentage deducted on the sum expressed in the

note or bond, etc. The provisions of the act cannot be so extended as to authorize and legalize all transactions between debtors and creditors wherein usurious interest is added to the sum really due as a consideration for an extension of time or for the indulgence of the creditor. 15 A. 329, *Crane v. Beatty*.

4. The holder of the note can only claim eight per cent. interest per annum, although the note bears more. 17 A. 200, *Williams v. Halsmith*.

5. Where the stipulated damages or interest exceed the highest conventional rate, the debt bears legal interest from the time it becomes due. 18 A. 557, *Tarver v. Winn*.

6. A contract to pay more than eight per cent. interest per annum, is usurious, unless included in the note. The penalty for a usurious contract is the forfeiture of the entire interest so contracted. 18 A. 712, *Walker v. Villaraso*.

7. It is no defense to an action on a promissory note that the amount named in the note was made larger than the real cash amount due on account of expected payment in confederate money or depreciated currency. 18 A. 532, *Williams, administrator v. Boozeman*.

8. The notes put in circulation by banks organized under the free banking law of 1855, bear no interest, and in case of non-redemption by the bank, must be regularly protested and then will bear twelve per cent. interest. 20 A. 293, *Barker v. Union Bank*.

9. Banking institutions organized under the general banking law of 1855, are exempt from paying interest on their notes in circulation. 20 A. 293, *Barker v. Union Bank of Louisiana*.

10. The city cannot be made liable for interest on the city money in circulation. 27 A. 187, *Smith v. City*.

11. The note being made in Mississippi, interest at ten per cent. was exigible as stipulated therein. 19 A. 373, *Nalle v. Ventress*; 8 N. S. 1; 3 A. 88.

(b) *Time from which interest runs, rate of interest and damages and the law by which they are governed.*

1. An accepted draft bears legal interest from its maturity, although defendants sought to find out the draft at the time of its maturity, it not being payable at any particular place. 19 A. 299, *Collins v. Sabatier*.

2. Where no actual injury has been proved, no damages will be awarded for the protest of a note made through error, although there was carelessness in the bank. 25 A. 331, *Lalaurie v. Southern Bank*.

3. See also INTEREST.

XV. OF FORGED BILLS AND NOTES.

1. The bank having paid a check forged by the clerk of the drawer, who did not denounce the fact to the bank officers, on being informed of the overdraft, but having condoled himself of the loss and continued the clerk in his employment, should be held liable to the bank for a second forged check drawn by the same clerk, shortly after the first. 23 A. 310, *Bank of America v. De-Ferriet*.

2. One who comes voluntarily as agent, on being informed that a draft accepted by the principal would be protested unless paid, and pays the draft, and the amount is immediately paid to the holder, has no recourse on the bank which received the draft for collection, if the same proves to be a forgery. 19 A. 296, *Stephenson v. Mount*.

3. Where the drawees who had better opportunities of knowing the signature of the drawer, paid several forged drafts which had been discounted by a bank, they cannot recover the amounts so paid from the bank. 28 A. 727, *Howard & Preston v. Mississippi Valley Bank*.

4. Banks certifying checks to be genuine, which afterwards prove to be forgeries, cannot be made liable for advances made on the forged checks, previous to certification, where the notice of the discovery of the fraud was made known within a few hours after certification. 26 A. 399, *Louisiana State Bank v. Hibernia and Germania National Banks*. See *supra*, V. (c), No. 5.

XVI. OF BILLS AND NOTES LOST OR STOLEN.

1. To enable a party to recover on a lost instrument, he must by direct testimony or by circumstantial evidence, supported by his oath, show such a state of facts as render the loss probable. The loss must also be advertised within a reasonable time. 22 A. 508, *Vance v. Cooper*.

2. Where the defendant does not ask for security against the future appearance of an instrument alleged to have been lost, the plaintiff is not bound to furnish it. 15 A. 463, *Weaver v. Cox*.

3. Where the paper is shown to have been destroyed, no advertisement is required. 15 A. 463, *Weaver v. Cox*.

4. Where it is shown that the bonds sued upon were lost or destroyed, and after due advertisement nothing was heard therefrom, judgment must be rendered in favor of plaintiff, execution not to issue until an indemnity bond be furnished to hold defendant harmless against a second payment. 18 A. 234, *Paulhamius et al. v. City*.

5. When the note has been lost, the judge should compel plaintiff to give security to defendant, against its re-appearance, before allowing execution to issue. 30 A. 503, *Nalle & Cammack v. Conrad*.

XVII. OF BANK NOTES AND MUNICIPAL CURRENCY; CERTIFICATES OF INDEBTEDNESS.

1. By an act approved February 27, 1869, entitled, "An act to authorize the city of New Orleans to fund its floating debt," the legislature ratified the issuance of the city notes. 23 A. 6, *Smith v. City*; 24 A. 20, *Same v. Same*.

2. To constitute a bill of credit within the meaning of the constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. The city notes were not bills of credit. *Ib*.

3. The metropolitan police warrants are not bills of credit, but certificates of indebtedness, issued by the corporation, to facilitate their business operations, and are receivable by the city, for taxes and licenses. 24 A. 37, *City v. Mount, treas.* See TAXES, III. (a), No. 8.

4. For interest on city money, see *supra*, XIV. (a), No. 10.

5. For interest on bank notes, see *supra*, XIV. (a), Nos. 8, 9.

BIRDS.

Protection of, 1877, E. S., p. 100.

BIRTH.

1. For revocation of will by subsequent birth, see DONATIONS, VI. (c), 3).

2. For evidence of birth, see EVIDENCE, IX. (c); XXIII. (d).

3. For recorder of births, marriages and deaths, see NEW ORLEANS, II. (g), 4). The office transferred to the Board of Health, by act 1877, E. S., p. 117.

BLOCKADE.

1. Effect of its violation, see OFFENSES AND QUASI OFFENSES, I. No. 2.

BOARD.

1. A boardinghouse keeper is not a public merchant. 25 A. 38, *Courcelle v. Saurinet*.

2. See CORPORATIONS, III. IV. (b); IX. NEW ORLEANS, II. (g), 1). ELECTION BY THE PEOPLE. RETURNING BOARD.

BOARD OF ENGINEERS.

1. See OFFICE AND OFFICER, No. 36. BONDS, No. 29. Acts of 1871, p. 39; repealed by 1877, E. S., p. 213; 1878, pp. 107, 218.

BOARD OF FLOUR INSPECTORS.

See FLOUR. 1870, E. S., p. 156.

BOARD OF HEALTH.

1. See acts 1870, E. S., p. 14; 1877, E. S., p. 117.
2. The sanitary commission created by the Board of Health are entitled to no compensation. NEW ORLEANS, II. (g²), No. 2.

BOARD OF LIQUIDATORS.

See CORPORATIONS, IX.

BOARD OF POLICE COMMISSIONERS.

Acts 1877, No. 35; 1878, p. 104.

BOARD OF PUBLIC WORKS.

Acts 1868, p. 82; 1870, p. 63.

BŒUF AND CROCODILE NAVIGATION COMPANY.

Aid of the State, 1870, p. 21; amended 1872, p. 123.

BONDS.

1. There is no act approved 15th of February, 1866, "for the purpose of paying certain debts." Bonds purporting to be issued by virtue of said act cannot be funded. 27 A. 582, *State ex rel. Forstall v. Board of Liquidation*.

2. The levee bonds issued under act No. 32, approved February 25, 1870, and under act 115, of 1867, are valid. 27 A. 582, *State ex rel. Forstall v. Board of Liquidation*.

3. The legislature has the right to authorize any citizen to question the validity of the bonds outstanding. Act No. 11 of 1875, is not unconstitutional. 27 A. 582, *State ex rel. Forstall v. Board of Liquidation*.

4. Innocent holders for value, before maturity, of the bonds issued by the State, should be protected. 29 A. N. R., *State ex rel. New York Guaranty, etc. Co. v. Board of Liquidation*. 15 Wal. 356; 1 Wal. 84, 384; 21 Howard, 359; 1 Black. 386; 21 Wal. 354, 139.

5. The "final decision" required by act of May 17, 1875, upon the validity of the State bonds, is not a decision on each and every bond, but on a series, leaving to the board of liquidation the exercise of a certain discretion to force a holder to apply to the courts for relief. 29 A. 690, *State ex rel. Forstall v. Board of Liquidation*; act 1874, p. 39; 1875, p. 110.

6. The holder of a State bond included in the list mentioned in act 1875, p. 110, cannot compel the board of liquidation to fund the bonds without first having obtained a decision upon their validity. 29 A. 264, *Exchange Bank v. Board of Liquidation*; 29 A. 690, *Forstall v. Same*.

7. The levee bonds issued under acts of February 25, 1870, and March 26, 1867, are valid obligations of the State. 29 A. 690, *State ex rel. Forstall v. Board of Liquidation*.

8. The bonds issued under act No. 35 of 1865 are valid. N. R., *State ex rel. Mathers, Jr. v. Board of Liquidation*. [N. B.—This act is bound with the volume of 1866, p. 56; the bonds are known as levee bonds; their issue amounted to one million dollars.]

9. The act of 1875, approved March 2, authorizing the board of liquidation to fund a debt due to the Levee Company at par, destroys the benefits anticipated by the funding act of 24th January, 1874, makes an unjust discrimination, and is for that reason contrary to the constitutional amendment making said funding a contract between the State and bond holders. 92 Otto, 531, *Board of Liquidation v. McComb*.

10. A railroad company is bound as indorser of a negotiable bond issued by a municipal corporation, payable to the railroad company or its assigns at a fixed date, and which the company has transferred by indorsement. 2 Woods, 135, *Bonner v. New Orleans*.

11. Under the funding act of 1875, one of the bonds of a certain issue being declared valid by the court, the whole issue is validated. 29 A. 690, *State ex rel. Forstall v. Board of Liquidation*.

12. For bonds given in conservatory process, see ARREST, IV. ATTACHMENT, IV. IX. INJUNCTION, V. VII. PROVISIONAL SEIZURE. SEQUESTRATION, II. (c); (d). SHERIFF, I. (b), 2), B.

13. For appeal bonds, see APPEAL, III.

14. For forthcoming bonds, see EXECUTION, V. (a), 7). SEQUESTRATION. PLEADING, VIII. (d), Nos. 8, 11. ATTACHMENT, IX. (b), Nos. 6, 7, 8. PROVISIONAL SEIZURE, Nos. 3, 4, 5, 10.

15. For bonds in criminal proceedings, see CRIMINAL LAW, V.

16. For bonds of administrators, curators, tutors, etc., see SUCCESSION, VII. (e). INSOLVENCY, III. (c). MINORS, I. (d). COURTS, II. (d), 5).

17. For bonds of indemnity, see BILLS AND NOTES, XVI. SALE, IV. (b), 3). SHERIFF, II. (b), 2), D. SURETYSHIP, (a), 3).

18. For bonds given by public officers, see SHERIFF, I. (a); II. (b), 4). CONSTABLE. OFFICE AND OFFICER. MORTGAGE, I. No. 4. How cancelled, 1873, p. 123; 1877, p. 19. How tested, 1878, p. 39.

19. For other bonds, see OBLIGATIONS, VII. (a), 4). SURETYSHIP.

20. For bonds issued by Donaldsonville, see DONALDSONVILLE.

21. For bonds issued to Mississippi and Mexican Gulf Ship Canal Company, see DRAINAGE, Nos. 14, 15; *infra*, No. 35.

22. See FUNDING.

23. For consolidated bonds of New Orleans, see INJUNCTION, II. (a), No. 9. OBLIGATIONS, II. No. 3.

24. The tutor may sign judicial bonds. See MINORS, III. (c), No. 2.

25. Police juries cannot issue bonds. See POLICE JURY, No. 6; 1877, E. S., p. 47.

26. Judicial bonds, how construed. See SUCCESSION, VII. (e), 4), No. 1.

27. Where the amount of the bond given to secure the faithful performance of the duties of an officer in a private corporation, is left in blank, no recovery can be had thereon. See SURETYSHIP, II. (a), 1), No. 5.

28. Water works bonds. See WATER WORKS, Nos. 3, 4, 5, 6, 7. BILLS AND NOTES, I. No. 9.

29. The bonds issued by the State to the Consolidated Association of the Planters of Louisiana, are valid and fundable. 30 A. 611, *Lessassier & Binder v. Board of Liquidation*; ——— *v. Same*.

30. These and similar bonds are not to be computed as a part of the State debt, which is in such case less than fifteen millions. 30 A. —, *State ex rel. New Orleans and Pacific Railroad Company v. F. T. Nicholls, governor*.

31. The bonds of one thousand dollars, Nos. 13, 14, 15, 16 and 20, issued to the Baton Rouge, Grosse Tete and Opelousas Railroad Company, are valid and fundable. 30 A. 449, *Hamlin v. Board of Liquidators*.

32. Bond No. 605, for five hundred dollars, issued in 1853 for the relief of the State treasury, indorsed in blank by the treasurer, is legal and fundable. 30 A. 449, *Hamlin v. Board of Liquidators*.

33. Bonds made in favor of H. C. Warmoth, when the law declares that they should be made payable to the Beuf and Crocodile Navigation Company, do not comply with the act, and are not valid. Nothing shows what was to be improved. 30 A. 34, *Lord Cecil et als. v. Board of Liquidators*.

34. The commercial law is not applicable to a transfer of State bonds. The question to be decided is whether or not the bond is valid. 30 A. 34, *Lord Cecil et als. v. Board of Liquidation*; 29 A. N. R., *State ex rel. New York Guaranty and Indemnity Co. v. Board of Liquidation*.

35. The bonds issued under act No. 116, of 1869, to the Mississippi and Mexican Gulf Ship Canal Co., cannot be funded; they were issued without consideration, the certificate of the engineer notwithstanding. *Ib.*

36. See NEW ORLEANS, MOBILE AND CHATTANOOGA R. R. Co.

37. Bonds issued for the relief of the treasury, 1870, E. S., p. 52; to pay the floating debt, 1870, E. S., p. 153; return to the State of the Mississippi and Mexican Gulf Ship Canal Company's bonds, 1872, p. 73; funding act 1874, p. 39; premium bonds of New Orleans, 1876, p. 54; bonds issued to the New Orleans, Mobile and Chattanooga R. R. Co. not to be funded, 1876, p. 130;

premium bonds to be issued to the securities of New Orleans, who paid Mrs. Gaines' judgment, 1877, p. 75; enforcement of funding act, 1877, p. 77.

38. A railroad company executed bonds for £225 each, if payable in London, or for \$1,000 each, if payable in New York or New Orleans, and with coupons attached, by each of which the company promised to pay £9 if payable in London, \$40 in New York or New Orleans, and the bonds declared the president of the company to be authorized, by his indorsement, to fix the place for the payment of both the principal and interest of the bonds. The bonds were indorsed as follows: "I hereby agree that the within bond and the interest coupons thereto attached shall be payable in —," and the indorsement was signed with the genuine signature of the president; *Held*: That while in this condition, the bonds were not negotiable instruments. 2 Woods, 141, *Jackson v. The Vicksburg, Shreveport and Texas R. R. Co. et al.*

39. A negotiable bond issued by a municipal corporation, without authority, will not be valid even in the hands of a *bona fide holder*. 29 A. 673, *Wilson v. Shreveport*.

40. The bonds issued to the New Orleans, Mobile and Chattanooga R. R. Co. are null, the condition of their issuance never having happened. See NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY.

41. For twelve months bonds, see EXECUTION, V. (a), 7); (d), 6); VI. (b).

BONUS.

Bonus for printing reports of Supreme Court. See 1877, E. S., p. 166.

BOOKS.

See CORPORATIONS, IV. (b). EVIDENCE, IX. (a). SUCCESSION, VIII. (d). PARTNERSHIP, II. (b).

BOSSIER.

Two additional police jurors to be appointed by the governor, 1878, p. 62.

BOUNDARY.

1. The action for boundary is never prescribed. C. C. 825; 21 A. 673; 23 A. 529, *Latiolais v. Mouton*; 16 A. 313, *Porche v. Lang*. See ESTOPPEL, No. 26. PRESCRIPTION, I. No. 4.

2. Where the titles proceed from a common author, in an action of boundary, the oldest title should be allowed its quantity first. 16 A. 313, *Porche v. Lang*.

3. Where two lots of ground with a double tenement were partitioned in kind between the co-proprietors, nothing being said as to the dividing line or the position of the tenements, the limits are defined by the buildings on each. 26 A. 581, *Lyons v. Dobbins*.

4. The recognition of plaintiff's rights to certain lands, acts as an estoppel against the defendant, in an action of boundary, where the latter sets up a subsequent confirmation of the government of his then inchoate title, to plaintiff's lands. 21 A. 673, *Arceneaux v. Benoit*.

5. Where a survey has been made in présence of both proprietors, establishing a boundary line, and they occupy up to the line for more than ten years, the action of boundary is prescribed. 20 A. 343, *Bisso v. Calvo*; C. C. (849).

6. In a controversy between the United States and a foreign nation in regard to national boundary, it is the duty of the courts of the United States to conform their decisions to the will of the legislative department of the government, if that will has been clearly expressed; therefore, the country between the Iberville and the Perdido, passed to the United States as part of Louisiana, by the treaty of Paris, signed April 30, 1803. 2 P. 253, *Foster v. Neilson*.

7. Parol is admissible to prove the fact of actual division and possession. 26 A. 547, *Fleming & Baldwin v. Scott & Watson*.

8. The testimony of a surveyor is admissible to prove that the fence is on the land of one of the litigants. See EVIDENCE, XIV. (b), No. 4.

9. Binding effect of an agreement relative to a survey. See PUBLIC LANDS, III. (a), No. 1.

BRASHEAR.

Incorporated, 1871, p. 228; now called Morgan City, 1876, p. 20.

BRIEF.

1. Prescription cannot be pleaded simply in the brief, before the Supreme Court. 20 A. 201, *Chase v. Davis*.

BROKERS.

See MANDATE. VI.

BUILDERS AND BUILDINGS.

1. Where there is only a passive violation of a contract, by the contractors leaving the work before it was completed according to the terms of the contract, and the proof shows that the work could have been completed at no great expense, the putting in default is a prerequisite to the recovery of damages. 15 A. 112, *Rizan v. Prescott*.

2. Where, by the terms of a contract, a certain amount is due to the contractors, sub-contractors and material men are entitled to be paid out of that amount on service of their attested accounts, although the contractors fail afterwards to comply strictly with their agreement. The proper test in such a case is: had the contractors complied with the stipulations up to the time of the falling due of the installments for which the sub-contractors and material men had served their attested accounts. 15 A. 124, *St. Paul Church v. Giraud*.

3. A party who has violated his contract to erect buildings for another, is not entitled to exact a specific performance, but can only claim the value of his work and materials. 15 A. 230, *McClure v. King*.

4. By the mechanics' lien law of 1855, it is required that the attested account of materials furnished should be left in the hands of the owners, in all cases, by the workman or material man, in order to bind the former. 15 A. 325, *Stewart v. Christy*. See, also, PRIVILEGES, III, (f).

5. Under the provision of the act of 1855, relative to the mechanics' lien, it is necessary to submit an arbitration in writing, and if, in point of fact, there was not a written submission, the award is not binding. 15 A. 686, *Baxter v. Sisters of Charity*.

6. The statute above mentioned requires that the contractor should signify his assent or dissent to the owner within ten days after being notified of the claims of his journeyman or other person, for work performed; but this is a matter which concerns only the contractor and owner. A payment made of a claim after the lapse of ten days and before the contractor has notified his dissent to the owner, will be binding between the two latter, the law presuming assent from the silence of the parties. This presumption, however, is not absolute, and, at any time before payment, the contractor may object to the correctness of the demand. 15 A. 686, *Baxter v. Sisters of Charity*.

7. When the contract exceeds five hundred dollars, it must be in writing and recorded. See REGISTRY, II. (a), 1), No. 2.

8. The owner has a right to cancel, at pleasure, the bargain, even if the work has already been commenced, by paying to the undertaker the expenses and labor already incurred and the profits on the contract. 18 A. 635, *Moore v. Howard*.

9. A contractor or builder is not answerable for the defects of construction which occur from unfitness of the soil to properly support the construction, and of which the owner was previously informed. 18 A. 581, *Powell v. Markham*.

10. The recording of contracts for building is not governed by date of registry as mortgages; the laborers and furnishers of materials *inter se* must share *pro rata*. 20 A. 454, *Jamison v. Barelli*; 3 A. 504; 6 A. 480.

11. If the unpaid portion of the price fixed by a building contract is not sufficient to pay all, it must be distributed ratably among the sub-contractors. 24 A. 443, *Haughery v. Thelerge*.

12. The owner of a building is not personally liable to a sub-contractor who has been employed by the contractor to make additions or work upon the building. 16 A. 127, *Pelarene v. Coudreau*.

13. The contract between the owner and contractor, while not binding on such sub-contractor, may still be admitted in evidence to show in what capacity the former were acting. *Ib.*

14. Where the owner interferes with the contractor, directs works to be performed not included in the contracts, anticipates the payment agreed upon, directs the workmen personally, purchases lumber himself; he will be responsible individually to the workmen and to the furnishers of material. 28 A. N. R., *Hammond v. Ross et als.*

15. For prescription of claim of workmen and material men, see PRESCRIPTION, III, (c), 4).

16. See PRIVILEGES, III, (f).

17. For buildings put on the land of another, see ACCESSION, II. (a).

18. For buildings and improvements made by one of two co-proprietors, see QUASI CONTRACTS, Nos. 11, 12, 13.

19. Right to compensate the penalty agreed upon, against the balance due to the builder. See COMPENSATION, I. No. 7.

20. Taking possession of the building after the repairs, does not estop the owner from setting up defects in the work. See ESTOPPEL, No. 56.

21. All constructions are presumed to belong to the owner of the soil. See EVIDENCE, III. (c), No. 5.

22. Parol is admissible to prove who paid for the building. See EVIDENCE, XIV. (c), No. 6.

23. A forced sale may be made of the building erected by defendant on plaintiff's lot. See EXECUTION, V. (a), 1), No. 5. *Ib.* 4), No. 14.

24. When the builder's lien is novated. See NOVATION, II. No. 5.

25. When it is not novated. *Ib.* No. 6.

26. When defects of construction should be made known to the contractor. See OBLIGATIONS, VII, (a), 5), B. § 2, No. 7.

27. The contractor who has violated his contract, can only claim the value of his work and materials. See OBLIGATIONS, VII. (a), 5), B. § 2, No. 2.

28. How the heirs of the architect must be paid if the contract be dissolved by his death. See OBLIGATIONS, VIII. (a), No. 4.

29. Defendant sued for damages done by a falling building, may be relieved, how, etc. See OFFENSES AND QUASI OFFENSES, II. (e), 2), No. 1.

30. When the owner had no control over the work, he is not responsible for the damages done to a workman by a falling wall. See OFFENSES AND QUASI OFFENSES, II. (e), 2), No. 17.

31. The contractor must be made a party to the suit between the workmen and the owner. See PLEADING, I. (e), No. 1.

CADDO.

1. See POLICE JURY, No. 4.

2. Juries, 1871, p. 155; bonds, 1873, p. 12; 1876, p. 34; relief of tax payers, 1874, p. 82; additional justice, 1876, p. 118; board of audit, 1876, p. 124; 1878, p. 99; additional justice, 1878, p. 150.

CALCASIEU.

Roads, 1878, p. 93; special tax, 1878, p. 102.

CALDWELL.

Tax, 1877, E. S., p. 183; special tax, 1878, p. 146.

CAMERON.

Parish of, created, 1870, p. 168; additional justice, 1877, p. 70; burnt records, 1878, p. 127.

CANAL.

See SERVITUDES, II. (a), 1).

CAPACITY.

To inherit. See DONATIONS, I. SUCCESSION, IV.

To contract. See OBLIGATIONS, III. (a).

To sue and be sued. See PLEADING, I. (c); (d); V. (b), 5), B.; VI. (a), 3); IX. (d). APPEAL, I. (e); II. (b).

To testify. See BILLS AND NOTES, XII. (b). EVIDENCE, XVI. (b). DONATIONS, VI. (a), 6).

CAPITAL.

See CORPORATIONS, VI. TAXES, II. (a); (b), 3).

CAPTURE.

See CONFISCATION.

CARRIERS.

1. Steam towboats plying between New Orleans and the Gulf of Mexico are common carriers. 18 A. 683, *Clapp v. Stanton & Co.*; 20 A. 495, *Same v. same*. See SHIPPING, VIII.

2. Vessels whilst being towed should be under the control of the towboat, which is responsible for the damages caused by the bad steering of the vessel. 18 A. 683, *Clapp v. Stanton*.

3. The towboat is responsible for damages occasioned by the breaking of a hawser and a collision between the ships whilst they were towed. 20 A. 495, *Clapp v. Stanton*.

4. See OBLIGATIONS, VIII. (e). SHIPPING, VIII.

CARROLL.

Court house, 1868, p. 148; juries, 1860, No. 1; additional justice, 1860, p. 14; court house removed, 1870, E. S., p. 59; district court, additional terms, 1872, p. 58; abolished, 1877, E. S., p. 39.

EAST CARROLL.

Parish of, created, 1877, E. S., p. 39; amended, 1877, E. S., p. 43; Bayou Macon boundary line, 1877, E. S., p. 219.

WEST CARROLL.

Created, 1877, E. S., p. 39; amended, 1877, E. S., p. 43; Bayou Macon boundary line, 1877, E. S., p. 219.

CARROLLTON.

1. The act of September 4, 1868, took away all control over the police from the city of Carrollton, and vested the same in the board of metropolitan police. The corporation of Carrollton has no interest to contest the constitutionality of the act, if it did, the act is constitutional. 21 A. 447, *Carrollton v. Metropolitan Police*. See METROPOLITAN POLICE.

2. The city of Carrollton is dispensed from giving bond in judicial proceedings. 21 A. 447, *Carrollton v. Metropolitan Police*.

3. The city, how represented. See PLEADING, I. (c), 4), No. 3.

4. Incorporated, 1859; supplementary act, 1873, p. 64; annexed to New Orleans, 1874, p. 119; municipal court therein, 1874, p. 119.

CASHIER.

See CORPORATIONS, IV. (b). PLEDGE.

CATAHOULA.

Portion of, annexed to Franklin, 1878, p. 64.

CATTLE.

See POLICE JURY. WALLS AND FENCES.

CEMETERY.

Jurisdiction over certain cemeteries ceded to the United States, 1868, p. 112.

CENSUS.

Of the State, for 1875; 1875, p. 57.

CERTAINTY.

In Judicial proceedings. See PLEADING, V. (a), 3); (b), 5); (c); (e); VIII. (b), 1).

CERTIFICATE.

Of surveyor. See NEW ORLEANS, II. (g), 2).

Of transcript of appeal. See APPEAL, VIII. (e).

Of bankruptcy. See BANKRUPTCY.

Of notice of protest. See BILLS AND NOTES, VIII.

Of election. See RETURNING BOARD.

Of registry. See REGISTRY, II. (c).

CERTIORARI.

1. It is useless to issue a *certiorari* if the appellants file a copy of the missing document. 25 A. 336, *Baltimore v. Parlange*; 29 A. 823, *Borde v. Erskine*.

2. No *certiorari* can issue where an appeal does not lie. 16 A. 164, *State v. Recorder*.

3. If the matter in dispute be really under three hundred dollars, the Supreme Court cannot take jurisdiction by way of a writ of *certiorari* any more than by a direct appeal, and article 857 of the Code of Practice is so far inapplicable to it. 15 A. 120, *Tuenzer v. Judge Third District Court*.

4. A writ of *certiorari* will not lie to protect the possession of a constable whom the district court attempts to divest of his possession; his remedy is by appeal, if the case be appealable. 15 A. 34, *State v. Judge Fifth District Court*.

5. A writ of *certiorari* cannot issue from the Supreme Court to a recorder's court to examine and arrest the prosecution against relator, under acts 1874, p. 47, relative to the sale of lottery tickets. 30 A. 451, *State ex rel. Geale v. Smith, recorder*. 9 A. 522; 15 A. 120.

6. Further, see APPEAL, VIII.

CESSIO BONORUM.

See BANKRUPTCY. INSOLVENCY. RESPITE. PRESCRIPTION, V. (d). COMPENSATION, IV. PLEADING, I. (c), 6). PARTNERSHIP, IV. (c). SUCCESSION, X. JUDGMENT, XV. (c).

CHARACTER.

See CRIMINAL LAW, XII. (d); (f), 3). EVIDENCE, XVI. (b), 3). LIBEL AND SLANDER. MALICIOUS PROSECUTION.

CHECK.

1. BILLS AND NOTES, XV.

2. For certified checks and obligations of banks, see BILLS AND NOTES, V. (d), Nos. 4, 5.

3. Payment of checks by the bank, see BILLS AND NOTES, XIII. No. 12.

CHURCH.

1. The ownership of the church carries with it the power of discharging the pastor. 4 R. 68; 25 A. 282, *African Methodist Episcopal Church v. Clark*.

2. Ministers may sue to recover the salary agreed upon with the congregation and the amount due to him as a mechanic for building the church. 30 A. 711, *Jones v. Trustees of Zion*.

CITATION.

I. IN GENERAL, AND HEREIN OF THE FORM AND REQUISITES OF THE WRIT.

II. OF THE SERVICE.

III. OF THE RETURN.

IV. OF THE WANT OF CITATION, ITS WAIVER AND EFFECT.

I. IN GENERAL, AND HEREIN OF THE FORM AND REQUISITES OF THE WRIT.

1. The insertion, in the citation of the name of a judge, whose title to the office is in dispute, forms no part of the citation, and will be regarded as surplusage. 22 A. 55, *State ex rel. v. Heald*.

2. An exception that the residence of plaintiff and defendant is not set forth in the petition, is without merit. *Ib.*

3. It is sufficient if the petition accompanying the citation, mentions the residence of the defendant. 22 A. 172, *Succession Marigny*.

4. Deputy clerks may sign citations, whether the clerk be present or not. *Ib.*

5. Citations should be addressed to the defendant, not to a third person not alleged to be defendant's agent; such citations are null and void. 23 A. 779, *Waddill v. Payne & Harrison*; 21 A. 27, *Leblanc v. Perrouc*; 4 A. 61, *Fuselier v. Robin*.

6. A citation addressed to an ordinary partnership and served at their elected domicile, does not bring any of the partners into court. The citation should be addressed to each of the members composing the firm. 25 A. 464, *Leblanc v. Marsoudet*. See No. 12.

7. All proceedings had under a judgment rendered without citation are absolute nullities and can confer no right. 26 A. 386, *Mathews v. Crescent City Mutual Insurance Company*.

8. Citation on the agent of one of the partners, after dissolution of the firm, is not sufficient to bring the partnership into court. 20 A. 75, *Michie v. Brown & Co.*

9. Citation addressed to the husband alone, and served on him, is not sufficient to authorize judgment against the wife sued with him. 19 A. 208, *Marrienneaux v. Downes*.

10. A citation addressed by error to Mrs. Bertoulin, who is plaintiff, will not authorize judgment against Mrs. Bourgoin, who is defendant, and on whom the citation is served. 19 A. 360, *Bertoulin v. Bourgoin*.

11. A citation must express the number of days given to the defendant, to file his answer, according to the distance from his residence. 21 A. 629, *Dupuy v. Arceneaux*; 4 R. 258.

12. A citation addressed to a firm and served on one of the partners, with a copy of the petition which sets forth the names of the partners, and which prays for judgment against each member *in solido*, is sufficient to obtain judgment against the partner cited. 30 A. 54, *Montague v. Weil & Bro.* See No. 6.

13. That provision of the constitution of the State of Louisiana, which requires the style of process to be, "The State of Louisiana," does not apply to citations. 2 Woods, 37, *Kimball v. Taylor*.

14. The absence of a seal from a citation in the copy of a record is no proof that the original citation was without seal. 2 Woods, 37, *Kimball v. Taylor*.

15. A citation must be addressed to the defendant, not to his agent. A judgment by default on such a citation is null. 28 A. 625, *Jacobs v. Frere*. See ABSENTEES, II. No. 15. See *infra*, II. No. 1.

16. Publication on three several days, during thirty days, is all that is required for citation of the delinquent city tax payers. See NEW ORLEANS, II. (c), 1, No. 7. But see acts 88 and 96, E. S. of 1877.

17. Citation of delinquent tax payers by advertisement, is constitutional. See NEW ORLEANS, II. (c), 1, No. 14.

18. For citation on absentees, see ABSENTEES, II.

II. OF THE SERVICE.

1. Service of citation on one who is not alleged in the petition, to be the agent of defendant, is not valid. 23 A. 304, *Jones v. Jones*; 21 A. 26, *Leblanc v. Perroux*. See *supra*, I. No. 15.

2. Service of petition and citation on the overseer, who resides on the plantation, but not under the same roof with his employer, during the absence of everybody from the latter's house, is sufficient and valid. 24 A. 356, *Rousseau v. Gayarré*.

3. Notice of citation at domicile, in the hands of a person transiently there, but not residing in the house, is not valid. 24 A. 617, *Lewis v. Smith*.

4. Service of a citation at the elected domicile of an ordinary partnership, addressed to the firm only, does not have the effect of bringing the defendants into court. 25 A. 464, *Leblanc v. Marsoulet*.

5. Where there is no legal service of citation, the case will be remanded. 18 A. 337, *Johnson's Ex. v. Brown*.

6. Service of an irregular or erroneous citation is not void when the service is personal. 2 Woods, 37, *Kimball v. Taylor*.

7. When husband and wife are co-defendants, citation served on the husband alone is sufficient. 29 A. 749, *Jordan & Co. v. Anderson*; 30 A. 552, *McElvin v. Taylor*.

8. For service of citation on absentees, see ABSENTEES, II.

9. Parol is inadmissible to prove citation. See EVIDENCE, XV. (j), Nos. 2, 3. CITATION III. No. 1.

10. On whom served, when laborers sue for wages, 1873, p. 163.

III. OF THE RETURN.

1. The proof of the service of citation is not a matter *en pais*, and there can be no evidence of it but the sheriff's return; no parol evidence can be received. C. P. 200; 1 R. 30, *Harris v. Alexander*; 21 A. 27, *Leblanc v. Perroux*; 682, *Gliddon v. Goos*. See II. No. 9.

2. The return cannot, after judgment, be amended so as to render valid a judgment otherwise null; but it may be amended before judgment. 21 A. 27; 10 M. 91; 3 N. S. 489, *Auber & Buchler*; 2 R. 485, *Elmore v. Bell*; 5 L. 287, *Rochelles' Heirs v. Cox*.

3. Where the citation is served at the domicile of a party, the omission of the sheriff to state in his return that the person upon whom the service was made resided in the house with the defendant, will be a fatal objection to the citation. 15 A. 462, *Feazel v. Cooper*.

4. A return on the citation that it was "served on —, a white person, about the age of 14 years, residing in defendant's house," is defective, because no mention is made that it was at the usual place of domicile or residence of the defendant. 19 A. 33, *Wm. McCracken v. Simms*.

5. A return of service of citation at domicile should state that the person to whom the citation and petition were delivered, resided at the domicile of the defendant. 21 A. 613, *Cole, Jr. v. Hocha*.

6. The return of the service of citation, must state the absence of defendant from home, and that the person with whom the citation was left, was residing there. 21 A. 630, *Arnault v. St. Julien*; 19 L. 36; 4 A. 363; 7 A. 268.

IV. OF THE WANT OF CITATION, ITS WAIVER AND EFFECT.

1. Want of citation is waived by the defendant who appears for any other purpose than to plead the want thereof. 23 A. 803, *City v. Walker*; 27 A. 542, *Heard v. Patton*; 432, *Nicholson v. Jennings*.

2. A defendant who in a petition to bond the writ of sequestration, alleges that the suit is "*pending*" against him, cannot be heard to urge the irregularity of the citation on an appeal from the judgment confirming a default. 21 A. 438; 12 A. 368; 24 A. 272, *Bush & Thompson v. Dewing*.

3. A judgment rendered against a party who has neither been cited nor appeared, is an absolute nullity. 1 N. S. 9; 8 N. S. 145; 6 L. 577; 16 L. 570; 17 L. 42, 448; 2 A. 403; 13 A. 150; 1 M. 220; 10 A. 174, *Amonette v. Crandell*; 6 R. 592; 21 A. 27, *Leblanc v. Perroux*.

4. A court can presume nothing with respect to a party being cited; nothing will cure the defect of citation or want of service except appearing and answering to the merits. 5 N. S. 429; 7 N. S. 161; 1 R. 30; 13 A. 374; 21 A. 27, *Leblanc v. Perroux*.

5. An exception of want of citation is waived by defendant who subsequently takes a rule on plaintiff to show cause why the default entered before the filing of his exception, should not be set aside, on the ground that the proceeding was informal and contrary to law. 21 A. 438, *City v. Hall*.

6. Where there is no citation all proceedings had, are null, unless defendant appears and answers. 17 A. 91, *McCan et al. v. Steamer Golden Age*.

7. The want of citation is a cause of nullity, which may be urged on appeal. 15 A. 86, *Shannon v. Goffe*.

8. The sheriff is without capacity to certify a waiver of citation; such waiver must either be made in express terms of record or may be inferred from the appearance of defendant in person or by attorney. 15 A. 86, *Shannon v. Goffe*.

9. A want of citation is cured by the appearance of defendant in the suit, for any other purpose than to allege want of citation. 21 A. 438, *City v. Hall*; 23 A. 803, *City v. Walker*.

10. An answer of the curator *ad hoc*, in cases of absences, is not a waiver. See ABSENTEES, II. No. 16.

11. A plea of *lis pendens* cures the citation. See ESTOPPEL, No. 2.

12. Parol is admissible to prove that the judgment was rendered without citation. See EVIDENCE, XV. (j), No. 5.

13. The unknown partner who answers, is bound by the decree. See JUDGMENT, XII. No. 1.

CITIZEN.

1. A free person of color, in 1844, was a citizen of the United States. 25 A. 189, *Walsh v. Lallande*. See COLORED PERSONS.

2. Corporations are not citizens. See LICENSE, No. 33.

3. DOMICILE, I. CONSTITUTION, I.

CITIZENS' BANK.

See CORPORATIONS, X. (g).

CIVIL.

1. For civil commotion, see RIOT.

2. For civil death, see BANKRUPTCY. INSOLVENCY. PLEADING, I. (c), 6).

3. For civil possession, see PRESCRIPTION, II. (b), 1), c.

CIVIL RIGHTS.

See COLORED PERSONS.

CLAIBORNE.

Minden, Limits of, 1871, p. 47; relief of tax payers, 1872, p. 131; 1873, p. 144; increase of jury, 1876, p. 20; burnt records, 1868, p. 165; floating debt, funded, 1877, p. 48; additional justice, 1877, E. S., p. 85.

CLERKS.

See LEASE, II. (c). PRESCRIPTION, III. (e). PRIVILEGE, I. (d). SHIPPING, V. (c); X. (b), 1).

CLERKS OF COURT.

1. Proceedings carried on before a clerk of court to probate a will, are in contravention of articles 87 and 133 of the constitution of 1868, and therefore null. 22 A. 93, *Succession Tanner*.

2. The clerk has no right to require payment for the transcript before delivering it, when the appellant has furnished his bond of appeal. 22 A. 563, *State ex rel. Kearney v. Clerk Seventh District Court*; 578, *State ex rel. Bernard v. Clerk Sixth District Court*; 585, *State ex rel. Anselmi v. Clerk Second District Court*; 23 A. 762; 17 A. 67.

3. The transcript must be paid for by appellant before delivery. 28 A. 580, *State ex rel. Richard v. Robertson, clerk*. See acts 1872, p. 71.

4. Act No. 51 of 1868, section 4, making clerks of district courts *ex officio* clerks of the parish courts, is in conflict with article 117 of the constitution of 1868. Section 9 of said act is in conflict with article 86 of the constitution, and the parish judge is entitled to the fees of his office. 21 A. 138, *Bonauchaud v. D'Hebert*.

5. Act of 1869, No. 110, authorizing clerks of district courts to perform clerical duties of parish courts, does not create an office, and is therefore constitutional. 21 A. 563, *Hawley v. Barlow*.

6. Under the act of 1846, p. 63, clerks of the several district courts had authority to issue commissions to take testimony, in and out of the State, to fix the return day thereof and to appoint commissioners to execute the same. 16 A. 88, *Cannon v. White*; 1 A. 325; 9 A. 169; 1850, p. 99.

7. The clerk of the Third District Court for the parish of Orleans, has no interest and cannot compel the city of New Orleans to sue in his court, on all tax bills below one hundred dollars. He cannot allege that the other courts are without jurisdiction to entertain such suits. 24 A. 115, *State ex rel. Byerly v. Walton, administrator finance*.

8. The clerk of the Superior District Court for the parish of Orleans, is not entitled to extra compensation for the transfer of city tax suits from other courts to his; the law fixes two dollars as compensation for all proceedings had in a city tax suit. 25 A. 301, *Burk v. City*; act No. 48 of 1871, section 21.

9. The 52d section of act No. 42 of 1871, relating to assessors and tax collectors, and all others named in connection with the assessment and collection of taxes, who are to be paid for costs, does not apply to clerk's costs. 25 A. 343, *State of Louisiana ex rel. Lynne v. Clinton*.

10. The city of New Orleans having caused writs of *feri facias* to issue in the tax cases, has the right to have said writs set aside, but cannot, by so doing, deprive the clerk of his legitimate costs. 26 A. 48, *Lynne v. City*.

11. The deposit of money in court with the clerk is not a payment to the creditor, or any person authorized by him or by law to receive it for him. 14 A. 328, *Alexandre v. Saloy*.

12. A deputy clerk may issue a commission to take testimony. 16 A. 399, *Rhodes v. Meyers*.

13. A deputy clerk may sign the certificate of a transcript of appeal. 27 A. 507, *Burton v. Hicks*; 3 A. 247; 15 L. 33.

14. It is the duty of the clerk "to receive, file and record all mandates and decrees rendered by the Supreme Court and to issue all legal process thereon." 1855, p. 51, § 5; Rev. Stat. 1870, section 464. No order of court is necessary. 29 A. 649, *Edwards v. Whited*; 24 A. 619, *State ex rel. Boves v. Herron*. See EXECUTION, I.

15. It is not against good morals for a clerk of court to agree that his deputy shall perform the duties of the office and give him a per-centag of the fees. 30 A. 282, *State ex rel. Lisso v. Peck*.

16. General fee bill, 1870, p. 161; clerk First District Court, 1870, E. S., p. 106; salary of clerks Superior Criminal Court and First District Court for the parish of Orleans, 1877, Nos. 17 and 18; short hand reporters, 1876, p. 149; one dollar for clerk in tax suits brought by New Orleans, 1877, E. S., p. 127; fee bill, except Orleans, 1876, No. 99, bound with the acts of 1878; clerks to copy all documents filed, 1878, p. 42.

COAL OIL.

1. Inspection of, 1877, E. S., p. 60; this act is constitutional. 30 A. —, *James G. Clark et als. v. Board of Health*.

CODES.

1. For promulgation of the Civil Code, Code of Practice and Revised Statutes, known as acts 96, 97, and 98 of 1870. See LAWS, I. (b), No. 5.

2. French text of Code of Practice. See LAWS, II. (b), No. 2.

3. CIVIL CODE—amended or repealed articles:

Articles.	Amended or Repealed.	Articles.	Amended or Repealed.
138.....	1870, p. 108	1957.....	1871, p. 199
139.....	1877, E. S., p. 192	2061.....	" "
346.....	1876, p. 106	2218.....	" "
495.....	1871, p. 199	2386.....	" "
560.....	" "	2453.....	1878, p. 31
580.....	" "	2495.....	1871, p. 199
1211.....	" "	2566.....	" "
1221.....	1877, E. S., p. 12	2591.....	" "
1223.....	" "	2665.....	" "
1308.....	1871, p. 199	2740.....	" "
1468.....	" "	2792.....	" "
1568.....	" "	2977.....	" "
1581.....	" "	2986.....	" "
1589.....	" "	3042.....	1876, p. 109
1729.....	" "	3125.....	1871, p. 199
1741.....	" "	3162.....	1872, p. 36
1794.....	" "	3260.....	1871, p. 199
1844.....	" "	3274.....	1877, p. 59
1945.....	" "	3442.....	1871, p. 199

4. CODE OF PRACTICE—amended articles:

Articles.	Amended or Repealed.	Articles.	Amended or Repealed.
163.....	1876, p. 106	625.....	1877, E. S., p. 87
488.....	1877, E. S., p. 176	644.....	1872, p. 93; 1874, p. 53; 1876, p. 123
573.....	1871, p. 151	1116.....	1877, E. S., p. 178
575.....	1876, p. 49		
582.....	1878, p. 129		

COIN.

See DEPOSIT, I. No. 1. CURRENCY.

COLLATERAL.

1. Collateral kinsmen. See SUCCESSION, II.; III.
2. Collateral facts. See PLEADING, V. (d). EVIDENCE, XV. (f); XVI. (c).
3. Collateral security. See MANDATE, V. (b). NOVATION, II. PLEDGE. PRIVILEGE, III. (b). SURETYSHIP, I. (c); II. (a), 3).

COLLATION.

See SUCCESSION, V. (c), 2).

COLLECTOR OF CUSTOMS.

See OFFICE AND OFFICER.

COLLISION.

See SHIPPING, VII.

COLORED PERSONS.

1. Act No. 38 of 1869; prohibiting a discrimination between white and black passengers, on account of race or color, is not unconstitutional; it is not a regulation of commerce. 27 A. 1, *Decuir v. Benson*.
2. WYLY, J., *dissenting*: The act regulates commerce. *Ib.* See COMMERCE, No. 2.
3. A man of color has a right to drink in a white man's coffee house. 27 A. 14, *Sauvinet v. Walker*; 92 U. S. (Otto's) 90, *Walker v. Sauvinet*.
4. WYLY and HOWE, JJ., *dissenting*: No excessive damages should be allowed for such refusal. *Ib.*
5. A colored man is entitled to damages for a refusal to admit him in a theatre. 28 A. 382, *Peter Joseph v. Bidwell*.
6. WYLY, J., *dissenting*: The ticket of admission was purchased with the

contract written thereon, that it was optional with the defendant to refuse admittance on refunding the amount, and the only claim the colored man had was to get back the price of admission. A white man would not be entitled to any damages, and the law cannot discriminate in favor of a colored man. *Id.*

7. The ordinance of the city of New Orleans, approved April the 7th, 1858, relative to the assemblages of colored persons, free or slave, in violation of law, is not unconstitutional in its provisions. 15 A. 441, *African Church v. New Orleans*.

8. A colored person was a citizen. See CITIZEN, No. 1.

9. Discrimination in conveying colored persons. See COMMERCE, No. 2.

10. Summary trials of civil rights cases, 1870, E. S., p. 93.

COMMERCE.

1. Hay inspection is not a regulation of commerce. See CONSTITUTION, II. (c), 1), No. 2.

2. The act of 1869, p. 37, R. S., 1870, p. 93, providing that no discrimination shall be made between blacks and whites, on common carriers, is a regulation of inter-state commerce, when applied to carriers traveling in and out of the State. 95 U. S. (Otto's) 485, *Hall v. Decuir*. See also 1873, p. 156. COLORED PERSONS, Nos. 1, 2.

COMMERCIAL.

See TAXES, II. (a). THINGS, I. (b). CORPORATIONS, X. (b); (j); (w).

COMMISSION AND COMMISSIONER.

1. To take testimony, See EVIDENCE, XVIII. (d), 2); XIX. CRIMINAL LAW.

2. Commission of Executor, etc. See SUCCESSION, VIII. (f), 8), c.

3. Commission of factors, brokers, etc. See MANDATE, III. (b). ATTORNEY, II. (c). PRIVILEGE, III. (d); (g). EVIDENCE, XVI. (b), 2), F; 6). PRESCRIPTION, III. (e).

4. Commission of tax collector. See TAXES, III. (c).

5. Commissioner of deeds. See EVIDENCE, XXIV. (a).

COMMISSION MERCHANT.

See FACTOR.

COMMON.

1. Law. See LAWS, VIII.

2. Highway. See NEW ORLEANS, I. (a); II. (d), 2). THINGS, I. (b).

3. Carrier. See CARRIERS and references.

4. Walls. See SERVITUDE, II. (a), 2), c.

5. For property held in common, see PARTITION.

6. For use made by one joint partner of property in common, see LEASE, I. (a), No. 9.

7. For buildings erected on common property, see QUASI CONTRACTS.

8. For commission of a co-proprietor who collects rent, see QUASI CONTRACTS, Nos. 11, 12, 13.

COMPENSATION.

I. IN GENERAL.

II. AS AFFECTED BY CHARACTER OF THE DEBTS.

III. AS AFFECTED BY CHARACTER OF PARTIES.

IV. IN MATTERS OF INSOLVENCY AND SUCCESSIONS.

I. IN GENERAL.

1. A plea in compensation admits the claim sued upon. 12 L. 397; 18 L. 6; 14 A. 54; 22 A. 442, *Ashly v. Scholars*. See PLEADING, VIII. (a).

2. The payee of a draft drawn by a third party on a bank which refused payment, cannot plead such draft in compensation to his note held by the bank. 23 A. 49, *Case, rec'r v. Henderson*.

3. When the debt which the defendant offers in compensation is of less amount than the one demanded, compensation only takes place for that amount, and judgment must be given in favor of the plaintiff for the surplus; the defendant must pay the costs, unless he shows that he has made a real tender of such surplus at the time and in the manner provided by law. C. P. 369; C. C. 2203; 16 A. 181, *Stewart v. Harper*.

4. Compensation is of three kinds: legal or by operation of law; by way of exception; and by reconvention. *Id.*

5. No compensation can be pleaded by a bank, based on the indebtedness of a stockholder, so as to prevent the transfer of his stock sold under execution by the sheriff, although the by-laws, passed by the board of directors after the issuance of the stock prohibits a transfer when the stockholder is indebted to the bank. 22 A. 99, *Bryon v. Kendall*. See CORPORATIONS, VI.

6. The court cannot order that the judgment be credited with the amount of another judgment disconnected from the pleadings. 20 A. 106, *Patterson v. City of New Orleans*.

7. The owner of the building on being garnisheed for a debt due by the contractor, has a right to compensate against any balance due by him, the penalty incurred by the contractor for the delay in completing the building. 28 A. 733, *Succession Thompson v. S. B. Allison*.

8. Defendant being the holder of a note against plaintiff when a written compromise was entered into whereby all claims and debts which plaintiff and defendant had against each other would be considered settled, the latter cannot, when sued on a debt which was contracted since the compromise, plead in compensation the note held by him at the time of the compromise. Not reported, *Lorrain v. Dechamps*; O. B. 45, fo. 10.

9. Where the plaintiff, by agreement, was to take up certain notes in part payment of a property sold to defendant and was besides indebted to the defendant, the note so taken up became extinguished by compensation. 28 A. n. r., *T. Lafon v. W. B. Hyman*.

10. The plea in compensation has a retroactive effect to the time when the plaintiff and defendant became indebted to each other; no prescription accrues when the debts existed simultaneously. 17 A. 246, *Millaudon v. Lesseps*.

11. The transferee of an open account can only acquire the rights of the transferer, and if compensation had taken place before the transfer, the defendant when sued should be allowed to prove it. 25 A. 117, *Adams v. Webster*.

12. There is no issue for a jury under a plea of compensation. See JURY, I. (c), No. 6.

13. When the creditor becomes indebted to his debtor, compensation takes place. See PAYMENT, III. No. 9.

14. See PLEADING, VIII. (a).

II. AS AFFECTED BY CHARACTER OF THE DEBTS.

1. If the claim set up by defendant is not equally liquidated and demandable, compensation does not take place. C. C. 2205; 22 A. 430, *Castille v. Offutt*.

2. The note of the partnership is inadmissible, as an offset against the individual claim of one partner. 22 A. 443, *Ashley v. Scholars*. See III. No. 6.

3. A due bill signed by the deceased, cannot be compensated by the conditional obligation of the surety of the administrator who may be indebted to the succession. 23 A. 612, *Succession Arick*.

4. A factor cannot compensate his claim by retaining the proceeds of cotton sold, from a consignment made to him by the trustee of his debtor. 23 A. 797, *Bell, trustee v. Powell*.

5. A claim for damages cannot be pleaded in compensation to a note. 24 A. 208, *Pike, Lapeyre & Brother v. J. M. Wells*.

6. An insolvent and his heirs are bound by the insolvent's oath to his schedule; they cannot set up against the vendor, an indebtedness not set down on the schedule, and which arose previous to the insolvency, as compensation to the purchase price. 26 A. 365, *Pardo v. Pardo*.

7. An account does not compensate a note. 26 A. 716, *Woods v. Viosca, Jr.*

8. The purchaser of an heir's interest, cannot plead such interest in compensation to his notes held by the estate. 22 A. 249, *Naquin v. Durac*.

9. Attorneys' fees for professional services cannot be pleaded in compensation to a note. 28 A. 96, *Behrens v. R. J. Ker*.

10. The price of certain movables, having been ascertained, may be pleaded in compensation for rent. 19 A. 465, *Hope v. Howard*.

11. The depository is not authorized to apply the funds on deposit to the payment of the debts of the depositor, except if there be a special mandate from the depositor, or a course of dealings justifying the application. 23 A. 116, *Murdock & Co. v. Citizens' Bank*; 2 A. 27; 6 A. 46; 7 A. 53; 11 A. 73; 12 A. 257.

12. A judgment from which a suspensive appeal has been taken, cannot be pleaded in compensation to mortgage notes; the case is different if the appeal be devolutive. 18 A. 527, *Sandel v. George*; 12 R. 376; 2 A. 243.

13. A claim for damages alleged to have arisen in another suit, disconnected from plaintiff's demand, cannot be pleaded in compensation and reconviction to a suit on a note and an account. 28 A. 574, *Moss v. Munn & Co.*

13. The vendee cannot plead compensation of the price when the sale was made for cash. 28 A. 627, *Gilbeau & Bro. v. Melancon*.

13. See PLEADING, VIII. (a).

14. No compensation takes place as regards taxes. See TAXES, I. Nos. 8, 14.

III AS AFFECTED BY CHARACTER OF PARTIES.

1. Compensation does not take place between a bank and its depositors, and the former cannot apply the funds of the latter to the payment of the debts of the depositor. 23 A. 113, *Murdock & Co. v. Citizens' Bank of Louisiana*; 2 A. 27; 6 A. 46; 7 A. 53; 11 A. 73; 12 A. 257.

2. Having received the cotton from the tutor as the property of the minor, the merchant cannot appropriate the proceeds thereof to the payment of the obligations due to him by the tutor, individually, without the latter's consent. 24 A. 218, *Succession Norton*.

3. The husband who settles with his wife's debtor, by taking the judgment obtained by his wife, against his creditor, in deduction of his debt, thus extinguishes the judgment by payment. 25 A. 288, *Milttenberger v. Keys, sheriff*. See *infra*, IV. No. 3.

4. No salaried officer of the city government, whose salary is to be paid in the manner pointed out by law, can, while acting within the strict line of his duty, collect money belonging to the city, and when sued, plead in compensation the salary which may be due to him. 27 A. 681, *City of New Orleans v. M. Finnerty*; *Same v. Turnbull*; 650, *Same v. Fassman et als.*; *Same v. Fitzgerald*.

5. An individual account cannot be pleaded in compensation of a claim due to a tutor. 27 A. 537, *Spears v. Spears*.

6. A partnership debt is not extinguished or compensated by the indebtedness of the creditor to one of the partners, although such partner may, by way of defense or by exception, offset or oppose the compensation of his demand to that of the creditor. 91 Otto, 134, *Beauregard v. Case*. See *ante*, II. No. 2.

7. An individual who holds public money in his hands cannot defend himself against an action brought by the government, by purchasing claims against it even though under the laws of Louisiana a debt be assignable, so as to enable the assignee to plead it by way of set off against the United States. The fiscal action of the government cannot be made to depend upon the local jurisdiction or law of any particular State. 3 P. 319, *State v. Robeson*; but see PLEADING, VIII. (b), 1), No. 11.

8. In suits brought by the United States against its officers for money due

to the government, the defendant will not be permitted to plead credits due him by the government, except such as shall appear to have been presented to the accounting officers of the treasury, and by them disallowed, unless it shall be proved to the satisfaction of the court, that the defendant is in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credits at the treasury, by absence from the United States or some unavoidable accident. The Statutes of the United States, and not the Code of Practice of Louisiana must govern the court in such cases. 10 Pet. 125, *United States v. Hawkins*; but see PLEADING, VIII. (b), 1), No. 11.

9. The real owner of a promissory note having informed the drawer that the note was owned by another, cannot prevent compensation. See ESTOPPEL, No. 58.

10. For debts of partnership and individual members, see *supra*, II. No. 2.

11. For debts of factor and principal and depositary, see *supra*, II. Nos. 4, 11.

12. For debts of succession and transferees of heirs, see *supra*, II. No. 8.

13. PLEADING, VIII. (a).

14. No claim shall be paid by the State to persons indebted to her, 1874, p. 159.

IV. IN MATTERS OF INSOLVENCY AND SUCCESSIONS.

1. A draft being acquired after the failure of a bank, cannot be pleaded in compensation to notes due to the bank. 23 A. 36, *Case, receiver v. Cannon & McCa*; 49, *Same v. Henderson*; 13th U. S. Statutes at large, p. 114, Sec. 50; 23 A. 60, *Case, receiver v. Marchand*; 23 A. 112, *Same v. Cannon*.

2. The creditor of an insolvent, whose indebtedness preceded the surrender of the insolvent, may plead his debt in compensation of any amount due by him to the insolvent. 15 A. 165, *Martin v. His Creditors*.

3. The husband cannot plead in compensation to a debt due by him to a succession, the portion coming to his wife as heir to such succession: nor can he, as administrator of his wife's paraphernal property, receive in payment of such portion as may fall to her, debts due by himself, and by receipting for the same, thereby discharge the administrator from the claims of the wife, as heir-at-law of the estate. 15 A. 204, *Hanrahan v. Leclercq*. See *ante*, III. No. 3. MARRIAGE, XI. (b), No. 19. MANDATE, V. (b), 4), No. 4.

4. Where a succession obtains a judgment against a debtor, who in his turn obtains a judgment against the succession, compensation takes place to the amount of the lesser judgment. 27 A. 695, *Lemane, administratrix v. Lemane*.

5. A judgment creditor cannot seize a judgment against himself. 27 A. 695, *Lemane, administratrix v. Lemane*.

6. The administratrix must collect the notes due to the estate and let the debtors who are also creditors of the estate, claim their right of preference over the proceeds. 27 A. 553, *Succession Gayle*.

7. Right of purchasers at probate sales to retain the price. See SUCCESSION, VIII. (c), 7), c.

COMPOUNDING.

1. Compounding a felony. See OBLIGATIONS, III. (c), 2), A. No. 8; D. Nos. 1, 2.

COMPROMISE.

1. See TRANSACTION. EVIDENCE, XII. (b).

2. As relates to annuities, see ALEATORY CONTRACTS, No. 4.

3. An agreement to take less than due, to a mariner, is a *nudum pactum*. See SHIPPING V. (b), No. 2.

CONCUBINAGE.

See EVIDENCE, XVI. (b), 4). MARRIAGE, III. DONATION, I. (d); II. (b). PARENT AND CHILD, II.

CONDITION.

See OBLIGATIONS, VIII. (b). DONATION, III; V. (c); VI. (b), 3); (d). JUDGMENT, V. (c).

CONFEDERATE MONEY.

1. When payment of an obligation has been received in Confederate treasury notes, the courts will not interfere. This is an executed contract. 19 A. 473; 24 A. 480, *Dull v. Gordon*.

2. Articles 127, 128 and 149 of the constitution, construed together, mean that contracts or obligations for Confederate money are reprobated; those which are executed cannot be set aside, and those unexecuted cannot receive the aid of the courts to enforce them. 21 A. 514; 23 A. 649, 614; 24 A. 531, *Brown v. Jacobs*.

3. It is the duty of an agent to notify his principal immediately that his draft cannot be collected in lawful money. A collection made in Confederate money, when it is not shown to have been known by the principal, will render the agent liable for the amount of the draft in legal currency. 25 A. 77, *Waterhouse v. Citizens' Bank*.

4. Confederate notes placed in the hands of an agent, who does not account therefor satisfactorily, cannot be recovered. 21 A. 259, *Juillard v. Rogay*; 19 A. 288, *King v. Huston*.

5. A judgment based on a contract, the consideration of which was Confederate money, is null and cannot be enforced under article 127 of the constitution of 1868. 25 A. 344, *Henderson v. Merchants' Mutual Insurance Company*.

6. A contract made prior to the adoption of the constitution of 1868 is not void because payable in Confederate money, which constitutes a valid consideration. That article of the constitution could not destroy their validity. 25 A. 350, *Henderson v. Merchants' Mutual Insurance Company et als.*; 14 Wallace, 661, *Delmas v. Insurance Company*.

7. A purchaser at probate sale during the war, when sued on his notes, cannot set up that they were to be paid in Confederate notes and claim a reduction of the price to that extent. 21 A. 671, *Bordelon v. Coco*.

8. The court cannot recognize a proprietary right in Confederate notes. 18 A. 55, *Murphy v. Denman*; *infra*, 12.

9. A tender made in Confederate money will not be available although made when that currency was circulating. 19 A. 186, *Graves v. Harris*.

10. The Confederate States never reached the dignity of a *de facto* government, and consequently were without legal right to coin money or emit bills of credit. 19 A. 359, *McCracken v. Poole*.

11. A contract, the consideration of which was Confederate notes, cannot be judicially enforced. 20 A. 37, *O'Donnell v. Burbridge*.

12. Confederate notes were not property, and cannot be regarded as effects of the community of acquets and gains. 20 A. 39, *Cockburn v. Wilson*. *Ante*, 8.

13. The evidence should not leave a doubt that the consideration of the contract was Confederate money; a check on a bank, deposited in another bank to the credit of the obligor, does not constitute a reprobated contract. 20 A. 47, *Tompkins v. Thornhill*; 70, *Martin v. Thornhill*.

14. The orders of General Butler, of May 1st and May 18th, 1862, permitting the circulation of Confederate notes for a limited period, did not give validity to these notes. 20 A. 167, *Parker v. Broas*.

15. A loan of Confederate money cannot be recovered. 21 A. 620, *Bethel v. Hawkins*.

16. Payment of a note, the consideration whereof is Confederate money, cannot be enforced. 22 A. 132, 485; 21 A. 305; 20 A. 138, 167; 19 A. 257, 269, 464. See BILLS AND NOTES, IV. (a), No. 17; *per contra*, see OBLIGATIONS, III. (c), 1), Nos. 27, 28, 29.

17. Their circulation permitted. See general order, No. 1, May 1st, 1862, department of the gulf. Their prohibition after May 27th, 1862, see general order, No. 29, same department. See also general order, No. 30, 19th May, 1862.

18. Want of consideration of the note may be proved by parol. See EVIDENCE, XV. (d), 2), No. 1.
19. Parol is not admissible to prove that the note was to be paid in Confederate money. See EVIDENCE, XV. (e), No. 1.
20. Parol is admissible to prove that the contract was for Confederate money. See EVIDENCE, XV. (e), No. 2.
21. See OBLIGATIONS, III. (c), 1); (c), 2), A.
22. DEPOSIT, III. Nos. 5, 8, 9.
23. A liquidating partner who collected the assets in Confederate money, is liable for legal currency. See PARTNERSHIP, IV. (e), 2), No. 5.
24. Payment received in Confederate money, under duress, is not binding. See PAYMENT, I. No. 7.
25. Plaintiff who paid a part of the price in Confederate money and the balance in United States currency, is entitled to the ownership of the land. See SALE, I. (d), No. 7.

CONFEDERATE STATES.

1. The United States had the same power and rights over the territory conquered in the south, as if it was a foreign territory. It could displace the existing authority and assume its exercise. There is no limit to the powers that might have been exercised in this case, save those which are found in the laws and usages of war. 20 Wal. 393, *New Orleans v. Steamship Co*; 2 Black, 36; 2 Wal. 417; 6 Wal. 1.
2. The military occupation of New Orleans by the forces of the United States, may be considered as having been completely effected on the 6th day of May, 1862. After that date the citizens of New Orleans were not "enemies" within the meaning of the expression as used in public laws. 2 Wal. 258, *The Venice*.
3. The blockade of the coast of Louisiana was not terminated by the proclamation of May 12th, 1862, declaring that after June 1st, of the same year, the blockade of the port of New Orleans should cease. 2 Wal. 474, *The Baigorry*.
4. The subjugation of New Orleans and the restoration of the national authority there, are regarded as having become complete on the 6th of May, 1862. From that time its citizens were clothed with the same rights of property and were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection, as the inhabitants of the loyal States. 6 Wal. 521, *The Ouachita Cotton*.
5. See CONFEDERATE MONEY, No. 10.
6. For note given by a conscript, to be relieved from service, see BILLS AND NOTES, IV. (a), No. 16.
7. For validity of probate sales made in the Confederacy, see CONSTITUTION, II. (b), No. 4.
8. For validity of legislation, see CONSTITUTION, II. (c), 2), No. 1.

CONFISCATION.

1. Our courts cannot countenance directly or indirectly, a contract to shield property from confiscation by the government, and preserve it for the benefit of a rebellion. 18 A. 414, *Gray v. Thomas, Griswold & Co*.
2. Private property not actually confiscated during the revolution, reverts back to the owner on the restoration of peace. 20 A. 468, *State v. Louisiana State Bank*.
3. One who made during his ownership improvements and repairs to a property sold at confiscation sale by the United States, cannot recover their value from the heirs who have recovered the same after the death of the confiscated. 27 A. 70, *Brugere v. Heirs John Slidell*.
4. The sale, before the confiscation act, divested the title of the vendor and proceedings in confiscation as against him, and a sale by the marshal vested no title; the purchaser has no right to sue for a partition by licitation. 27 A. 152, *Burbank v. Conrad*. See No. 36.

5. The effect of confiscation ceases by the death of the defendant in confiscation, and the property confiscated and sold to third persons, reverts back to the heirs. 27 A. 354, *Heirs Slidell v. Germania National Bank*; 9 Wal. 339, *Bigelow v. Forrest*; 18 Wal. 156, *Day v. Micou*; 92 Otto, 214, *Chaffraix v. Shiff*.

6. The confiscated property reverts back to the heirs after the death of their ancestor. The possessor, after such demise, owes rent, and is entitled to deduct therefrom, the taxes paid by him and necessary repairs made. 28 A. N. R., *Slidell v. Gonthier*; *Same v. Vanderstraten*.

7. The confiscation sale by the United States marshal, only transfers the life estate, and the property at the death of the defendant in confiscation, reverts to his heirs. 27 A. 383, *Slidell v. Huppenbauer*. (*Carried to U. S. Supreme Court.*)

8. Where certain portions of the property sold under confiscation was not mentioned, either in the libel, the monition or the decree of condemnation, no title is vested by the marshal's deed in the purchaser. 28 A. 694, *Thos. J. Semmes v. E. W. Burbank*.

9. An information *in rem* under the fifth, sixth and seventh sections of the confiscation act of July 17th, 1862, for the confiscation of the real estate of a person falling within the provisions of those sections, such information not being in any sense a criminal proceeding, and is not, after default made and entered, and after a final judgment of condemnation, to be held fatally defective, because it averred that the property seized belonged to some one or another of the persons referred to in the fifth and sixth sections of the act, (thus making its allegations in the alternative), and has not averred it otherwise. 20 Wallace, 92, *The Confiscation Cases*.

10. Where an information avers, that on a day named, a seizure was made by the marshal, under written authority given him by the district attorney, in compliance with instructions issued to him by the attorney general of the United States, *by virtue of the act of congress of July the 17th, 1862*; (the confiscation act, above mentioned) and when, to a citation or monition founded on the information, default has been made, it will, after such final judgment and condemnation, be presumed that the requirements of the statute (which direct apparently that a seizure be made *prior* to filing the information, and that this seizure be by order of the *President of the United States*), have been complied with. *Ibid.*

11. The joint resolution of even date with the confiscation act was designed only to qualify and not defeat it. The provisions therein that "no proceeding shall work a forfeiture beyond the life of the offender," obviously means that they shall not affect the ownership of the land after the termination of his natural life, and that after his death it shall pass and be owned as if it had not been confiscated. *Ib.*

12. The maxim that a fee cannot be in abeyance is not of universal application, nor has it any weight in an enquiry as to the intent and effect of said act and joint resolution. *Ib.*

13. The amnesty proclamation of the President of the United States, of December 25, 1868, did not give back property which had been sold under the confiscation act, or any interest in it, either in possession or expectancy, nor did it repeal the confiscation act. *Ib.*

14. The proclamation of the President of the United States, bearing date September 7, 1867, did not work the dismissal of legal proceedings against property seized under the confiscation act of July 17, 1863, or provide for the restoration of all rights of property to persons engaged in the rebellion. 91 Otto, 21, *Semmes v. United States*; 1 Woods, 209, *Bragg v. Lorio*; 1 Woods, 234, *United States v. Six Lots of Ground*.

15. Where a loyal citizen suffered his property, when he might have removed it, to remain in the Confederate lines in the hands of his disloyal partner, it was liable to be taken as a prize of war. In such a case it becomes impressed with the national character of the belligerent within whose territory it was situated. 5 Wall. 377, *The William Bagaley*.

16. A capture of a steamer, within the insurrectionary district, by the

forces of the United States, vested in the government of the United States an absolute title to the property without the necessity of any local condemnation. 1 Woods, 40, *White v. Red Chief*.

17. The fact that the libellant, who was at the time of the capture resident in the district in insurrection, afterwards came into the United States and took the oath prescribed by the acts of congress, could not divest the title of the government. *Ib*.

18. An attempt was made to transport, without a license, and contrary to the thirtieth section of the act of congress of July 13, 1861, and third section of the act of May 20, 1862, property from the United States to the territory declared to be in insurrection; *Held*: That such property becomes subject to forfeiture to the United States, notwithstanding the insurrectionary district to which it was being conveyed was at the time in the possession of the Federal forces. 1 Woods, 55, *United States v. Gay's Gold*.

19. Where a writ of *venditioni exponas*, issued from the Circuit Court, ran in the name of the President of the United States, bore teste of the Chief Justice of the United States, was under the seal of the court but was not signed by the clerk, but by the deputy clerk in his own name, neither the writ nor the proceeding under it are void. 1 Woods, 193, *Griswold v. Cornolly*.

20. The defect in the writ could only be taken advantage of, in a direct action and not in a collateral proceeding. *Ib*.

21. The fact that a good defense existed against a decree of condemnation but which was not pleaded before, will not avoid the decree. *Ib*.

22. In an action to recover possession of an established title to real estate, when the defendant relies upon a title derived through confiscation proceedings, no error or irregularity in such proceedings can be regarded which does not go to show want of jurisdiction in the court which rendered the judgment condemning the property; the judgment is binding until reversed in a direct proceeding. 1 Woods, 209, *Bragg v. Lorio*.

23. A seizure of property under the confiscation acts, made by the marshal, upon the written order of the United States attorney, is sufficient to give the court jurisdiction of the *res*. 1 Woods, 209, *Bragg v. Lorio*.

24. Under the act of March 3, 1821, (3 stat. 643) the deputy clerk of the United States District Court of Louisiana, was authorized to sign process in his own name as such deputy, and a *venditioni exponas* so signed, and in other respects regular, and under the seal of the court, is valid. 1 Woods, 209, *Bragg v. Lorio*.

25. The proceedings under the fifth, sixth, seventh and eighth sections of the confiscation act of July 17, 1862, are *in rem* conforming as near as may be to proceedings in admiralty when the seizure is on water, and to revenue cases when the seizure is made on land. 1 Woods, 221. *The Confiscation Cases*.

26. If a claimant of land or property seized on land, contests the material facts alleged in the libel of information, the issue is to be tried by a jury. *Ib*.

27. When no answer is filed, judgment by default may be taken, and the court may proceed to ascertain the material facts in the case *ex parte* and without a jury. *Ib*.

28. If a third person intervenes for the purpose of setting up some charge or lien upon the property and not of resisting the confiscation, collateral proceeding may be taken suitable to the nature of the cases. *Ib*.

29. A belligerent has the right to take such course and impose such conditions with regard to the confiscation of enemy's property as it sees fit. *Ib*.

30. The rights of government against its own citizens in rebellion are not less but rather greater than those it may exercise towards a foreign enemy. *Ib*.

31. By the act of July 17, 1862, congress directed property to be seized and confiscated as enemy's property. A proceeding under this act is not therefore a criminal proceeding, and many rules which must be observed in criminal prosecution have no application. *Ib*.

32. A libel of information filed for the confiscation of property as enemy's property, which charges the acts of the owner of the property in the alternative, thus: "Did act as an officer of the army or navy of the rebels in arms against the government of the United States, or as a member in congress, or as a

cabinet officer of the so-called Confederate States," etc., is bad for ambiguity and uncertainty, and in fact contains no charge at all; and a decree of confiscation rendered thereon by default, will be reversed. *Ib.*

33. During the late war between the United States and the insurgent States, a quantity of cotton was seized in one of the insurgent States by an officer of the government, under the authority of the captured and abandoned property act, was sold, and the proceeds paid into the treasury; *Held*: That the question, whether or not the property was in fact captured or abandoned property, was not open to litigation in the courts. 2 Woods, 164, *Chamberlain v. Stanton*. See ABANDONMENT, No. 2.

34. If the price of the confiscation sale was used in paying a mortgage existing on the property, this does not give to the purchaser a right of reimbursement of this amount when the heirs claim the property. 30 A. 592, *Pendergast v. Geo. Schantz*.

35. Purchasers at confiscation sale acquire only the life estate of the person whose property is confiscated; they cannot prescribe. *Ib.*

36. Although the act of sale was not recorded, the United States acquired nothing by the decree in confiscation against the vendor; they transferred by the sale no greater right than they themselves had. — U. S. (Otto's) —, *Burbank v. Conrad*. See No. 4.

37. The taxes and necessary repairs are at the charge of the purchaser at a confiscation sale they cannot be recovered from the heirs. 30 A. 591, *Pendergast v. Geo. Schantz*.

38. How damages against one who burns confiscated property must be computed, see OFFENSES AND QUASI OFFENSES, II. (g). 2), B. No. 4.

CONFLICT.

Of jurisdiction, see COURTS, II. (d); IV. SUCCESSION, VIII. (e), 8).

CONFUSION.

1. If two persons agreeing to adjust and settle the claims they respectively owe to each other, appoint experts who make their report satisfactorily, the two debts are extinguished by *confusion* (?). 23 A. 301, *Cavanaugh v. Coleman & Co.*

2. *Confusion* and *merger* are synonymous terms. 1 Woods, 180, *Palmer v. Burnside*.

3. Where a senior incumbrancer wrongfully carried away personal property, subject to his own and a prior incumbrancer, his debt was not extinguished by "confusion" to the extent of the value of the property carried off. 1 Woods, 180, *Palmer v. Burnside*.

4. When the sole heir is a creditor of the deceased, confusion takes place. See PRESCRIPTION, IV. (b), No. 1.

5. The judgments obtained by the commissioners of the New Orleans park, against the city of New Orleans, were not extinguished by confusion by the transfer of all their powers and duties to the city council of New Orleans. 30 A. 706, *State ex rel. Carondelet Canal, etc. v. Pilsbury, mayor*.

6. See OBLIGATIONS, IX.

CONGRESSIONAL DISTRICTS.

Acts 1874, p. 116.

CONSENT.

1. See OBLIGATIONS, III. (b). SALE, I. (c).

2. Consent of counsel. See JUDGMENT X. No. 6.

3. Consent to give jurisdiction. See COURTS, II.

CONSIGNEES.

1. Who pay the proceeds to the *real* owners are discharged. See MAN-DATE, V. (b), 6).

2. Must insure when so directed. See MANDATE, V. (b), 6).
3. See FACTOR.
4. Consignees who receive Confederate money. See MANDATE, V. (d), No. 5.
5. The action against a consignee is not prescribed by three nor five years. See PRESCRIPTION, III. (c), No. 14.

CONSOLIDATION.

See PLEADING, III. VIII. NEW ORLEANS, I. (b).

CONSTABLE.

See JUSTICE OF THE PEACE; Constabulary, 1870, p. 104.

CONSTITUTION.

I. OF THE UNITED STATES.

II. OF LOUISIANA.

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| <p>(a) <i>General rules of constitutional interpretation.</i></p> <p>(b) <i>History of the State constitutions; their adoption and abrogation, and the effect thereof.</i></p> <p>(c) <i>Legislative department and its powers.</i></p> <ol style="list-style-type: none"> 1) In general. 2) Conditions and forms of legislation. 3) Constitutional protection of vested rights and conventional obligations, and herein of <i>ex post facto</i> laws. <p>A. <i>In general.</i></p> <p>B. <i>Laws affecting the charters of corporations.</i></p> <p>C. <i>Remedial laws and those affecting accessory rights.</i></p> | <p>4) Delegation of power to subordinate corporations.</p> <p>5) Power of impeachment and removal from office.</p> <p>6) Legislative usurpation of judicial powers.</p> <p>(d) <i>Executive department and its powers.</i></p> <p>(e) <i>Judiciary department and its powers.</i></p> <ol style="list-style-type: none"> 1) In general. 2) Subjection of the co-ordinate departments to judicial control. <p>(f) <i>Other matters.</i></p> |
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I. OF THE UNITED STATES.

1. Citizens are members of the political community to which they belong. They are the people who compose the community and who in their associate capacity have established or submitted themselves to the dominion of a government for the promotion of their general welfare and the protection of their individual as well as their collective rights. The duty of a government to afford protection is limited always by the power it possesses for that purpose. 92 Otto, 542, *United States v. Cruikshank et al.*

2. There is in our political system a government of each of the several States and a government of the United States. Each is distinct from the other and having citizens of its own who owe allegiance to each and whose rights within their jurisdiction must be protected. The same person may be at the same time a citizen of the United States and a citizen of a State, but the rights of citizenship under one of these governments will be different from those he has under the other. *Ib.*

3. The government of the United States is supreme only in matters which are expressly or by implication placed under its jurisdiction, by the constitution. *Ib.*

4. The right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the constitution. The first amendment to the constitution prohibiting congress from abridging the right to assemble and petition was not intended to limit the action of the State government in respect to their own citizens, but to operate upon the national government alone. It left the authority of the States unimpaired, added nothing to the already existing

power of the United States, and guaranteed the continuance of the right only against congressional interference. The people, for their protection in the enjoyment of it, must, therefore, look to the States where the power for that purpose was originally placed. *Ib.*

5. The right of the people peaceably to assemble, for the purpose of petitioning congress for a redress of grievances, or for anything else connected with the powers or duties of the national government is an attribute of national citizenship, and, as such, under the protection of and guaranteed by the United States. The very idea of a government, republican in form, implies that right, and an invasion of it presented a case within the sovereignty of the United States. 92 Otto, 542, *United States v. Cruikshank et al.*

6. The right to bear arms is not granted by the constitution, neither is it in any manner dependent upon that instrument for its existence. The second amendment means no more than that it shall not be infringed by congress, and has no other effect than to restrict the powers of the national government. *Ib.*

7. Sovereignty, for the protection of the rights of life and personal liberty, within the respective States, rests alone with the States. *Ib.*

8. The fourteenth amendment prohibits a State from depriving any person of life, liberty, or property, without due process of law, and from denying to any person within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen as against another; it simply furnishes an additional guaranty against any encroachments by the States upon any fundamental right which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights, was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right. This the amendment guarantees, but no more. The power of the national government is limited to the enforcement of this guaranty. *Ib.*

9. Special provision is made in the constitution of the United States for the cession of jurisdiction by the States over places in which the Federal government shall establish forts or other military works; and it is only in these places, or in the territories of the United States, that they can exercise acquired jurisdiction. 10 P. 662, *New Orleans v. United States.*

II. OF LOUISIANA.

(a) General rules of constitutional interpretation.

1. Where the pleadings do not put at issue the constitutionality of a law, the court will decline to decree the nullity. 26 A. 754, *State v. St. Romes.*

2. Confederate notes in ordinary circulation during the civil war constituted a valid consideration for a contract, and, as applied to such contracts, article 127 of the constitution of Louisiana, which declares that "all agreements, the consideration of which was Confederate money, notes and bonds, are null and void," is in violation of the constitution of the United States. 14 Wall. 661, *Delmas v. Insurance Company.*

3. When a law will be pronounced unconstitutional, see *infra*, II. (c), 1), No. 1.

(b) History of the State constitutions; their adoption and abrogation, and the effect thereon.

1. The constitution of 1864 was provisional in its character, and the legislation under it partook of the same nature. 21 A. 325, *Police Jury of Jefferson v. Burthe.*

2. The amendment of the constitution limiting the State debt to twenty-five millions, became operative from the day it was ratified by the people, i. e., the first Monday of November, 1870. 24 A. 366, *State ex rel. Livingston & Guthrie v. James Graham*; 25 A. 629.

3. The third amendment of the constitution did not invalidate existing claims, but prohibited the legislature from appropriating more than the revenues of the year. 28 A. 511, *State ex rel. Charbonnet v. Johnson, auditor.*

4. The constitution of 1868, which was adopted pending the appeal, having

ratified all sales, judgment, etc., rendered by the State courts during the Confederacy, a probate sale made at that time in conformity to existing laws is valid. 21 A. 540, *Hughes v. Stinson*.

5. By the act of February 20, 1811, congress authorized the people of Louisiana to form a constitution and State government, and by section three of that act certain restrictions were imposed in the form of instructions to the convention that might frame the constitution, such as: That it should contain the fundamental principles of civil and religious liberty. Nevertheless, after the constitution had been accepted by congress and Louisiana admitted into the union "on an equal footing with the original States," there remained no power in the general government to protect the citizens of Louisiana in the enjoyment of their religious liberty. 3 H. 589, *Perinoli v. Municipality*.

6. A State constitution may be retrospective in its operation, and may divest vested rights, yet if it does not impair the obligations of a contract or partake of the character of an *ex post facto* law; it will not contravene the constitution of the United States. Appeals pending in the late Supreme Court, cannot be entertained by the Supreme Court created by the constitution of 1868, where the amount in dispute is below five hundred dollars. 20 A. 533, *Meyers v. Mitchel*.

7. Amendments to the constitution of 1868, proposed by acts 1870, p. 45; 1870, p. 117; 1870, E. S., p. 53, Nos. 11 and 12; 1874, pp. 42, 56, 113; 1878, pp. 5, 120, 246.

(c) *Legislative department and its powers.*

1) In general.

1. A law will not be pronounced unconstitutional, unless manifestly so. 20 A. 587, *State v. Volkman*; 3 M. 12; 4 N. S. 138; 5 R. 383; 8 A. 341; 9 A. 562.

2. The act of 1867 as amended September 18, 1868, for weighing and inspecting hay, does not amount to the prohibited regulation of commerce between the States, and does not lay any impost or duty on imports or exports. 23 A. 350, *Hay Inspectors v. Pleasant*.

3. The act approved February 21st, 1870, whereby the State made a gratuity to the New Orleans, Mobile and Texas Railroad, in aid of its construction, of three million dollars State bonds, is not violative of the constitution limiting the State debt to twenty-five millions. The constitutional limitation having been adopted on the 15th December, 1870, could have no retroactive effect. 23 A. 623, *State ex rel. N. O., M. & T. R. R. Co. v. Graham*.

4. Act No. 32 of 1871, created a debt and is therefore unconstitutional, the State indebtedness having reached the constitutional limit. 23 A. 402, *State ex rel. Salamon & Simpson v. James Graham, auditor*; 25 A. 344, *State ex rel. Nixon v. Graham*.

5. Act No. 32 of 1870, authorizing the issue of three million dollar bonds for levee purposes being a law previous to the adoption of the amendment of the constitution, limiting the State debt, cannot be affected thereby. 26 A. 564, *State v. Clinton*.

6. The act of 19th April, 1871, providing for the refunding of certain taxes improperly collected, increased the State debt above the constitutional limit, and in addition provided no means for their payment and is therefore void. 25 A. 625, *State ex rel. Blackmore v. Graham, auditor*.

7. LUDELING, C. J. and WYLY, J., *dissenting*: The act simply recognized a debt which existed since the erroneous payment of the tax, and even if a debt was created, the legislature provided for its payment by making the certificates receivable for taxes. *Ib.*

8. The appropriation in favor of W. W. Howe under act No. 59 of, 1874, is not contained in the title, and is a debt created when the constitutional limit had already been reached; it cannot therefore be enforced. 27 A. 40, *State ex rel. Howe v. Clinton*.

9. MORGAN, J., *dissenting*: The legislature having authorized the employment of relator, his fee formed part of the expenses of the State, and should be paid. *Ib.*

10. The legislature may grant monopolies. 27 A. 139, *Crescent City Gas Light Co. v. New Orleans Gas Light Co.*; 23 A. 743, *Lottery Co. v. Richoux*; 22 A. 546, *Belden v. Fagan*; 1 Woods, 21, *Slaughter House Case*.

11. The legislature may enact any law not prohibited by the constitutions of the United States and of the State. 20 A. 585, *State v. Volkman*.

12. It may levy a license tax on certain trades and professions, provided the tax be uniform. *Ib.*

13. The legislature is vested with absolute right of legislation, except when restricted by the constitution. 21 A. 1, *City v. Lusse & Ruhlmann*; 20 A. 585, *State v. Volkman*; 15 A. 190, *State v. Gutierrez*.

14. The legislature is supreme, except when restricted by the constitution. 27 A. 147, *Crescent City Gaslight Company v. New Orleans Gaslight Company*; 9 R. 411; 9 A. 562; 11 A. 308, 338, 370; 12 A. 169, 554; 16 Wallace, 36.

15. The act making an appropriation out of any money not otherwise appropriated, if not in excess of the revenues of the year, does not create a debt, and is not therefore contrary to the article of the constitution limiting the debt to twenty-five million dollars. 28 A. 400, *State ex rel. Mrs. Noble v. Clinton, auditor*.

16. The claim of relator being evidenced by a voucher from the officers of the house of representatives to whom were entrusted the expenditure of the appropriation for expenses of the house, issued in due course of law, must be paid. 28 A. 350, *State ex rel. Bloomfield v. Chas. Clinton, auditor*.

17. Section eight of act No. 47 of 1873, which disqualifies as a witness a delinquent tax payer, published as such for thirty days, is unconstitutional. The title of the act does not embrace the provision. 26 A. 142, *Adams v. Webster*.

18. The levee taxes are not for the benefit of the Louisiana Levee Company; the legislature has not contracted a debt above the constitutional limit, in levying the tax; acts Nos. 4 and 27 of 1871, are not unconstitutional. 26 A. 560, *State v. Maginnis*; 25 A. 401, *State ex rel. v. Clinton*.

19. The State has the right, in the exercise of its police powers, to pass a law ordering all indigent cases of small pox to be sent to a designated locality at the expense of the local authorities. 27 A. 522, *State ex rel. J. J. Hayes v. City of New Orleans*. Act No. 60 of 1872.

20. The act 81 of 1872, abolishing the free school fund, and ordering the bonds composing that fund to be sold out by the auditor and treasurer, is unconstitutional; the purchasers of these bonds acquired nothing. 27 A. 77, *State ex rel. Durant v. The Board of Liquidators*.

21. The legislature cannot change the judicial districts pending the existing term of office of the district judges. 29 A. 419, *Lafayette Fire Insurance Company v. Remmers*.

22. The legislature cannot dispose of the property of corporations. See CORPORATIONS, II. (b), Nos. 1, 2, 3.

23. Nor make an appropriation in favor of a private institution. CORPORATIONS, X. (ii); *infra*, No. 29.

24. Nor to legislate in regard to the powers of parish courts. See COURTS, II. (f), No. 1.

25. It may direct vacancies in municipal offices to be filled by appointment. See NEW ORLEANS, II. (b), No. 2.

26. Act No. 6, of 1875, appropriating two-hundred and fifty thousand dollars for the purchase of the St. Louis Hotel, to be turned into a State House, said sum to be paid in semi-annual instalments, and providing that a half mill from the general fund tax shall be set apart to meet said liability, is not unconstitutional, and does not appropriate an amount exceeding the revenues of the year; nor does it create a debt exceeding one hundred thousand dollars without making provision for its payment. 30 A. 665, *Harris v. Dubuclet*.

27. EGAN, J., *dissenting*: The general fund tax being once levied cannot be diverted; a provision against constitutional requirements, is no provision at all. *Ib.*

28. The legislature was authorized to loan the credit of the State to an

amount not exceeding two million dollars, inasmuch as the State debt does not reach fifteen million dollars. 30 A. —, *State ex rel. New Orleans Pacific Railway Company v. Nicholls, governor*.

29. The legislature has the right to assist private enterprises. 30 A. —, *State ex rel. New Orleans Pacific Railway Company v. Nicholls, governor*. See No. 23. CORPORATIONS, X. (ii), No. 1.

30. Extra sessions, how called, 1870. p. 44. Secretary of the senate, and chief clerk of the house to remain in office, 1870, E. S., p. 111. Apportionment, 1871, p. 26; 1876, p. 12; 1878, p. 277. Mileage, 1872, pp. 39, 46. Salaries of officers, 1873, p. 61. Compensation in lieu of stationery, 1876, p. 148. No mileage for extra session called within five days of adjournment, 1877, p. 33; three days, 1878, p. 70, Sec. 17. Election of the officers and their pay, 1878, p. 67.

31. Title of an act creating a corporation, what it covers. See CORPORATIONS, I. No. 7.

2) Conditions and forms of legislation.

1. The acts of 1863 are not laws, because the pretended legislators were never qualified. *They did not take the essential oath (?)*. 19 A. 111, *White v. McKee*. See REBELLION.

2. See LAWS.

3) Constitutional protection of vested rights and conventional obligations, and herein of *ex post facto* laws.

A. In general.

1. An order of the commanding general, while in command in Louisiana, under acts of congress of March 23d, 1867, annulling a contract made by the city of New Orleans, was a legitimate exercise of his power under the law. 20 A. 518, *State ex rel. O'Hara v. Heath, mayor*.

2. A law exempting from a license already levied, but not collected, is not retroactive. 25 A. 571, *Whited, collector v. Lewis*.

3. The contract between the city of New Orleans and its contractor being complete, the subsequent amendment of the constitution limiting the city debt, could not destroy the rights arising from the contract, and prevent the city from paying for the work performed, in street assessment bonds. 29 A. 863, *State ex rel. Henry v. Mayor and Administrators*.

B. Laws affecting the charter of corporations.

1. The statute of 1856, conferring judicial functions upon the mayor of Baton Rouge, is not unconstitutional. 15 A. 208, *Baton Rouge v. Dearing*. See COURTS, I. No. 17.

2. The act of 1855 "for the organization of corporations for works of public improvement and utility" does not contain two objects in its title. 18 A. 218, *Bridgeford & Co. v. Hall et al.*

3. The change of the corporation by legislative enactment, from a loan and pledge association to a banking corporation, must, to be valid, be accepted by the unanimity of the corporators. 26 A. 288, *State ex rel. Attorney General v. Accommodation Bank*.

4. The legislature has the power to enlarge the limits of towns and cities. The contrary wishes of the inhabitants, and the imposition of taxes on the annexed territory to pay the existing debts of the city, do not render the act unconstitutional. 28 A. 851, *Stoner v. Flournoy*; 12 A. 515; 27 A. 156.

C. Remedial laws and those affecting accessory rights.

1. The laws with regard to the surrender of property are merely remedial; in such cases the law of the *forum* governs. 15 A. 110, *Brent v. Shrusse*.

2. Act No. 95 of 1869, prescribing that the tacit mortgages and privileges of married women should be recorded on or before the first day of January, 1872, is not unconstitutional, because it does not impair the obligations of contracts; it is but a modification of the remedy. 24 A. 25, *Succession of Nelson*; 26 A. 584, *Rochereau v. Delacroix*.

3. A law which has for its object to change the mode of executing judgments is merely remedial and does not impair the obligation of contracts. 29 A. 608, *Carnes v. Red River*; 7 N. S. 259; 17 L. 476; 1 R. 565.

4) Delegation of power to subordinate corporations.

1. The general assembly may grant the right to corporations, to make and maintain wharves; this is not a grant of public revenues. 27 A. 415, *City v. N. O., M. & C. R. R. Co.* See No. 4.

2. The law requiring an estimate of the necessary expenditures of the parish to be made and published before assessing the taxes, is mandatory and not merely directory. 28 A. 261, *Wilson, ex. v. Anderson, tax collector*.

3. The legislature may delegate the power of taxation to municipal corporations and the latter have the right to adopt rules for their collection. The penalties imposed for their non-payment may be enforced. 26 A. 710, *Bracey v. Ray*.

4. Where the legislature has delegated the power to a municipal corporation to collect wharfage, it cannot exempt certain crafts from the payment of these dues. 30 A. 190, *Ellerman v. McMains*.

5. It is questionable whether the legislature has authority to appoint commissioners, whose decision shall be final as to one party, to pass upon the validity of outstanding obligations of a parish. 30 A. 290, *State ex rel. Rabasse v. Police Jury of Terrebonne*.

6. For delegation of power to tax, see TAXES, II. (b), 2), A; NEW ORLEANS, II. (e), 1).

7. For power of the legislature to recognize debts as valid, see CORPORATIONS, II. (a), Nos. 2, 3.

8. The legislature may give power to the mayor of cities to hear civil suits for the recovery of fines incurred under police regulations. See COURTS, I. No. 17.

9. Towns authorized to contract for Nicholson pavement, 1869, p. 138.

5) Power of impeachment and removal from office.

1. Act No. 26 of 1873 declaring that a conviction for extortion in office, shall *ipso facto* operate a vacation of the office, so far as it applies to justices of the peace, is unconstitutional. State officers, judges and justices of the peace are removable only by address of the legislature. 28 A. 444, *State ex rel. Koppel v. W. L. Thompson*; *per contra*, see SHERIFF, I. (a), No. 4.

6) Legislative usurpation of judicial powers.

1. The legislative department has no power to adjust the rights of the creditors of an insolvent, and any act to this effect can produce no legal or binding effect. 22 A. 289, *Liquidator C. and P. H. R. R. Co. v. S. Lee*.

2. The act of the legislature of March 20, 1850, entitled "an act to amend the fourth section of an act providing for the organization of certain corporations in this State, approved April 30, 1847," is a mere legislative interpretation of the word, "persons" in the act of 1847. 15 A. 441, *African Church v. New Orleans*.

(d) Executive department and its powers.

1. The governor has no right to make an appointment when the office is not vacant. 21 A. 490, *State v. Towne*.

2. The governor may remove and appoint a tax collector at any time. 28 A. 49, *State ex rel. Dumas v. Carey*; 25 A. 119, 396; 26 A. 537; 28 A. 645, *State ex rel. Winder v. Cahen*. See TAXES, III. (c), 1), Nos. 9, 10.

3. Under act 1869, No. 114, the governor has the right to remove from office any State tax collector refusing or failing to do his duty. 19 A. 210, *Dubuc v. Voss*; 22 A. 122, *Evans v. Populus*. See TAXES, III. (c), 1), Nos. 9, 10.

4. The governor being the proper representative of the State, has the right to appeal. 22 A. 602, *State ex rel. Mahan v. Dubuclet, treasurer*. See APPEAL, I. (e), 1), No. 5.

5. The governor, like the president of the United States, has the right to pardon a party convicted of a contempt of court. 24 A. 121, *State ex rel. Van Norden v. Sauvinet, sheriff*.

6. The governor has no power to appoint an assistant secretary of State, the power is vested with the secretary. 24 A. 432, *State ex rel. Wiggensstein v. Fairfax*. 1877, p. 28.

7. The removal by the governor of an officer occupying an office created by the legislature, and removable under certain circumstances, is not subject to the revision of a court; the executive is distinct and separate from the judiciary. 25 A. 120, *State ex rel. v. Doherty*.

8. Some public record should be made of the intended absence of the governor, or he should publicly place the lieutenant governor in charge of the government, so that the time of absence shall appear of record. The absence for a few hours or a few days creates no vacancy in the office, and does not authorize the lieutenant governor to act. 26 A. 568, *State ex rel. Warmoth v. Graham*.

9. An appointment made by the governor during the session of the senate, is of no effect until confirmed by that body. 29 A. 638, *State ex rel. Farrar v. Garrett*.

10. The prohibition to employ other counsel than the attorney general is limited to the treasurer and auditor, and does not include the governor. 25 A. 163, *State ex rel. Strauss v. Dubuclet, treasurer*.

11. There is no law which requires the treasurer to give preference of payment to warrants of oldest date and lowest number. 26 A. 129, *State ex rel. Merle v. Dubuclet*. See MANDAMUS, I. (b), No. 21.

12. The governor has no authority to remove or suspend a constitutional officer. See OFFICE AND OFFICER, No. 18.

13. The vacancy having occurred when the senate was not in session, the governor had the right to send to the senate an appointment other than the previous one made. See OFFICE AND OFFICER, No. 38.

14. The governor cannot cancel the bond of an officer who has been suspended from office. See OFFICE AND OFFICER, No. 39.

15. To appoint district judges in case of vacancy, 1860, p. 36; vacancy in the office of governor and lieutenant governor, 1876, p. 1; authorized to employ a private secretary and messenger, 1877, p. 28; governor to appoint additional police jurors until next election, 1877, E. S., p. 87; may remove for cause any officer whose appointment is vested in him, 1877, E. S., p. 80; amended, 1877, E. S., p. 194.

(e) *Judiciary department and its powers.*

1) In general.

1 The duty of interpreting laws belongs to the judiciary, and it alone has the power to decide when an obligation has been violated. 23 A. 227, *State v. Burgess et al.*

2. The courts cannot determine, whether payments ordered by the legislature are without consideration; they can only declare an act unconstitutional. 25 A. 432, *State ex rel. v. Louisiana Levee Company*.

3. The constitutionality of a law will not be considered where an issue to that effect has not been raised in the case. 26 A. 754, *State v. St. Romes*.

4. It belongs to the political branch of the government to recognize the true governor and legislature, where more than one claim to exercise the authority. Courts can only recognize the government from whom the judges hold their commission. 29 A. 223, *State ex rel. Mercier v. Judge of the Superior District Court*.

5. During the civil war, W. W. Handlin was appointed by General G. S. Shepley, military governor of Louisiana, judge of the Third District Court of New Orleans; sometime afterwards M. Hahn was elected governor of Louisiana by a portion of the citizens of that State, and was also appointed military governor in place of Shepley, by the President of the United States. Handlin was removed from office by Hahn, but asserted, notwithstanding, that he

remained of right in the office and was entitled to the emoluments of the same; *Held*: That if Hahn acted by virtue of his military authority, he succeeded to all the powers of Shepley, who had a perfect right to revoke an appointment purely military. If, on the other hand, Hahn was the constitutional governor of the State, the right of a military judge to his office expired of itself upon Hahn's induction into office. In either alternative, therefore, Handlin was not entitled to the salary which he claimed. 12 Wall. 173, *Handlin v. Wickliffe*.

6. For duty of courts, as to policy of the law, see COURTS, I. No. 1.

7. Courts cannot prolong the existence of political corporations. See COURTS, I. No. 12.

8. The judiciary has no power to decide whether a law has passed through all the stages necessary to become a law, up to promulgation. See LAWS, I. (a), No. 3.

2) Subjection of the co-ordinate departments to judicial control.

1. Under the division of powers, as laid down in the Federal and State constitutions, the judiciary department has no jurisdiction over the chief executive, in the exercise of the functions of his office, even if the act he is required to perform, be purely ministerial in its character. The chief executive must determine whether the act is ministerial or political, and not the courts. 22 A. 1, *State ex rel. Olivier v. Warmoth*; 24 A. 351, *State ex rel. Mississippi Valley, etc. v. Warmoth*.

2. The fact that holders of bonds issued by a State are prohibited, by the eleventh amendment to the constitution of the United States, from obtaining judgment on their bonds by suit against the State in a court of the United States, does not authorize a court of equity, by decree, to compel the State officers to levy and collect a tax for the payment of principal and interest of the bonds. 2 Woods, 13, *McCauley v. Kellogg et al.*

3. A court of the United States will not compel, by injunction, the officers of a State to execute the laws of the State. To do so would be an attempt by the court to administer the State government. *Ib.*

4. An action in a court of the United States against the executive officers of a State, in their official capacity, to compel them to comply with a contract of the State by the enforcement of its laws, is, to all intents and purposes, an action against the State, and prohibited by the eleventh amendment to the constitution of the United States. *Ib.*

5. Courts cannot order the promulgation of laws. See COURTS, I. No. 7.

6. Nor order the levy of taxes. See COURTS, I. Nos. 12, 13, 14.

(f) Other matters.

1. The legislature has no power to authorize a judge to select a lawyer to act for him in case of his absence or sickness. Article 90 of the constitution of 1868, provides in what cases the judge may select a lawyer, and this excludes all other contingencies. A conviction had in such a case, is null. 27 A. 689, *State v. Fritz*; 663, *State v. Phillips*; acts of 1874, p. 220.

2. For recusation of judges, See RECUSATION.

CONSUL.

1. A contract made by a foreign consul to protect property in the Confederate lines, by issuing certificates that it belonged to subjects of a friendly power, is null. See OBLIGATIONS, III. (c), 2), A. No. 11.

CONTINUANCE.

I. IN GENERAL.

II. OF THE AFFIDAVIT.

III. OF THE GROUNDS OF A CONTINUANCE.

(a) *Absence of counsel.*

(c) *Other cases.*

(b) *Absence of testimony and surprise.*

IV. OF THE DISCRETIONARY POWER TO GRANT CONTINUANCES AND THEIR EFFECT.

I. IN GENERAL.

1. A second application for a continuance, on a ground which had already been overruled, should not be heard. 15 A. 240, *Huft v. Freeman*.

2. No bill of exception being taken to the refusal to grant a continuance, the appellate court is unable to say what were the reasons for the ruling. 24 A. 444, *Powell v. Jenkins & Walker*.

3. An application for a continuance should be renewed after the sheriff has made his return that the witness could not be found. 26 A. 390, *State v. Turner*.

4. The setting aside of a continuance without notice to the other party is irregular, and the judgment will be reversed. 18 A. 596, *Ogden v. Wilson*.

5. For continuance on account of defect in the certificate to the transcript, see APPEAL, VIII. (e), 2), No. 9.

6. For continuance in criminal cases, see CRIMINAL LAW, XIII. (c).

7. Time must be allowed to the intervenor to issue citation. See PLEADING, VIII. (d), 1), Nos. 4, 5 and 6.

II. OF THE AFFIDAVIT.

1. An affidavit for continuance, which does not mention the names of absent witnesses, is insufficient. 15 A. 240, *Huft v. Freeman*.

2. The affidavit ought to show why the testimony of the absent witnesses had not been taken; why the witness had not been notified to be present, and what is expected to be proven by him. 23 A. 59, *Lex and Wife v. Southern Express Company*.

3. The affidavit for a continuance should show that the applicant was not aware of the witness' intended departure, and he could not have obtained his testimony. 15 L. 276; 24 A. 232, *Pruyn v. Gibbons*.

4. If the plaintiff admits that if the absent witnesses were present they would swear to the facts stated in the affidavit, the defendant is not entitled to a continuance. *Ib.*

III. OF THE GROUNDS OF A CONTINUANCE.

(a) *Absence of counsel.*

1. A continuance cannot be granted on account of the absence of the defendant, or the inability of his counsel to attend court. 18 A. 291, *Kohn v. Short*.

2. A motion for a continuance, addresses itself for the most part to the sound legal discretion of the court. The absence of the attorney is not a legal ground for a continuance. 19 A. 268, *Rist v. Abbott*.

(b) *Absence of testimony and surprise.*

1. Where defendant has not used due diligence to procure his testimony, the judgment will not be reversed for a refusal to grant a continuance. 18 A. 222, *Citizens' Bank v. Payne et al.*

2. A continuance should not be allowed on account of the absence of a witness, if proper directions for the subpoena have not been given. 20 A. 459, *Golding v. Str. Castro*.

3. If plaintiff is not in court to testify, the case should not be postponed, to allow him to testify. 26 A. 651, *Richardson v. Dinkgrave*.

4. A continuance should not be refused when the delay for the return of the commission has not expired. 28 A. 260, *Calhoun v. Mechanics' and Traders' Bank*.

5. When the testimony shows the value of each item, the allegation giving the value of the whole, the other party is entitled to a continuance. See EVIDENCE, VII. No. 26.

(c) *Other cases.*

1. A continuance should be granted on proving the want of sufficient time to get the proof, or some unforeseen event preventing the litigant from so doing. 18 A. 227, *Montgomery v. Citizens' Mutual Insurance Company*; 8 A. 468.

2. The party whose testimony taken under commission was rejected for want of having furnished names, is not entitled to a continuance. 26 A. 113, *Caballero v. Maduel, executor*.

3. The cause being continued to the next day, defendant's exception to go to trial on that day was properly overruled; injury or inconvenience should have been shown. 26 A. 125, *State v. Ranson*.

4. A vague report of death is not sufficient for a continuance. See PLEADING, I. (d), No. 7.

5. The death of a partner, is a cause for continuance. See PLEADING, I. (c), 7), No. 3.

IV. OF THE DISCRETIONARY POWER TO GRANT CONTINUANCES AND THEIR EFFECT.

↓ The judge of the court *a qua*, may, in the exercise of a sound discretion, refuse a continuance on the application of the defendant to obtain answers to interrogatories, where the interrogatories are manifestly frivolous. 22 A. 421, *Moncheux v. Mistrot*.

CONTRACT.

See OBLIGATIONS. ALEATORY CONTRACTS. ARBITRATION. BILLS AND NOTES. DEPOSIT. DONATIONS. EXCHANGE. INSURANCE. LEASE. LOAN. MANDATE. MARRIAGE. MORTGAGE. NOVATION. PARTITION. PARTNERSHIP. PLEDGE. RENT. RESPITE. REMISSION. SALE. SEQUESTRATION. SERVITUDES, II. (b). SHIPPING. SURETYSHIP. TRANSACTION. TRUST.

CORONER.

Deputies for Jefferson, 1870, E. S., p. 68; salary of, in New Orleans, 1875, p. 17; proces verbal of inquest to be recorded in clerk's office, parish court, 1875, p. 60; salary of, Orleans excepted, 1877, E. S., p. 67.

CORPORATIONS.

I. IN GENERAL.

II. OF THEIR POWERS AND LIABILITIES.

(a) *In general.*

(c) *Private corporations.*

(b) *Political corporations.*

III. OF THE ELECTION AND AMOTION OF OFFICERS.

-IV. OF THEIR MODES OF ACTION AND POWERS AND LIABILITIES OF THEIR OFFICERS.

(a) *Political corporations.*

(b) *Private corporations.*

1) *In general.*

2) *Liability of officers to the corporation.*

V. OF BY-LAWS.

VI. OF THE CAPITAL STOCK; SUBSCRIPTION FOR, AND TRANSFERS OF, SHARES; AND RIGHTS AND OBLIGATIONS OF THE STOCKHOLDERS.

(a) *In general.*

(c) *Rights and obligations of stockholders, inter se, and as regards the corporation.*

(b) *Application to subscribe; and transfer of shares.*

(d) *Obligations of the stockholders as regards third persons.*

VII. OF THE FORFEITURE OF CHARTER.

VIII. OF THE DISSOLUTION AND LIQUIDATION; AND OF INSOLVENT CORPORATIONS.

(a) *In general.*(b) *Appointment and powers, duties and compensation of Liquidators.*

IX. OF THE BOARD OF LIQUIDATORS.

X. OF PARTICULAR CORPORATIONS, AND THE INTERPRETATION OF THEIR CHARTERS.

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|---|--|
| (a) <i>Accommodation Bank.</i> | (x) <i>Pontchartrain Railroad Company.</i> |
| (g) <i>Citizens' Bank of Louisiana.</i> | (aa) <i>New Orleans, Mobile and Chattanooga Railroad Company.</i> |
| (j) <i>Commercial Bank of New Orleans.</i> | (bb) <i>New Orleans, Opelousas and Great Western Railroad Company.</i> |
| (k) <i>Consolidated Association of the Planters of Louisiana.</i> | (dd) <i>North Louisiana and Texas Railroad Company.</i> |
| (l) <i>Firemen's Charitable Association.</i> | (ff) <i>Sanitary and Fertilizing Company.</i> |
| (n) <i>Louisiana, Bank of; and Louisiana State Bank.</i> | (gg) <i>Slaughterhouse Company.</i> |
| (q) <i>New Orleans and Carrollton Railroad Company.</i> | (hh) <i>Sugar Shed Company.</i> |
| (r) <i>Louisiana Levee Company.</i> | (ii) <i>Straight University.</i> |
| (s) <i>New Orleans Draining Company.</i> | (jj) <i>Workingmen's Bank.</i> |
| (t) <i>New Orleans Gas Light Company.</i> | |
| (v) <i>New Orleans, Jackson and Great Northern Railroad Company.</i> | |
| (w) <i>Orleans Navigation Company; New Orleans Canal and Navigation Company, and Carondelet Canal Navigation Company.</i> | |

I. IN GENERAL.

1. Where a number of free colored persons had associated themselves together as a corporation, for purposes of public worship, and purchased property in their social capacity; *Held*: That although such corporation has no legal existence, yet the members, considered as individuals, are entitled to their rights of property in what may have been acquired in the corporate name. 15 A. 441, *African Church v. New Orleans*.

2. Although corporations are distinct from the persons who compose them, yet the individual members have rights which they may protect in courts of justice, such as relate to property or to intellectual gratification, the violation of which can be made the basis of a demand in money. 16 A. 15, *Knabe v. Tanot*. See *infra*, VI. (a), No. 3.

3. By act of 1812, approved June 20, the grand lodge of Louisiana, a masonic institution, was incorporated with power to establish through the State, subordinate lodges with corporate capacities. When so incorporated, the subordinate lodges could, by a resolution adopted by a majority of its members, dissolve all connection with the grand lodge. 16 A. 27, *Curien v. Santini*.

4. A corporation organized under the act of 1855, approved March 14, need not have the certificate of a district judge nor file their charter in the office of the secretary of State as directed by act 1848. 18 A. 218, *Bridgeford v. Hall et al.*

5. Under act of 1855, for the organization of corporations for works of public improvement and utility, a corporation may be organized to construct steamboats. 18 A. 219, *Bridgeford v. Hall et al.*

6. Political corporations are liable for damages done by mobs. 23 A. 507, *Williams v. City of New Orleans*; 28 A. 936, *Folsom v. City*. See OFFENSES AND QUASI OFFENSES.

7. The title of an act which provides for the incorporation of a town and the government thereof, is sufficient to cover a grant of power to levy taxes and

enforce the collection thereof, with penalties. 26 A. 675, *Slack v. Ray*. See CONSTITUTION, II. (c), 1).

8. The property of an extinct corporation belongs to the individual members thereof. 29 A. 39, *Burke v. Wall*.

9. The corporation may sue on a bond given in favor of the president and board of directors, to guarantee the faithful performance of the duties of paying teller to the bank. 28 A. 736, *New Orleans National Bank v. John S. Wells et als.*

10. The purchasers of all the rights and franchises of a corporation, do not for that reason become invested with the corporate powers of the vendee. An obligation issued by such purchasers under the style of the vendee will bind the purchasers individually. 27 A. 610, *Chaffe & Bro. v. Ludeling et als.* See TAXES, II. (b), 3), Nos. 9, 10, 11.

11. Since there is nothing in the laws of Louisiana upon the subject of corporations, which points to the necessity of using a corporate seal in appointing agents, or authorizing corporate acts, the fair inference deducible from the silence of the code is, that it does not contemplate any such formality as essential to the validity of any official act done by the officers of the corporation. 18 Wheaton, 338, *Fleckner v. Bank of the United States*.

12. An act of the legislature creating a private corporation, must be offered in evidence. See EVIDENCE, II. No. 11.

13. Parol evidence when received to prove the charter of a corporation, will be considered. See EVIDENCE, V. (c), No. 6.

14. A national bank may sell the real estate it owns, on terms of credit, and reserve a mortgage and vendor's privilege, to secure the price. 29 A. 355, *New Orleans National Bank v. Raymond*.

15. If the corporation acquire property in a manner prohibited by law, it is not liable for the debts of the vendor. See EXECUTION, V. (a), 3), A. No. 12.

16. For laws affecting the charter of corporations, see CONSTITUTION, III. (c), 3), B.

17. Interpretation of the word "persons," in a certain charter. See CONSTITUTION, II. (c), 6), No. 2.

18. Insurance companies to publish statements, 1874, p. 162; foreign companies to have agents here who may be sued, 1877, No. 21; corporations, how formed, 1878, p. 83.

II. OF THEIR POWERS AND LIABILITIES.

(a) *In general.*

1. In 1816, the legislature incorporated the Grand Lodge of Louisiana, and in 1819, conferred power upon the same to create subordinate lodges. In February, 1855, the grand lodge granted a charter to the Polar Star lodge No. 1; in 1858, twenty-two of the forty-four members of the Polar Star lodge, formed themselves into a corporation of the same name, and at a meeting of the old lodge, donated all the property and effects to the new corporation, contrary to the protest of the minority who were present at the meeting. Suit was brought by said minority under the name of the corporation, which not being objected to *in limine*, came too late, and the donation was annulled by reason of an incapacity of the members to dissolve the corporation, and to transfer its property to another body. 16 A. 74, *Polar Star Lodge v. Polar Star Lodge*.

2. A political corporation being the creature of the legislature, the latter has the right to order that certain certificates of debts, in the hands of *bona fide* purchasers, be recognized and paid by the corporation, although the certificates are fraudulent. 24 A. 57, *State ex rel. Hernandez v. Flanders, mayor, etc.*

3. WYLY, J., *dissenting*: The warrants were fraudulent, null and void on their face, and the legislature could not make them valid. *Ib.*

4. A corporation not yet in existence, cannot incur liability, although the services rendered were to organize and put the same in successful operation. 26 A. 389, *Marchand v. Loan and Pledge Association*.

(b) *Political corporations.*

1. A political corporation may acquire real estate in fee simple, and the legislature from which it derives its power, cannot dispose of the same without the consent of the corporation. 26 A. 478, *New Orleans, Mobile and Chattanooga Railroad Company v. City*.

2. LUDELING, C. J., *dissenting*: If the property be a public thing, the legislature may dispose of it; the corporation is only the creature of the legislature. *Ib.*

3. The batture bounded by Canal, Delta and Poydras streets, is held by the city *in fee simple*. *Ib.*

4. A political corporation has power to purchase real estate, and to secure by mortgage the credit portions as well as interest, attorney's fees and costs, etc. 26 A. 636, *Edey v. Shreveport*.

5. An ordinance providing for the closing of all stores, etc., on Sunday, excepting that of the Jews, is unconstitutional. 26 A. 671, *City of Shreveport v. Levy*.

6. The act of the general assembly of 4th March, 1872, authorizing the police jury of Red River parish to issue bonds to build a court-house contemplates "some action of the police jury, ordering that the bonds shall be issued; fixing the denominations." This was not done; the bonds had no existence. Police jurors can exercise no powers except such as specially conferred, and it is a fundamental principle that all persons contracting with a municipal corporation must, at their peril, enquire into the power of its officers to make the contract; and a contract beyond the scope of the corporate power is void. 29 A. 590, *Lisso v. Parish of Red River*.

7. The consent of a municipal corporation may be as effectually given by the inaction of the council as by a formal resolution. 29 A. 581, *Booth v. Shreveport*.

8. It is within the power of a municipal corporation to prohibit the erection of wooden buildings within certain limits and to cause the removal of those erected contrary to the prohibition. 29 A. 653, *Monroe v. Hoffman*.

9. The officers of a municipal corporation cannot create obligations binding on the corporation, unless their power so to do be express or implied in their charter. 29 A. 673, *Wilson v. Shreveport*. See POLICE JURY, No. 8.

10. The officers of a municipal corporation can create no debt against the corporation, unless the ordinance creating the debt imposes a tax for its extinguishment. 29 A. 673, *Wilson v. Shreveport*. See No. 9.

11. A municipal corporation, which is expressly authorized to make expenditures for certain purposes, may, unless prohibited by law, make contracts for the accomplishment of the authorized purpose, and thereby incur indebtedness and issue proper vouchers therefor. 15 Wall. 566, *Police Jury v. Britton*.

12. The charter of a municipal corporation imposed conditions and restrictions upon its power to contract debts and issue bonds. Holders of bonds, issued in pursuance of the charter, made no opposition to the issue, at a subsequent date, of bonds contrary to the restrictions of the charter, and the later bonds found their way into the hands of *bona fide* holders for value; *Held*: That such irregularly issued bonds were binding on the municipal corporation, and that the holders of bonds regularly issued could not assail their validity. Woods, 128, *Ranger v. New Orleans*.

13. Holders of the bonds, regularly issued, had no right to claim that their bonds should be paid in preference to the irregular bonds, out of moneys not specially collected for that purpose, even though the regular bonds were due, and the irregular one were not. *Ib.*

14. Negotiable bonds issued without authority by municipal corporations, and in the hands of third holders, are not valid. See BONDS, No. 13.

15. The legislature may enlarge the limits of towns. See CONSTITUTION, II. (c), 3), B. No. 4.

16. Parol is not admissible to show that time was given by a municipal corporation to a tax collector, to settle. See EVIDENCE, IX. (a), No. 23.

17. For power of New Orleans to acquire and alienate property, see NEW ORLEANS, II. (c).

(c) *Private corporations.*

1. The failure of a company in forming a corporation, to obtain the authorization or certificate of the district attorney or judge, and to have the act of incorporation duly recorded, is not a mere informality within the meaning of the eighth section of the act of 1852, but a substantial omission which strikes the act of incorporation with nullity. 16 A. 154, *Spencer Field & Co. v. Cooks*.

2. The clause of the act of 1855, relative to the organization of corporations for works of public improvement, prohibiting them from engaging in mercantile or agricultural business, or in commission, brokerage, stock jobbing, exchange or banking of any kind, applies to no other corporation. 22 A. 523, *Graham & Henderson v. Hendricks*. See *infra*, X. (jj).

3. Act No. 52, of 1865, entitled "an act to enable certain persons to construct a steamboat canal from Vermilion bay to the Sabine river, etc.," does not give aid, in the sense of articles 112, 121 and 127 of the constitution of 1864. It is simply a right of pre-emption. The act does not create a corporation. It confers rights on the individuals named. It does not divest the swamp land from the purposes for which they were granted by congress, to this State. 23 A. 226, *State v. Burgess et als*.

4. HOWE, J., *dissenting*: The State cannot give aid to companies or individuals, except in certain cases and under certain limitations. *Ib*.

5. An insurance company created for the purpose of carrying on such business, with the power to convert the bonds and stocks in cash when needed, to pay risks, has the right through its president to borrow money and pledge said stock as collateral security. 23 A. 788, *Bezou, commissioner v. Pike, Lapeyre & Brother*.

6. The giving of the note being ratified by the vestry, plaintiff may recover as against the corporation. 26 A. 738, *Donnelly v. St. John's Episcopal Church*.

III. OF THE ELECTION AND AMOTION OF OFFICERS.

1. The officers of the company have no right to vote on the shares held by the company. 19 A. 485, *Monseaux v. Urquhart*.

2. If a public corporation is continued into a limited existence for the purpose of settling up its indebtedness, and no provision is made for the continuance or new election of the officers of such corporation, the functions of the existing officers will cease when their respective terms expire, and the corporation will then be *de facto* extinct. 93 Otto, 258, *Barkley v. Levee Commissioners et al*. See *infra*, VII. No. 2. COURTS, I. No. 12.

IV. OF THEIR MODES OF ACTION; AND POWERS AND LIABILITIES OF THEIR OFFICERS.

(a) *Political corporations.*

1. The ownership of the church carries with it the power of discharging the pastor. 25 A. 282, *African Methodist Episcopal Church v. Clark*; 4 R. 68. See *infra*, (b), 1), No. 1.

2. The managers and officers of a company, where capital is contributed in shares, are in a very legitimate sense trustees alike for its stockholders and its creditors, though they may not be trustees technically and in form; they accordingly have no right to enter into or participate in any combination, the object of which is to divest the company of its property and obtain it for themselves at a sacrifice; they have no right to seek their own profit at the expense of the company, its stockholders, nor even its bondholders, contrarywise in case of embarrassment to the company, and if necessary to sell the estates of the company, it is their duty to the extent of their power to receive for all those whose interest are in their charge, the highest possible price for the property which can be obtained for it. 21 Wall. 616, *Jackson v. Ludeling*.

(b) *Private corporations.*

1) In general.

1. The trustees of all incorporated churches have the possession and custody

of the temporalities of the church; and the courts will protect their possession against all irregular and unlawful intrusion, whether by the pastor, members of the congregation, or strangers. 17 A. 127, *German Evangelical Congregation of Lafayette v. Pressler*. See *ante*, (a), No. 1.

2. The directors who, in pursuance of a resolution of the stockholders, advertise a lease of the property, and reject all the sealed proposals received, have the right to adopt another mode of contracting, and the courts will not interfere. 20 A. 67, *Ricau v. Baquie et als.*

3. When the powers of a bank cashier are not otherwise fixed, they are to be regulated as the powers of other agents and factors. 8 Wh. 338, *Fleckner v. Bank of the United States*.

4. For liability of corporations on their notes, see **BILLS AND NOTES, II.** Nos. 8 and 9.

5. Parol is admissible to prove a resolution, when no minutes have been kept. See **EVIDENCE, No. 24.**

6. The president of a railroad company who superintends the putting up of a building for the company, cannot claim compensation. See **QUASI CONTRACTS, I. No. 18.**

2) Liability of officers to the corporation.

1. Where, in time of war, a bank was, notwithstanding the protest of its officers, put in liquidation, by order of the commanding general of the United States forces and its effects transferred to commissioners appointed by him, who, during their administration, sold for less than their face value, *chooses in action*; *Held*: That, as the proceedings of the commanding general and the commissioners constituted "superior force," which no prudent administrator of the affairs of a corporation could resist, the bank was neither responsible for those proceedings nor for a loss thereby occasioned. 91 Otto, 27, *McLemore v. Louisiana State Bank*.

2. Corporations when bound on their notes. See **BILLS AND NOTES, II.** Nos. 8 and 9.

V. OF BY-LAWS.

1. The by-laws and regulations which corporations enact for their police and discipline, are obligatory upon all their respective members, provided they be not contrary to law and public policy or to the interest of others. 17 A. 127, *German Evangelical Congregation of Lafayette v. Pressler*.

2. The by-laws of a corporation have the force of law between the employees; the company may exercise its rights and discharge its employees. 26 A. 13, *Hunter v. Sun Mutual Insurance Company*.

3. Force of by-laws. See VI. (c), No. 7; X. (t), No. 3.

VI. OF THE CAPITAL STOCK; SUBSCRIPTIONS FOR, AND TRANSFERS OF, SHARES; AND RIGHTS AND OBLIGATIONS OF THE STOCKHOLDERS.

(a) *In general.*

1. A corporation cannot subscribe for stock, in another company, foreign to the object of its own charter. 28 A. 173, *New Orleans and Florida Steamship Co. v. Ocean Dry Dock Co.*

2. A municipal council has no power to refer the question of a vote of the people for subscription to the stock of a railroad company, to the mayor for action; the action of the latter will be null and void when the legislature directs the action to be taken by the council. 27 A. 623, *State ex rel. Haven v. City of Shreveport*.

3. The ownership of stock does not give the stockholders any legal estate in the property of the corporation. 1 Woods, 15, *Morgan v. R. R. Co. et als.* See *supra*, I. No. 2; *infra*, (c), No. 5.

4. The subscription notes of an insurance company, constituting its stock, are subject to taxation. See **TAXES, I. No. 2.**

(b) *Application to subscribe; and transfer of shares.*

1. If the books of subscription are closed by resolution of the directors, no subscription can lawfully be made thereafter. 24 A. 318, *State ex rel. Hams-worth v. Crescent City Gas Light Company*.

2. A provision in the charter of a bank that no transfer of stock shall be valid or effectual until such transfer shall be entered in a book kept for that purpose, is a provision intended for the protection of the banks and of third persons purchasing without notice of any previous transfer, but as between the owner of the stock and his vendee, a transfer, not in conformity to such provisions, is sufficient to pass the equitable title and divest the vendor of all interest in the stock. 3 H. 483, *Black v. Zacharie*.

3. When the stock is seized, how it is transferred, contrary to the by-laws, in certain cases. See COMPENSATION, I. No. 5.

4. A transfer once recognized by the company, estops it from calling for an assessment on the transferrer. See ESTOPPEL, No. 37.

5. When the intention and spirit of a resolution, to open subscription for stock is that the stock be paid for, within the delay during which the subscription is opened, a stockholder who has notified his intention to subscribe before the delay, and made a tender of the amount after the delay allowed for subscription, cannot compel the company to deliver the stock. 30 A. 758, *Hart v. St. Charles Street Railroad Company*.

6. SPENCER and MARR, JJ., *dissenting*: The terms of the resolution being to take stock cannot mean a simultaneous payment. *Ib.*

7. Foreign executors or representatives of absentees owning shares of stock here may transfer the shares without order of court, or even opening a succession here. 1877, p. 60.

(c) *Rights and obligations of stockholders, inter se, and as regards the corporation.*

1. The stock of defendant in a private corporation having been declared forfeited, he cannot be called upon by the creditors for any unpaid balance. 18 A. 619, *Macaulay v. Robinson*.

2. A stockholder when sued on his stock note to pay the liabilities of the insolvent corporation, must, to be relieved, show that the contribution called for is not needed. 25 A. 136, *Peychaud v. Weber*.

3. Even if the penalty for non-payment of the stock is its forfeiture, the corporation may enforce payment by suit as long as the stock is not declared forfeited. 27 A. 318, *New Orleans, etc. Steamship Company v. Briggs*.

4. One becoming a stockholder in an association must be held to the rules and regulations in existence at the time he became such; and where there existed a club composed of the majority of the stockholders, giving unto themselves certain privileges refused to others, he cannot complain. 28 A. 421, *Johnson v. La Variété Association*.

5. The ownership of stock in an incorporated company does not give the stockholders any title to the property of the company. 2 Woods, 189, *Sala v. New Orleans*. See *supra*, I. No. 2; VI. (a), No. 3.

6. A stockholder present at the distribution of shares of stock cannot afterwards object. See ESTOPPEL, No. 54.

7. Heirs of a stockholder cannot compel the company to transfer their ancestor's shares, in their name, without producing the original certificate, in accordance with the by-laws regulating the transfer of shares. 30 A. 308, *State ex rel. Martin v. N. O. Carrollton R. R. Co.*

8. Where the by-laws require indemnity, to issue a new certificate of stock, the courts will compel the issuance of the new certificate without the bond of indemnity. See CORPORATIONS, X, (t), No. 3.

9. The stockholders have no right to enter into any combination to divest the company of its property and obtain it for themselves; they are entitled to no share of the capital stock until the debts are paid. 30 A. — *Cochran v. Ocean Dry Dock Co.*; 21 Wall. 916, *Jackson v. Ludeling*.

(d) *Obligations of the stockholders as regards third persons.*

1. A corporation is not a partnership; the members can only be compelled to pay to creditors of the corporation the amount due by them to the company. 18 A. 310, *Monaghan v. Hall*.

2. Agreements made between the officers of the corporation and stockholders are not binding on the creditors. 23 A. 732, *Peychaud v. Hood*.

3. No act or contract on the part of the stockholders can defeat the rights of the creditors of the corporation, and they are bound to pay the full price of the shares subscribed by them. 24 A. 405, *Peychaud v. Lane*.

4. The members of a corporation, to transport persons and property, are not liable individually or *in solido* for the debts of the corporation. They are not assimilated to commercial partners. 29 A. 552, *Reinhold v. Ludeling et al.*

5. The patentee having accepted stock in payment of his patent, cannot recover the patent as against a seizing creditor. See PAYMENT, I, No. 10.

6. Officers of the corporation who are not stockholders, can only receive their salary after payment of its debts. 30 A. — *Cochran v. Ocean Dry Dock Co.*

VII. OF THE FORFEITURE OF CHARTER.

1. Proceedings by one party to forfeit the charter of a corporation in the parish of Orleans, does not divest the other district courts of jurisdiction to entertain similar proceedings brought by other parties. 20 A. 177, *State v. Judge Fourth District Court*.

2. A public corporation charged with specific duties, such as building and repairing levees within a certain district, being superseded in its function by a law dividing the district, and creating a new corporation for one portion, and placing the other under the local authorities, ceases to exist, except so far as its existence is expressly continued for special objects, such as settling up its indebtedness and the like. 93 Otto, 258, *Barkley v. Levee Commissioners et al.* See *ante*, III. No. 2. COURTS, I. No. 12.

3. Every public corporation in Louisiana can be dissolved by legislative authority, when this is deemed necessary or convenient to the public interest. 15 H. 367, *McDonogh's Executors v. Murdock*.

4. No one but the attorney general can urge the forfeiture of a bank's charter. See PLEADING, I. (c), 9), No. 10.

VIII. OF THE DISSOLUTION AND LIQUIDATION; AND OF INSOLVENT CORPORATIONS.

(a) *In general.*

1. Corporations have no right, under the laws of Louisiana, to make a voluntary cession of their assets. 18 A. 685, *Jeffries v. Belleville Iron Works Co.*; 15 A. 19, *Same v. Same*. See INSOLVENCY, I. No. 1.

2. A corporation cannot be dissolved by a simple resolution adopted by the majority of its members; nor can the majority base a demand for forfeiture of its charter on such a resolution, which in contemplation of law, was a wrongful act, as such gives no right of action. 16 A. 27, *Curien v. Santini*.

3. A corporation may be dissolved, first, by an act of the legislature on certain conditions; second, by a forfeiture of its charter, judicially ascertained at the suit of the State. *Ib.*

4. An act of the State of Louisiana, entitled "an act to provide for the liquidation of banks," approved March 14, 1842, which provided for the forfeiture of the charter of an insolvent bank, for a stay of all suits against such bank, and for the appointment of commissioners to collect the assets and pay the debts of the bank and distribute any surplus there might be among the stockholders, is in effect a bankrupt law for banks, and was suspended by the passage by congress of the general bankrupt act. 1 Woods, 1, *Thornhill v. The Bank*.

5. The decree of the State court, made by virtue of proceedings under said act, declaring the charter of the bank forfeited, constitutes no bar to a pro-

ceeding in involuntary bankruptcy against the bank under the general bankrupt law. 1 Woods, 1, *Thornhill v. The Bank*.

6. The property of an extinct corporation belongs to the individual members. 29 A. 39, *Burke v. Wall*.

7. Corporations when *de facto* extinct. See *ante*, III. No. 2.

8. The corporation being defunct, the term of its officers having expired, no mandamus can issue against it. See MANDAMUS, I. (b), Nos. 43, 44, 45.

(b) *Appointment and powers, duties and compensation, of liquidators.*

1. The appointment of a receiver for a corporation on an *ex parte* application, without even alleging its insolvency, is absolutely null and carries with it no right to receive the assets or revenues of the company. 24 A. 348, *Turgeon v. Brady*.

2. The appointment of a judicial sequestrator, to wind up the affairs of the loan and pledge association, is illegal. Section 14 of act 212 of 1868, provides for the liquidation and the mode of so doing. 28 A., not reported, *Mahan v. Benton*. *Ib.*, *In the matter of Stockholders of the Loan and Pledge Association*.

3. The receiver of an insolvent national bank holds only the estate and title of the bank in its assets, and he has no greater rights in enforcing their collection than the bank itself would have had. 2 Woods, 77, *Casey v. La Société du Crédit Mobilier*.

4. Liquidators of a corporation, appointed by the stockholders, cannot be displaced by a liquidator appointed by the court; their election must first be annulled. 30 A. 161, *Folliet v. Spencer Field & Co*.

IX. OF THE BOARD OF LIQUIDATORS.

See MANDAMUS, I. (b), Nos. 9, 13, 27, 39; II. No. 21. DRAINAGE, Nos. 14, 15. NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY. Funding act, 1874, p. 39; right to test validity of bond, 1875, p. 110; board of liquidators, funding, etc., 1877, E. S., p. 113.

X. PARTICULAR CORPORATIONS AND INTERPRETATION OF THEIR CHARTERS.

(a) *Accommodation bank.*

1. How the change of corporation from a loan to a banking one must be made, see CONSTITUTION, II. (c), 3), B. No. 3.

(g) *Citizens' Bank of Louisiana.*

1. Where, by the charter of a bank, the default of a stockholder to pay one of the installments of the stock-loan at maturity, renders the whole amount of the loan immediately exigible, and deprives the stockholder of the delays to which he was originally entitled, the bank has a right to waive the enforcement of this entire obligation of its defaulting debtor; and where such waiver has been made, the clerk of the court cannot, by his order of seizure and sale, give greater relief than has been sought in the petition. 15 A. 83, *Ives v. Citizens' Bank*.

2. If the plaintiff shows injury to himself by the sale of property under such an order, even the *bona fide* purchaser's title is not valid. *Ib.*

3. The mortgage given to secure a subscription for stock and one for a loan made from the Citizens' Bank, are distinct and separate. 22 A. 484, *Rind v. Successions Flucker and Farmer*.

4. By the twenty-fifth section of the charter of the bank, a married woman may bind herself conjointly and in *solido* with her husband to mortgage her property; thus removing the disabilities of article 2412 C. C. 24 A. 274, *Wells v. Citizens' Bank*.

5. The charter of the bank, the original act of mortgage of defendant's stock, and a certified copy of the resolutions of the board of directors, calling for contributions in accordance with act No. 45 of 1873, will authorize the issuance of executory process. 25 A. 628, *Citizens' Bank v. Deynoot*.

6. Act No. 12, of 1872, defining the distances from the domicile of members

of the legislature, does not contain in its title its primary object, which is to borrow two hundred thousand dollars from the bank, and is therefore unconstitutional. 26 A. 83, *Citizens' Bank v. Dubuclet*.

7. ON RE-HEARING: The bank having obtained a mandamus against the treasurer, and the judgment being final, the question as to the validity of the act was not an open one. *Ib.*

8. The Citizens' Bank has the right to enforce the contributions authorized to be levied by the legislature. Not reported, *Citizens' Bank v. Castillo*; O. B. 44, p. 376, *Same v. Louis Muh*; O. B. 45, fo. 138; *Same v. Widow de St. Romes*. See act 1873, No. 45.

9. The stock mortgage is anterior to the loan mortgage. See MORTGAGES, VIII. (b), No. 1.

10. The bank's mortgage is not affected by a probate sale. See MORTGAGE, VIII. (c), No. 7.

11. Bank incorporated, 1833, April 1; amendment 1835, March 19; 1836, January, 30; 1836, February 12; 1839, Nos. 15, 22, 60; 1842, January 24, No. 17; 1842, February 5, Nos. 22, 47, 59, 93, 95, 98, 151, 157; 1843, Nos. 92, 96; 1845, Nos. 58, 72; 1846, No. 182; 1847, Nos. 100, 216; 1852, No. 141; 1853, Nos. 52, 246; 1854, No. 214; 1855, No. 113; 1856, No. 162; 1857, Nos. 120, 103; 1858, March 17; 1867, No. 7; authorized to levy contributions, 1873, No. 45; charter extended, 1874, p. 77.

(j) *Commercial Bank of New Orleans.*

1. Under its charter to furnish water for public purposes, the Commercial Bank must supply the water for universal public use, and not a portion of it. 17 A. 190, *Commercial Bank v. City of New Orleans*. See WATER WORKS.

(k) *Consolidated Association of the Planters of Louisiana.*

1. The bonds issued to this corporations by the State, are fundable. See BONDS, Nos. 29, 30.

2. The court of equity has power, notwithstanding act No. 20, of 1878, E. S., to order the liquidation of the corporation and appoint its liquidators without regard to this act. See judgment rendered by the United States Circuit Court in the case of ——— v. *Consolidated Association of the Planters*.

(l) *Firemen's Charitable Association.*

1. The Firemen's Charitable Association has no power to pass a resolution "to prevent the Babcock engines from running to fires" or send the men working them to prison; they are properly enjoined from interfering with the Babcock engines. 27 A. 373, *Teutonia Insurance Company v. O'Connor et als*.

(n) *Louisiana, Bank of; and Louisiana State Bank.*

1. The order of Major General Banks, appointing commissioners to liquidate the affairs of the Bank of Louisiana did not, *ipso facto*, destroy the charter of the bank. 30 A. 214, *Bank of Louisiana v. Green*.

2. Louisiana State Bank continued until 1900. 1870, E. S., p. 121.

(q) *New Orleans and Carrollton Railroad Company.*

1. Under the by-laws of the company, the original certificate of stock must be produced to compel a transfer of the shares to the heirs of the stockholders, else a proceeding by mandamus is not proper. 30 A. —, *State ex rel. Martin v. New Orleans and Carrollton Railroad Company*.

(r) *Louisiana Levee Company.*

1. The contract of the State with the levee company, acts of 1871, Nos. 4 and 27, does not create any debt and is not in conflict with the amendment of the constitution limiting the State debt to twenty-five million dollars. 25 A. 403, *State ex rel. Louisiana Levee Co. v. Clinton*.

2. To maintain a suit in damages against the Louisiana Levee Company.

plaintiff must conform their allegations to the causes specially mentioned in the two acts creating the company and entering into contract with them. 30 A. 345, *Choppin & Beard v. Louisiana Levee Co.*

3. The levee tax is not a State debt. See CONSTITUTION, II. (c), 1), No. 18.

4. The levee company not liable in damages, for crevasses. See LEVEES, No. 11.

5. A stockholder present at the distribution of shares cannot object afterwards. See ESTOPPEL, No. 54.

6. Whenever dividends are declared to preferred stocks, ordinary stocks must participate in the surplus. 30 A. —, *Southworth v. La. Levee Co.*, (not final).

7. See acts 1871, pp. 19, 64; 1873, p. 83; 1874, p. 95; amount due by the State to the company, how ascertained, 1875, p. 55; laws repealed, 1877, E. S., p. 210.

(s) *New Orleans Draining Company.*

See DRAINAGE.

(t) *New Orleans Gas Light Company.*

1. The action to annul the act of 1860, extending the charter of the New Orleans Gas Light Company from 1875 to 1895, before the act goes in operation, is premature. 25 A. 399, *State v. New Orleans Gas Light Company.*

2. The act of March 1, 1860, extending the charter of the New Orleans Gas Light Company to 1895, is unconstitutional in not expressing its object in its title. 27 A. 139, *Crescent City Gas Light Company v. New Orleans Gas Light Company.*

3. The by-laws of the company requiring a bond of indemnity before the issuance of a new certificate of stock, in lieu of one which has been lost, is not a good reason for such refusal. The stock cannot be transferred, except upon the books of the company, by the owner thereof. 25 A. 413, *State ex rel. Phillips v. New Orleans Gas Light Company.* But see VI. (c), No. 7.

4. Crescent City Gas Light Company incorporated, 1870, E. S., p. 216.

(v) *New Orleans, Jackson and Great Northern Railroad Company.*

1. The State and city of New Orleans have each a vote in the election of directors of the New Orleans, Jackson and Great Northern Railroad Company, and when their votes have not been counted, the election is null. 20 A. 489, *State v. New Orleans, Jackson and Great Northern Railroad Company.*

2. Joint resolution, 1860, p. 9; to sell stock owned by the State, 1870, E. S., p. 188; track extended to the river, 1870, E. S., p. 191; consolidated with Mississippi Central, 1874, p. 79; approval, 1878, p. 141.

(w) *Orleans Navigation Company; New Orleans Canal and Navigation Company, and Carondelet Canal Navigation Company.*

1. The Carondelet Canal and Navigation Company have the right to lease their property, in part or in whole. 20 A. 106, *Gubernator v. City of New Orleans.*

2. For right of the lessee to claim damages from the city for draining into Bayou St. John, see DRAINAGE, Nos. 3, 5.

3. Right of the company to recover for the use of their dredgeboat, see QUASI CONTRACTS, I. No. 18.

4. See TOLLS AND IMPOSTS.

(x) *Pontchartrain Railroad Company.*

1. This company had a right to *pro rate* with Charles Morgan, to the detriment of other common carriers; no damages could arise from this contract. 24 A. 12, *Eclipse Towboat Co. v. Pontchartrain R. R. Co.*

2. TALIAFERRO, J., *dissenting*: The contract was a wrong upon the public. *Ib.*

3. See act of 1872, p. 37; 1868, p. 179.

(aa) *New Orleans, Mobile and Chattanooga Railroad Company.*

1. The two million five hundred thousand dollars of bonds issued to the New Orleans, Mobile and Chattanooga R. R. Co. are null, having been issued against the authority of the State; these bonds cannot be considered as promissory notes, and as such negotiable. 28 A. 393, *State v. Chas. Clinton and Dubuclet*.

2. LUDELING, C. J., *dissenting*: Third persons claim these bonds; it matters not, therefore, if the company has failed to comply with its obligations. *Ibid.*

3. See CONSTITUTION, II. (c), 1), No. 3.

4. Acts 1870, p. 55; name changed, 1871, p. 211; guarantee released, 1871, p. 211.

(bb) *New Orleans, Opelousas and Great Western Railroad Company.*

1. The rights, duties and obligations of the New Orleans, Opelousas and Great Western Railroad Company, are created by express law, and until the legislature shall, by statute, require them to enclose their roads, or shall delegate the power to the parochial authorities, and they shall exercise the same, they will be under no obligation to enclose their road or any part thereof with fence or barriers, and if cattle stray upon the track and be killed or are maimed by accident *damnum absque injuria*, the owner will have the loss to bear. 15 A. 105, *Knight v. Opelousas R. R. Co.*

2. An action cannot be maintained by a railroad company against the owner of cattle for damages occasioned by the cars coming in collision with the cattle on the road while it remains unenclosed. 15 A. 118, *Jenkins v. Opelousas R. R. Co.*

3. Plaintiff, who claims for cattle killed, must make his claim certain. See OFFENSES AND QUASI OFFENSES, II. (a), No. 1.

4. Investigation, 1870, E. S., p. 201.

(dd) *North Louisiana and Texas Railroad Company.*

1. Acts of 1868, No. 108, and of 1871, No. 105, were repealed by act 97 of 1872, so far only as the former stipulates a mortgage in favor of the State, or holds the North Louisiana and Texas Railroad Company, liable on the bonds issued by the State to them; the form of the security only is changed. The law creating the debt and providing for its payment is not repealed. 25 A. 65, *State v. The North Louisiana and Texas Railroad Company*.

2. The acceptance of the terms of act of 1872, by the company, was made in time. *Ib.*

(ff) *Sanitary and Fertilizing Company.*

1. The second section of act No. 102 of 1870, is repealed by act No. 46 of 1874. 25 A. 536, *State ex rel. Sanitary and Fertilizing Co. v. Board of Health*. 1877, E. S., p. 123.

(gg) *Slaughter House Company chartered as the "Crescent City Live Stock Landing and Slaughter House Company."*

1. The slaughter house company had no right to abandon the location of the slaughter house on the right bank, and establish it on the left bank. It cannot prevent butchers from carrying on their business in the place first established by them. 28 A. 210, *Berthin v. Crescent City Live Stock and Slaughter House Company*.

2. MORGAN, J., *dissenting*: The company had the right to remove the slaughter house. *Ib.*

3. See CONSTITUTION, II. (c), 1), No. 10.

4. Incorporated 1869, p. 170; located 1877, E. S., p. 220.

(hh) *Sugar Shed Company.*

1. The capital of the sugar shed company invested in buildings in a *locus publicus* may be taxed. 26 A. 378, *Sugar Sheds v. Harris*.

2. Illegal charges of the company and appeals. See APPEAL, I. (a), 1), No. 38.

(ii) *Straight University.*

1. The Straight University is a private institution, in favor of which the State can make no appropriation of money. Constitution of 1868; act 81 of 1870. 25 A. 440, *State ex rel. Straight University v. Graham*. Per contra, see CONSTITUTION, II. (c), 1), No. 29.

(jj) *Workingmen's Bank.*

1. The Workingmen's Bank was not incorporated under the free banking law, but under the general incorporation act; as such it has no power to engage in banking business, nor to sue on a bond given by a book keeper and paying teller for the faithful performance of his duties as such. 29 A. 369. *Workingmen's Bank v. Converse et als.* See *supra*, II. (c), No. 2.

2. Act of incorporation, 1874, p. 169.

COSTS.

I. IN GENERAL.

II. OF THE RIGHT TO DEMAND AND PROCEEDINGS TO ENFORCE THE PAYMENT OF COSTS; WHAT THEY ARE; AND THEIR AMOUNT.

III. OF THE LIABILITY FOR COSTS AND THE AMICABLE DEMAND.

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| (a) <i>In general.</i> | (d) <i>Partnership, tutorship and suc-</i> |
| (b) <i>Amicable demand.</i> | <i>cession.</i> |
| (c) <i>Obligation to pay costs before further proceedings.</i> | (e) <i>Costs of appeal.</i> |

IV. OF SECURITY FOR COSTS.

I. IN GENERAL.

1. The appropriation made by act No. 35 of 1870, of \$2000, to pay the costs of suits lost by the State, does not apply to cases where the State obtains judgment. 22 A. 584, *Mahan v. Sundry defendants*.

2. Plaintiff cannot be made liable for illegal costs and charges received by the sheriff and clerk from the execution. 28 A. 149, *Succession Constant Hearing*.

3. For costs, see CLERKS OF COURT and SHERIFF.

4. For costs in city tax suits, see CLERKS OF COURT, No. 8.

5. For costs against the part owners of a steamer, see PRIVILEGE, III. (c), 2), A.

6. No fees paid to criminal and coroner's juries, 1874, p. 117; costs of arrests in other States, 1874, p. 156; short hand reporter, 1876, p. 149; city of New Orleans, tax suits, one dollar, 1877, E. S., p. 127; clerk's fee bill, except Orleans; 1876, No. 99, bound with the acts of 1878; fee bill for New Orleans, 1870, p. 161.

II. OF THE RIGHT TO DEMAND AND PROCEEDINGS TO ENFORCE THE PAYMENT OF COSTS; WHAT THEY ARE; THEIR AMOUNT.

1. The statutes of the State authorizing the municipal authorities, by whom the costs in criminal cases are paid, to regulate and fix the expenses in such cases, restrict them in respect to charges for the maintenance of prisoners. 15 A. 43, *Parker v. New Orleans*.

2. Under the act of 1856, the city of New Orleans has no greater power given to it in this respect: and the sheriff of the parish of New Orleans has the right, under the acts of the legislature, to charge thirty-seven and one-half cents for daily maintenance of prisoners, and one dollar for turnkey's fees for each prisoner. 15 A. 43, *Parker v. New Orleans*.

3. The city is concluded by the certificates of the judge and clerk as to sheriff's costs. Once paid the amount cannot be recovered. 27 A. 168, *City v. Patton*; 14 A. 246; 18 A. 195.

4. The judge's approval of the clerk's bill is not conclusive on the city, and where the items appear overcharged they will be reduced according to law. 27 A. 457, *Fitzpatrick v. City of New Orleans*.

5. The law does not allow any fee to the crier. If there be such an officer he can only recover on a *quantum meruit*. 24 A. 290, *Hart v. City of New Orleans*.

6. A jury of freeholders summoned to value property to be expropriated, cannot assess their compensation; they are to be paid as special jurors. See NEW ORLEANS, II, (e), 5) c.

7. The clerks and sheriffs may collect their fees every six months (January 1st and July 1st); on pursuing certain formalities; experts, auditors and judicial arbitrators are not included in this provision; they must wait the termination of the suit. 19 A. 382, *The City praying for expropriation*; 27 A. 394, *Lobdell v. Bushnell*.

8. The sheriff should annex specific bills of his and the clerk's costs to his return on executions. 19 A. 113, *Duplantier v. Wilkins*.

9. Under section 2 of act of 1874, p. 220, the clerk of the Superior Criminal Court is entitled to charge only for processes not provided for by law, above the salary fixed to him. Processes are the judicial means by which defendants are brought into court. 27 A. 457, *Fitzpatrick v. City of New Orleans*.

10. For costs of experts, see EXPERTS AND AUDITORS, I, No. 1.

11. Deposit for costs, 1877, p. 207.

III. OF THE LIABILITY FOR COSTS AND THE AMICABLE DEMAND.

(a) *In general.*

1. Where there is a reconventional demand, and both parties to the suit are cast, each must pay the costs of his own pleadings. 15 A. 679, *Peniston v. Somers*.

2. Plaintiff is only liable for the costs incurred after the illegal refusal of the judge to grant the trial by jury. 18 A. 303, *Simpson v. Richardson*.

3. The defendant is liable for costs, although he admits the amount claimed, but does not make a legal tender in accordance with article 407, C. P. 23 A. 183, *Thompson v. Edwards*.

4. The city of New Orleans may set aside the writs of *feri facias* issued by her, for taxes, but she is liable for the costs. See NEW ORLEANS, II. (c), No. 11!

5. Defendants liable jointly for the debt, are liable *in solido* for costs. See OBLIGATIONS, VIII. (e), No. 19.

(b) *Amicable demand.*

1. The city not having been put *in mora* by a demand of payment, judgment must be rendered in her favor. 23 A. 8, *Smith v. City of New Orleans*.

(c) *Obligation to pay costs before further proceedings.*

1. Sheriff and clerks may require security before being compelled to perform their duties. 1870, p. 161; 1877, No. 99.

(d) *Partnership, tutorship and succession.*

1. An estate is liable for all costs incurred by an executor who endeavors to maintain the will, but not those incurred by legatees. 18 A. 603, *Girard v. Babineau*; 5 L. 107.

(e) *Costs of appeal.*

1. The plaintiff appealed from a judgment dismissing a part of his claim; the Supreme Court dismissed the whole, but allowed him the costs of appeal. 25 A. 226, *Martin v. Cannon*.

2. The appellant is primarily liable for the costs of appeal. 30 A. 599, *State ex rel Baltor v. Judge Fourth District Court*. See acts 1872, p. 71.

3. For judgment on appeal, see APPEAL, IX. (a).

IV. OF SECURITY FOR COSTS.

1. There is no law whereby a *defendant*, who pleads to the merits and reconvenes, can be compelled to give security for costs. 25 A. 227, *State ex rel. Nelson v. Judge Sixth District Court*. See MANDAMUS, I. (a), 2), No. 171.

COTTON GINS AND PRESSES.

Acts 1872, No. 14, section 8; amended by, 1877, E. S., p. 108.

COURTS.

I. IN GENERAL.

II. OF THE JURISDICTION OF COURTS.

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| <ul style="list-style-type: none"> (a) <i>In general.</i> (b) <i>Federal courts.</i> (c) <i>Supreme Court.</i> (cc) <i>District courts.</i> (d) <i>Probate courts, and probate as distinct from ordinary jurisdiction.</i> <ul style="list-style-type: none"> 1) <i>In general.</i> 2) <i>Death of parties pendente lite; and jurisdiction of probate courts inter sese.</i> 3) <i>Claims for money by, and against, successions, minors, and persons absent or interdicted.</i> 4) <i>Partition and possession of estates; settlement of the community; questions of titles, and nullity of wills and judgments.</i> | <ul style="list-style-type: none"> 5) <i>Accounts by tutors, administrators, etc.; their liability, and that of their official sureties.</i> 6) <i>Succession sales.</i> (e) <i>City, commercial, and district courts of New Orleans.</i> (f) <i>Parish courts.</i> (g) <i>Jurisdiction, as affected by domicile, or character of parties; or subject matters of suit.</i> <ul style="list-style-type: none"> 1) <i>In general.</i> 2) <i>Real actions; warranty, and estates under administration.</i> 3) <i>Partnership; and obligations joint, or joint and several.</i> |
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III. OF CONTEMPTS OF COURT.

IV. OF THE FEDERAL COURTS.

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| <ul style="list-style-type: none"> (a) <i>In general.</i> | <ul style="list-style-type: none"> (b) <i>Removal of suits from the State to the Federal courts.</i> |
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I. IN GENERAL.

1. Whatever may be thought of the policy of the law, the courts have no power but to enforce it. 15 A. 399, *Norton v. Sterling*; 24 A. 242, *Marks, adm'r v. Donaldsonville*.

2. The courts of this State are vested with an equitable jurisdiction in cases where the laws are silent. 15 A. 407, *Clarke v. Peak*.

3. Courts of justice are to decide on real contest; they are not to be used as instruments to work injustice, by enforcing fictitious and collusive claims. 22 A. 300, *State ex rel. Howard v. Burbank*.

4. Courts possess the necessary powers for the exercise of their jurisdiction, although not expressly provided for by the code. C. P. 877; 22 A. 582, *State ex rel. Southern Bank v. Judge Eighth District Court*.

5. The minutes can at any time be corrected to make them correspond with the truth, and being under the eye of the judge, who, by law, takes part in the proceedings, no evidence is necessary to authorize the correction. 25 A. 115, *State v. Branch*; 28 A. 310, *State v. Williams*; 26 A. 236, *Hardy v. Stevenson*.

6. The general commanding the military forces which captured the city of New Orleans, had the right to establish the provisional court, called the provost court, with the right to determine civil questions. 25 A. 387, *Mechanics' and Traders' Bank v. Union Bank*; (affirmed on writ of error to United States Supreme Court.) See 22 Wallace, 276.

7. Courts have no power to promulgate, or order others to promulgate laws. This is a legislative prerogative. 27 A. 71, *State ex rel. Crescent City Water Works Company v. Deslonde*.

8. Courts of justice will not entertain an action relative to a fund created for the purpose of corrupting the members of the legislature. 27 A. 676, *Durbridge v. Slaughter House Company*.

9. Whenever the Supreme Court of the United States is called upon to determine the validity of a State law, which, it is claimed, violates the obligations of a contract, the court will determine for itself, without regard to the decisions of any State court, whether the contract in question was valid or invalid in its inception. 14 Wall. 661, *Delmas v. Insurance Company*.

10. It is unnecessary, unwarranted in law and grossly disrespectful to the Circuit Court of the United States, to invoke the interposition of a State court as to anything within the scope of the litigation already pending in the Federal court. 20 Wall. 393, *New Orleans v. Steamship Company*.

11. The Supreme Court of the United States will defer to the decisions of the State tribunals upon questions arising out of the State laws, especially when applied to land titles. 18 A. 497, *Beauregard v. City of New Orleans*. See CORPORATIONS, III. No. 2; VII. No. 2.

12. If a corporation, whose duty it was to levy and collect taxes to pay its obligations has ceased to exist, the remedy is in the legislature, either to assess the tax by special statute, or to vest the power in some other tribunal. It is not one of the inherent powers of a court to levy and collect taxes. 19 Wall. 655, *Herne v. The Levee Commissioners*; 1877, E. S., p. 87.

13. The imposition of taxes is the exercise of a legislative, not of a judicial function. 2 Woods, 230, *United States ex rel. Ranger v. New Orleans*.

14. The power of taxation belongs to the legislative department of the government. The judicial department has no general jurisdiction over the subject. 1 Woods, 246, *Herne v. The Levee Commissioners*.

15. The power of compelling parties, after a judgment has been rendered, to pay the amount thereof, or of raising money by the sale of their property, is an entirely distinct power from that of taxation, and is the special prerogative of the courts. 1 Woods, 246, *Herne v. The Levee Commissioners*; 1877, E. S., p. 87.

16. The existence of martial law does not prevent the administration of justice between the citizens in the civil courts. When such courts are authorized by the military power, they may exercise their functions, and their judgments and decrees will be binding on the parties. 2 Woods, 37, *Kimball v. Taylor*.

17. To recover the fines imposed by a city police ordinance passed in conformity to act No. 30 of 1875, relative to the closing of places of business on Sundays, the town of Plaquemines should have proceeded, in a civil suit before the mayor. The legislature is authorized to delegate such judicial power under article 94 of the constitution of 1868. A criminal proceeding for such purpose will be quashed. 30 A. 497, *State and Town of Plaquemines v. Ruff*; 27 A. 545, *Mayor v. Blackburn*. See CONSTITUTION, II. (c), 3), B. No. 1.

18. United States courts cannot issue injunctions to compel State officers to execute the law. See CONSTITUTION, II. (e), 2), No. 3.

II. OF THE JURISDICTION OF COURTS.

(a) In general.

1. The jurisdiction of the district court is to be tested by the value of the thing demanded, and not by reference to extraordinary matters, although the same may be used by way of proof. 15 A. 120, *Taenzer v. Judge Third District Court*.

2. The jurisdiction of the court depends upon the amount claimed, and not that for which judgment was rendered. 23 A. 34, *Daigle v. Lirette*; 25 A. 566, *Sandel v. Douglass, sheriff*.

3. The amount sued for determines the jurisdiction. 24 A. 118, *Blum, Stern & Co. v. Sallis*.

4. When the amount in contestation does not exceed five hundred dollars,

exclusive of interest, the district court is without jurisdiction. 28 A. 240, *Seligman & Kahn v. E. J. Gay*. See *infra*, No. 13.

5. The courts of this State have jurisdiction of an action to compel a mandatory to render his accounts, although he was to collect a debt in another State, and buy land there. 16 A. 33, *Nicholson's Heirs v. W. D. Hennen*.

6. The court being vested with jurisdiction, is not divested thereof by a subsequent sale of the claim. 22 A. 572, *Blake v. Bank of Louisiana*.

7. A judge may affix his signature to an order out of his territorial jurisdiction, in a proceeding pending before his court, where such an order can be granted in chambers, upon an *ex parte* application. 17 A. 70, *Succession of Weigel*.

8. The court issuing the process has the right to determine its jurisdiction as to the thing seized. 23 A. 450, *Brooks v. Montgomery*.

9. The lower court must confine itself to the examination of the cause on the point for which it was remanded. 23 A. 384, *Reiners v. Ceran*.

10. If the court be divested of jurisdiction on the same day the judgment was rendered, the judge has no authority to sign the judgment. 23 A. 502, *Hoyle v. New Orleans City Railroad Company*.

11. The fact that plaintiff is seeking to enforce his hypothecary action on property once sold by an assignee in bankruptcy, does not deprive the State court of jurisdiction. 24 A. 509, *King v. Bowman*.

12. The Circuit Court of the United States having rendered the judgment had exercised its authority; a writ of *feri facias* issued by virtue thereof had been returned *nulla bona*; there could be no conflict of jurisdiction to prevent the State court from issuing a garnishment process on the judgment debtor. 26 A. 85, *Foulouze v. Gaines*.

13. If the fees of the office in contestation do not amount to five hundred dollars, the district court has no jurisdiction. 28 A. 342, *State ex rel. Simmons v. Vargas*. See *supra*, Nos. 1, 2, 3, 4.

14. In determining the validity of sales, the district court has jurisdiction to decide whether the proceedings in the probate court are valid, without formally annulling the judicial proceedings. 28 A. 303, *Choppin v. Forstall*.

15. State courts have jurisdiction of a claim against owners of vessels, and may render judgments *in personam* against them. 7 Wallace, 624; 24 A. 268, *De Hardee v. Bark Magdalena*; 23 A. 40. See PROVISIONAL SEIZURE, Nos. 12, 14; SEQUESTRATION, II. (a), No. 14.

16. A personal action against the owners, coupled with a provisional seizure of the boat, may be brought in a State court. 26 A. 25, *Switzer v. John Heinn*; 11 Wall. 185; *contra*, 23 A. 40, *Southern Dry Dock Company v. Steamboat Perry*; see *infra*, (b), Nos. 1 and 5; 15 Wall. 185.

17. Our State courts are without jurisdiction to entertain a suit, coupled with a provisional seizure, against a boat by name, captain and owners, without mention of who is the captain or the owner. A judgment obtained in this manner is null and void. The proper proceeding is to sue *in personam* and to issue any conservatory process our law provides. 29 A. 410, *Haeberle v. Bar-ringer*.

18. The validity of the judgment must be determined by the jurisdiction of the court at the time it was rendered; it is null if the jurisdiction be vested after judgment. 21 A. 353, *Champlin v. Gordon*.

19. The court not having jurisdiction of the case when the judgment was rendered, the same must be reversed. The passage of an act of the legislature giving jurisdiction, after judgment, is too late. 28 A. 567 *Daniel & Jas. D. Edwards v. Edgar Marin*.

20. A suit transferred from the parish court of Jefferson to the Fifth District Court of New Orleans, by reason of the annexation of a portion of Jefferson to Orleans, may be dismissed in the latter court, on an exception that the parish court had no jurisdiction; even when said exception had already been dismissed by said parish court. 26 A. 37, *Parker v. Shropshire & Anderson*.

21. Persons holding a slave under a precarious title in another State, cannot obtain a remedy in our courts. 17 A. 35, *Hall v. McLauren*.

22. The judgment of a court without jurisdiction *ratione materiæ*, is a nullity and cannot be revised by the Supreme Court. 21 A. 611, *Edwards v. Edwards*.

23. By answering, when the court has jurisdiction *ratione materiæ*, the objections to the jurisdiction *ratione personæ* are waived. 29 A. 194, *Marquez v. Leblanc*. See *infra*, (g), 1), Nos. 1, 2, 3. JUDGMENT, XI. (a), No. 7.

24. The court which first seized the property, has jurisdiction to distribute the proceeds, although the creditors reside in other parishes. 29 A. 315, *Adams & Co. v. Daunis*. See *infra*, No. 31.

25. State courts derive their jurisdiction from State laws and not from acts of congress. *Ib.*

26. State courts may entertain jurisdiction against national banks. 29 A. 315, *Adams & Co. v. Daunis*; U. S. Revised Statutes, p. 1437, secs. 5198, 5136.

27. If in the execution of a writ from the Federal court, the marshal of the United States seize property which does not belong to the defendant, he may be sued as a trespasser in a State court. 10 Wall. 26, *Little v. Herndon*.

28. Where two courts have concurrent jurisdiction, the one with first actual jurisdiction of the parties and subject matter, is entitled to proceed to final adjudication, and neither party can be forced into another forum, except as provided by the acts of congress for the removal of causes from the State to the Federal courts. 1 Woods, 262, *Haines v. Carpenter, ex.*

29. For judgment of the Supreme Court in case of an improper transfer of a case from the district to the parish court, see APPEAL, IX. (a), No. 6.

30. The court having jurisdiction of the main action alone, can issue the conservatory writs of attachment or sequestration, etc. 24 A. 311, *Rochereau v. Guidry*; 26 A. 529, *Guyol & Montegut v. Duggan & Guyol*; but see SEQUESTRATION, II. (a), Nos. 10, 11, 12, 13; 1876, p. 106.

31. The court under whose orders the property within its jurisdiction has been sold, has jurisdiction to dispose of its proceeds, although some of the parties in interest may reside in another parish. 28 A. 585, *Mossy v. Gordy*. See *ante*, No. 24.

32. Jurisdiction how affected by bankruptcy. See COURTS, II. (c), No. 6.

33. The military had power to authorize the judge of one district to try cases in another. See JUDGMENT, XI. (a), No. 5.

34. How an exception to the jurisdiction is waived. See PLEADING, V. (b), 4), No. 3.

35. To prevent conflict of jurisdiction, 1870, p. 119.

36. Certain real actions may be brought at the domicile of the debtor or at the place where the property is situate, 1876, p. 106; the court accepting the bond may enforce it, 1876, p. 109.

(b) Federal courts.

1. Our State courts are without jurisdiction to entertain a suit by sequestration based on a contract of affreightment from New York to New Orleans, and where a privilege on the vessel is asked, such actions being *in rem*, are exclusively within the admiralty court. 19 A. 387, *Berwin v. Steamship Matanzas*; judiciary act, 1789, ch. 20, § 9; *Moses Taylor v. Hanimons*, United States Supreme Court. See *supra*, (a), Nos. 15, 16, 17, and *infra*, Nos. 4, 5.

2. A contract for building a ship or supplying engines, timber or other materials for her construction, is clearly not a maritime contract, and therefore actions based thereon may be brought in the State courts. 20 A. 432, *Avrill v. Alabama Belle*.

3. A Federal court will issue an injunction to compel a State officer to execute the laws of the State. 2 Woods, 13, *McCauley v. Kellogg et als.*; 15 Wallace, 427, *Graham v. Norton*.

4. State courts are without jurisdiction in a proceeding *in rem*, for the enforcement of a privilege given by law on a vessel for the recovery of damages for a tort. 22 A. 388, *Young v. Ship Princess Royal*; R. S. 1856, p. 538, § 9; 4 Wallace, 424, 561; 24 A. 267, *DeHardee v. Bark Magdalena*.

5. State courts have no jurisdiction to enforce by proceedings *in rem*, a

claim against a vessel; a provisional seizure can have no force and effect. 23 A. 40, *Southern Dry Dock Company v. Steamboat Perry*; 4 Wallace, 411, 555.

6. State courts have jurisdiction in such a case. 26 A. 25, *Switzer v. Heinn*; 11 Wallace, 185; 29 A. 410, *Haeberle v. Barringer*. See *supra*, No. 1.

7. Federal courts in construing local statutes respecting real property, should be governed by decisions of State tribunals. 23 A. 261, *Levy v. Mentz*.

8. The State courts have jurisdiction of a suit in damages arising from the breach of a contract of partnership and settlement thereof, although the same may relate to the sale of a vessel and employment thereof. 26 A. 313, *Francis v. Levine*.

9. Under section 4979 of the Revised Statutes, the Circuit Court of the United States has jurisdiction without reference to the citizenship of the parties, of a suit against an assignee in bankruptcy, brought by any person claiming an adverse interest touching any property or rights of property transferable to or vested in such assignee. 92 Otto, 180, *Burbank v. Bigelow et al.*

10. The United States provisional court, created by the president of the United States in war times, was a valid court. 22 A. 630, *Burke v. Tregre*; 23 A. 250, *Corrie v. Billiu*; 18, *Trègre v. Baudry*; 24 A. 223, *Levi & Co. v. Weil & Bro.*; 28 A. 437, *Burke, tutrix v. Trègre*.

11. The jurisdiction of the provisional court of Louisiana terminated on the 28th of July, 1866, when congress provided for the transfer of cases pending in that court, and of its judgments and decrees to the proper courts of the United States. 19 Wall. 519, *Burke v. Miltenberger*.

12. The petition for the allowance of a writ of error forms no part of the record of the State court, and the Supreme Court of the United States has no jurisdiction to determine a Federal question presented in such a petition and not disclosed by the record. 91 Otto, 690, *Warfield v. Chaffe et al.*

13. In Louisiana, a judgment creditor is not permitted to treat a conveyance, though fraudulent, if real, of his debtor's property to a third person as null and void, and to seize and sell the property which had thus passed to the vendee. The law requires that he should bring an action to set the alienation aside and succeed in the same before he can levy execution. 5 H. 143, *Ford v. Douglass*.

14. And this principle will be regarded by the courts of the United States, in passing upon Louisiana cases, as a rule of property which is binding upon them, and not merely as a matter of State practice. *Ib.*

15. Aliens do not lose their rights to sue in the Federal courts by a residence in the United States. 7 P. 413, *Breedlove v. Nicolet*.

16. A citizen of one State may be sued by an alien or a citizen of another State, in any district court of the United States, within whose jurisdiction he may be found, notwithstanding the fact that such defendant may reside in another district of the same State. 11 P. 25, *McMicken v. Webb*.

17. A statement in the petition that the plaintiff is a citizen of Maryland, and the defendant a citizen "or resident" of Louisiana, is not sufficient to give the Federal courts jurisdiction. 8 P. 112, *Brown v. Keene*.

18. A citizen of the United States, naturalized in Louisiana, is a citizen of Louisiana, and may therefore be sued in the courts of the United States by a citizen of another State or of a foreign nation. 6 P. 764, *Gassies v. Ballan*.

19. Where a suit has been begun by attachment, and the property attached has been released under bond, the surety upon the attachment bond cannot complain that the Federal court has no jurisdiction upon the bond signed by him, because he is a citizen of the same State with the plaintiff. The proceeding against the surety upon an attachment bond is by the Louisiana practice, which has been adopted by the United States Circuit Court, merely incidental to the principal suit. 10 Wall. 56, *Reilly v. Golding*.

20. A corporate body, created by the laws of one State, may maintain an action in the State or Federal courts of another State. 1 Woods, 72, *Insurance Company v. The "C. D. Jr."*

21. Where an assignee in bankruptcy recovered a fraudulent judgment against an alleged debtor of the bankrupt, and the judgment debtor filed a bill

in the circuit court to enjoin execution upon the judgment; *Held*: That the fact that all parties were citizens of the same State, did not oust the court of jurisdiction. 1 Woods, 187, *Noyes v. Willard*.

(c) *Supreme Court.*

1. The Supreme Court has only appellate jurisdiction and cannot entertain a writ of *habeas corpus* sued out by the adopter to recover the custody of a child retained by its father and mother and not in actual custody, under process of law. 16 A. 257, *Manouvrier praying for a habeas corpus*.

2. The Supreme Court can take no notice of documents not making part of the record, offered to show that appellant acquiesced in the judgment. 21 A. 666, *Nunez, ad'r v. Winston*. See APPEAL, I. (c), No. 15.

3. The Supreme Court cannot notice an affidavit in support of a peremptory exception filed before that court, that the note was partly for slaves. 21 A. 537, *Succession Taugin*.

4. The Supreme Court has no original jurisdiction; therefore affidavits there filed as evidence will not be noticed. 22 A. 31, *Keenan v. Freret*. See APPEAL, I. (b).

5. The Supreme Court cannot enquire originally whether a litigant's lawyer had authority to represent his client. 27 A. 235, *Boreland v. Leckie*.

6. The jurisdiction of the State court is not divested by bankruptcy proceedings. If the case be on appeal, no evidence of this fact can be adduced. If the discharge be granted before rendition of the judgment on appeal, objection to its execution must be made in the lower court. The judgment on appeal gives it no new force or effect. 29 A. 842, *Hill & Co. v. Bourcier*; 17, *Serra e Hijo v. Hoffman & Co.*

7. An affidavit showing that the appeal is prosecuted against the wishes of appellant, cannot be noticed by the Supreme Court. 28 A. 343, *Benham v. Parish of Carroll*.

8. It is not the amount of the judgment, but the amount in contestation which gives jurisdiction to the Supreme Court. 21 A. 366, *Mazen & Shearer v. Landrum, etc.* See APPEAL, I. (a).

9. The Supreme Court has no power to revise the judgments of the district courts rendered on appeals from the parish courts. 22 A. 465, *Tippit v. Lippmins*. See *infra*, No. 24.

10. WYLY, J., *dissenting*: The note sued upon is for four hundred and sixty-seven dollars and forty cents, with over two hundred dollars interest at the institution of the suit; and the Supreme Court has jurisdiction of all cases above five hundred dollars. *Ib.*

11. The jurisdiction of the Supreme Court must be apparent from the pleadings. 25 A. 286, *State ex rel. Recorder v. Clinton, auditor*.

12. This court has no jurisdiction of appeals from parish courts, except in probate matters, when the amount in dispute exceeds five hundred dollars. 23 A. 236, *Irving v. Gaines*; but see (f), Nos. 30, 31.

13. The amount of the lease being less than five hundred dollars, the Supreme Court is without jurisdiction to entertain an appeal from an action in ejectment where no money is claimed. 26 A. 47, *Ellis & Co. v. Silverstein*.

14. The Supreme Court is without jurisdiction, in a possessory action, when the amount of rent claimed does not exceed five hundred dollars, and it does not appear that the value of the possession exceeds five hundred dollars. 22 A. 272, *Slawson v. Meggett*.

15. Whether the jury were properly drawn, is a question of fact, and in criminal cases the jurisdiction of the Supreme Court is limited to questions of law. 22 A. 9, *State v. Bruington*.

16. The Supreme Court is without jurisdiction to try mixed questions of law and facts in criminal cases. 16 A. 309, *State v. Horten*; 21 A. 188; 23 A. 525, *State v. Evans*.

17. Also in cases where the punishment is not death, imprisonment at hard labor, or a fine exceeding three hundred dollars. 28 A. 655, *State v. Wickoff*; 30 A. —, *State ex rel. Geal v. Smith, recorder*.

18. The Supreme Court is without jurisdiction to entertain a claim arising

from a penalty of less than five hundred dollars, where the legality of the fine is not in question. 28 A. 102, *Cullinan v. City*.

19. When a decision is made on the ground of public policy, no writ of error lies to the Supreme Court of the United States; but when the court bases its opinion on the constitution which impairs an obligation within the meaning of the tenth section of the first article of the constitution of the United States, then a writ of error lies. 25 A. 348, *Henderson v. Merchants' Mutual Insurance Company*. (N. B.—*The writ of error as to the slave question had been refused, but the Supreme Court of the United States reversed the decision, because it was based on the article of the State constitution. See 14 Wallace, p. 661, Delmas v. Insurance Company.*) See WRIT OF ERROR, No. 14.

20. The Supreme Court is without jurisdiction *ratione materiæ*, in an appeal from a mandamus ordering the custodian of the books of a corporation to allow certain interested persons to examine said books. 27 A. 677, *State ex rel. Mrs. Pike v. Judge Superior District Court*; 22 A. 622; 25 A. 43.

21. MORGAN, J., *dissenting*: The imposition of this right of examination is worth more to relator than five hundred dollars. *Ib.*

22. Where the tax amounts to less than five hundred dollars, the jurisdiction of the Supreme Court extends only to questions of constitutionality of the tax. 27 A. 722, *State v. Maxwell*.

23. WYLY, J., *dissenting*: The facts and the law are before the court, and the evidence to prove the unconstitutionality of the tax should have been received. *Ib.* See APPEAL, I. (h), No. 7.

24. The Supreme Court cannot revise the judgment of a district court, rendered on an application for a prohibition against a justice of the peace. 27 A. 669, *State ex rel. Leahy v. Judge of the Third District Court*.

25. Whether the lower court had jurisdiction or not, the Supreme Court may entertain an appeal when the amount in dispute exceeds five hundred dollars. 28 A. N. R., *Hays v. Vidou*. See *ante*, No. 9.

26. The Supreme Court has no jurisdiction of a matter involving "at least five hundred dollars." 28 A. N. R., *State ex rel. Seube v. Judge Superior District Court*.

27. When, in a case in a State court, a right or immunity is set up under and by virtue of a judgment of a court of the United States, and the decision is against such right or immunity, a case is presented for removal and review by writ of error to the Supreme Court of the United States, under the act of February 5, 1867. 21 Wall. 130, *Dupasseeur v. Rochereau*.

28. In such a case, the Supreme Court will examine and enquire whether or not due validity and effect have been accorded to the judgment of the Federal court, and if they have not, and the right of immunity claimed has been thereby lost, it will reverse the judgment of the State court. *Ib.*

29. Whether due validity and effect have or have not been accorded to the judgment of the Federal court will depend on the circumstances of the case. If jurisdiction of the case was acquired only by reason of the citizenship of the parties, and the State law alone was administered, then only such validity and effect can be claimed for the judgment as would be due to a judgment of the State courts under like circumstances. 21 Wall. 130, *Dupasseeur v. Rochereau*.

30. Judgments of the Supreme Court, how executed. See EXECUTION, I. CLERKS OF COURT, No. 14.

31. Summary docket, 1870, p. 103; 1872, p. 122; 1876, p. 36; 1878, p. 45; appeals and trials regulated, 1870, E. S., p. 99; salary of the judges, 1871, p. 84; repealed, 1877, E. S., p. 44; reporter and reports, 1877, E. S., p. 165.

32. For appeals from Supreme Court to the United States Supreme Court, see WRIT OF ERROR.

RULES OF THE SUPREME COURT.

(Adopted in the month of May, 1878.)

RULE I. 1—In preparing transcripts of records, in causes appealed to this court, clerks of lower courts must observe the following requirements:

First—Such transcripts should be written in a fair, legible hand, on good, strong paper (the latter having a double margin on each page thereof), and the various parts should be securely fastened together.

Second—The different portions of a record should be made to appear in the order of their respective filing.

Third—Provided, however, that when the records of one or more other suits are introduced as evidence in a cause, such records should appear in the transcript distinct from, and subsequent in order to, the rest of the record of the principal suit.

Fourth—The transcript should show for which party to the suit each witness is sworn, and by which party each document or record is offered in evidence.

Fifth—No one document should be copied twice in the transcript.

Sixth—An accurate alphabetical index should be attached to and form part of each transcript, affording reference to particular pages of the same (and with proper designations or words of description) for the several pleadings, processes and orders in the suit; for the depositions and testimony of each witness by name (and not by general reference to testimony); for the note of evidence; and for each document, giving the latter its correct title, or some sufficient designation showing its nature and character, (and not merely by the letters, marks or figures endorsed thereon).

Seventh—Provided, that when records of other suits are included in the transcripts, as indicated above in the third requirement, a like index to each of such records should follow the general index.

2—Any neglect or omission to observe this rule strictly, will subject clerks, as aforesaid, to the cost of repairing such neglect or omission.

RULE II. The party applying for the filing of a transcript of the record in a cause in this court, must first tender to the clerk his bond, with satisfactory security, in the sum of fifty dollars, for the payment of such fees as may accrue to the clerk, or deposit with the latter, in place of such bond, the sum of twenty dollars.

RULE III. 1—Cases will be docketed in the order of their filing.

2—Pursuant to acts No. 17, of the laws of 1876, and No. 22, of 1878, the clerk will keep a *summary docket*, but will enter causes therein only on the formal application of counsel in writing, stating the facts entitling such causes to a summary trial, and he will so enter them in the order of such application.

3—Whenever it shall be made to appear to the court that a case has been improperly caused by counsel to be placed upon the *summary docket*, the same shall thereupon be transferred to the *ordinary docket*, and entered at the foot thereof.

RULE IV. 1—Only counsel engaged in a cause will be allowed to withdraw the record of the same from the clerk's office, and then not until the expiration of the three days allowed by law within which motions to dismiss may be filed.

2—Records shall, in all cases, be receipted for on withdrawal. They should be returned to the office within a reasonable time, and must be so returned on the requisition of the clerk.

3—No record shall be withdrawn from the clerk's office after final decree therein made has become executory, except upon written application to the court therefor, and the order of the court made thereon.

4—Whenever the transcript of appeal, which has been filed in the clerk's office of this court, is lost, mislaid, or has been removed from that office, either party to said appeal may supply its place by another transcript, which shall be considered as filed of the same date as the filing of the lost, mislaid, or removed transcript; or either party may supply its place by filing the original papers with copies of the minutes, and of such documents, testimony, etc., as should be included in a transcript; and any cause in which such substituted transcript or papers shall be filed, will be heard in its regular place on the calendar, notwithstanding the absence of the transcript first filed in this court.

RULE V. Court will be held every day of each alternate week of the session.

RULE VI. 1—On Monday of each court week cases will be called and fixed

for the next court week:—three for Monday, and eight for every other day, provided however, if there be causes entitled to a place on the *summary docket*, fifteen of them shall be called and fixed for Tuesday, and the same number (if there be so many) shall be fixed for each succeeding day, until the summary causes are exhausted. These cases shall be properly posted by the clerk, by eleven o'clock of the next day, which shall be notice to all parties. (This portion of the rule will not apply in country terms, during the pendency of which cases will be called and tried continuously, in the order in which they are filed).

2—Before the calling of cases, opportunity will be given counsel to have any cause entitled to preference, but not to entry in the summary docket, called and fixed for trial by motion.

3—All cases which have not been submitted to the court, after having been twice duly called for trial, shall be removed from the docket and placed upon a docket to be called the *delay docket*, and shall not be again put upon the trial docket, except on motion and leave granted thereon.

RULE VII. 1—Within six days after any cause shall be fixed for trial, the appellant shall file with the clerk a printed brief or abstract of the cause, containing the substance of all the material pleadings, facts and documents, (referring particularly to the pages of the record where they may be found), and an accurate reference to the points of law and authorities upon which he relies. Ten copies thereof to be furnished and filed with the clerk; one for the opposite counsel, and the remainder for the use of the court.

2—Within twelve days after the fixing of a cause, the appellee shall also file ten copies of a similar brief, embodying the requirements set forth in regard to the appellant.

3—No cause shall be heard unless one at least of the parties has complied with the foregoing sections of this rule, and if neither party has so complied, the case shall be continued and go to the foot of the docket. If only one party has complied, he may argue or submit the cause, or may decline to do either, in which last event the case shall be continued and go to the foot of the docket, and it is made the duty of the clerk to inform the court on this point when a case is called for trial.

4—If appellant has filed a brief *before* the day fixed for hearing the cause, but not within six days after it was fixed for hearing, and the appellee has not filed a brief at the time the cause is called for trial, then the appellant may submit the case, and the appellee may be allowed five days to file his brief, but the case shall not be orally argued. If the appellant shall not have filed any brief before the day fixed for the hearing of the cause, and the appellee has filed his brief before the opening of the court on that day, the latter may argue or submit the cause, or not as he shall prefer, and appellant shall not, in that case, be permitted to argue orally the cause, if the appellee does not, nor shall he have time to file a brief.

5—The clerk shall receive no brief in a cause, after it is submitted, unless accompanied by a certificate in writing from counsel that he has delivered a copy to the opposite counsel, with the date of such delivery, or by a written acknowledgement or waiver of such delivery signed by opposite counsel who shall have, upon application to the court, a reasonable time from the date of such delivery or waiver in which to reply; and in such cases ten copies must be filed by each party, as prescribed in the first section of the rule.

6—All briefs in a cause must be filed in the clerk's office, and before the opening of court on the day upon which the cause is fixed for trial.

RULE VIII. 1—The original plaintiff in the lower court shall have the right of opening and closing the argument of the cause in this court.

2—Not more than one hour will be allowed to the counsel for each side, except where in special cases the court, on application made before the opening argument is begun, may otherwise order. The time not consumed by one counsel will be allowed to another on same side.

RULE IX. 1—Applications for rehearing must be by petition filed within the legal delay, and must be accompanied by a printed statement of all the points and authorities on which the party founds his application. Additional

time for elaborating the argument on such points and authorities may be granted upon a proper showing, if made before the delay expires.

2—When a petition for rehearing in any cause is filed, the clerk will immediately enter it, with its date, in the docket kept for the purpose, and place the record with the decision and five copies of the petition in the consultation room.

3—When a re-hearing is granted the cause will be immediately called and fixed with preference, and briefs will be required, as in the first and second sections of Rule VII.

Oral argument may be granted, in the discretion of the court, if applied for on motion, and four days notice thereof be given to the opposite counsel.

The clerk will properly designate the cause on the judges' docket as being upon rehearing, and also the fact when oral argument is to be heard.

4—Only one rehearing in any cause will be granted.

RULE X. 1—Motions for dismissal of appeals shall be filed and fixed for trial by the clerk in his office. They shall be so fixed for Monday of each court week, at least one week previous notice being given by posting, as prescribed in the first section of Rule VI; but if not tried on the day for which they are thus fixed, they shall be continued to Monday of the next court week.

2—Such motions shall set forth distinctly all the grounds relied on, and on their trial shall be argued only in printed briefs, which must conform in character and number to the requirements stated in sections first and second of Rule VII.

RULE XI. 1—All motions made in open court must be offered before the regular business of the court is begun or after it is closed.

2—No motion will be entertained unless it be in writing, upon not less than a half sheet of paper, and with a proper title indorsed upon it.

3—All instructions to the clerk and agreements of counsel, on which the court is to act, must be in writing and duly filed.

RULE XII. 1—The court will entertain no application for a writ of prohibition, unless previous notice of intention to make such application shall have been given to the opposite party.

2—Hereafter all writs of mandamus and prohibition, and rules to show cause, shall be fixed and submitted on printed briefs, and without oral argument.

RULE XIII. Whenever, pending an appeal, either party shall die, his proper representatives may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined as in other cases. When the appellant dies, pending the appeal, if his proper representatives be known, and reside within the State, and have not made themselves parties to the case, the appellee may on affidavit apply for an order to summon them to appear within twenty-five days; and in default of such appearance, after due return of service, the appellee may move the dismissal of the appeal, or have the cause heard and determined as in other cases.

If the proper representatives of the appellant be not known, or do not reside within the State, the appellee may, on affidavit, obtain an order, that unless they appear and become parties within three months from publication, the appeal will be dismissed. The appellee must cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the court sits, and upon proof of such publication and in default of appearance, the appellee may have the appeal dismissed, or the cause heard and determined, as in other cases.

If the appellee dies, pending the appeal, and his proper representatives be known, and reside within the State, and have not made themselves parties to the cause, the appellant may, on affidavit, apply for an order to summon them to appear within twenty-five days, and in default of such appearance, after due return of service, the appellant may proceed to have the cause heard and determined, as in other cases.

If the appellee's proper representatives be not known, or do not reside in the State, the appellant may, on affidavit, obtain an order that unless they appear and become parties within three months from publication, the appel-

lant will proceed to have the cause heard and determined, and cause the said order to be published three times in a newspaper, printed at the seat of government of the State, or in the place where the court sits, and upon proof of such publication, and in default of appearance, the appellant may proceed to have the cause heard and determined, as in other cases.

In country cases the time of personal summonses may be reduced on special application, according to circumstances.

RULE XIV. No person applying for admission as an attorney and counsellor-at-law, shall be examined as such until his name as a candidate for admission shall have been, by the clerk, published during three judicial days at the foot of the trial list, posted at the court-room door. Application to be made through the clerk.

The court will hereafter require of candidates for admission to the bar:

First—Evidence of citizenship of the State of Louisiana.

Second—Evidence of good moral character, by certificates, in conformity to the statutes of March 29, 1823, and March 20, 1842, and of two years study according to act of May 7, 1877.

The court will not be satisfied with the qualification of a candidate in point of legal learning, unless it shall appear by examination that he is well read in the following course of studies at least: Story on the Constitution; Vattel's Law of Nations, or Wheaton's Elements of International Law; the Louisiana Civil Code; the Code of Practice; the Statutes of the State of a General Nature; the Institutes of Justitian; Domat's Civil Law; Pothier's Treatise on Obligations; Blackstone's Commentaries, Fourth Book; Kent's Commentaries; Smith on Mercantile Law; Story or Parson's on Notes; Chitty or Bayley on Bills; Greenleaf, Starkie or Phillips on Evidence; Russell on Crimes; and the Jurisprudence of Louisiana, as settled by the decisions of the Supreme Court.

The examination shall be conducted in the following manner: At the beginning of the session in New Orleans, the court will appoint, from among the members of the bar, a committee of seven, who are earnestly requested to lend their aid to the court. Upon the candidate producing a certificate from the committee that he has been examined by them upon the above works, and that he is, in their opinion, qualified for admission to the bar, the court will admit him to a public examination, and if, after such public examination, they concur with the committee in opinion, the candidate will be admitted and licensed as an attorney and counsellor-at-law, and not otherwise.

The committee will meet twice in each month, during the sessions of the Supreme Court, to-wit: on the Friday preceding each court week.

The court will examine on Tuesday of each court week.

Each candidate to be examined separately before the committee and the court.

The foregoing rules will be relaxed in the country districts when necessary for the proper dispatch of business, or when their rigid enforcement, in the short time the court sits in those districts, would work injury, or a protracted delay.

(cc) District courts.

1. The district courts have jurisdiction of a suit in damages of more than five hundred dollars against the surety on an injunction bond signed for exactly five hundred dollars. 27 A. 566, *Kimbrough v. Walker et als.*

2. WYLY, J., *dissenting*: The bond being only for five hundred dollars, suit should have been filed in the parish court. *Ib.*

3. The property being under foreclosure of mortgage, with vendor's privilege, by order of the district court, a *dation en paiement* was made to plaintiff by agreement of the debtor, who reserved a right to redeem. The property being seized by certain other creditors who obtained their judgments before the parish court, were properly enjoined before the district court where the utter nullity of their judgments might be shown. 28 A. 660, *Palfrey v. Gordy.* See INJUNCTION, III.

4. District courts are courts of record, and no verbal reservation to file exceptions can be entertained. 29 A. 593, *State v. McCoy*.

5. A suit for collation, where the amount in dispute exceeds five hundred dollars, should be instituted in the district court. 29 A. 737, *Flournoy v. Flournoy*.

6. Jurisdiction how tested. See *ante*, (a), Nos. 1, 2, 3, 4.

(d) *Probate courts, and probate as distinct from ordinary jurisdiction.*

1) In general.

1. The district court of the place of opening a succession, according to law, is the proper court in which to institute a demand for administration. 15 A. 699, *Succession of Carney*.

2. Courts of probate are without authority to issue executory process and writs of *fi fa*. 22 A. 266, *Graham v. Succession Markey*; 471; 11 L. 388; 11 R. 211; 20 A. 311; 23 A. 44, *Smith v. Jones*; 1 N. S. 577; 5 R. 25.

3. A probate court can declare the seizure of succession property null and can pass upon the merits of an opposition to a tableau pending an appeal from the judgment declaring the seizure null. 22 A. 12, *Succession Millaudon*.

4. Children applying to be recognized heirs, should present themselves to the probate court. 22 A. 517, *Hart v. Hoss & Elder*. See *infra*, (f), No. 24.

5. The power of courts to direct transmission of funds of succession of foreigners within their jurisdiction, to their representatives abroad, on the principles of established comity between nations, is no longer an open question. 24 A. 320, *Succession Cordeviolla*.

6. The transmission must not be ordered to the prejudice of domestic creditors. *Ib*.

7. A judgment of our court, recognizing the heir of a person who never resided nor owned property here, can produce no legal effect. 26 A. 127, *Succession Bougère*; 28 A. 744, *Succession same*.

8. The parish court may issue execution against the administrator, to satisfy a claim on the tableau, although the claim may be over five hundred dollars. C. P. 983, 993, 1057; 23 A. 592, *Ray v. Tatum*.

9. The act of 1855, conferring upon clerks of courts power to homologate accounts and tableaux of distribution after thirty days notice, does not deprive the courts of the power previously exercised, to homologate such accounts and tableaux after ten days notice. 15 A. 248, *Succession of Spivey*.

10. A suit to remove an administrator, must be brought in the parish court. 28 A. 799, *Sheppard v. Barron*; C. P. 924; 22 A. 131, 139; 26 A. 207, *Succession Williams*.

11. The courts of probate in Louisiana have no jurisdiction when the purpose is to charge an executor or curator personally for fraud, embezzlement, or mal-administration of the succession. 7 H. 160, *Fourniquet v. Perkins*.

12. See SUCCESSION, I. (a), for place of opening.

13. In probate matters the evidence must be reduced to writing. See EVIDENCE, I. No. 17.

14. A suit to revive must be brought before the court which rendered the judgment although the suit to revive be against the defendant's succession. See JUDGMENT, XVI. No. 10.

15. A jury is not permissible in a probate court. See JURY, I. Nos. 3, 4.

2) Death of parties *pendens lite*; and jurisdiction of probate courts, *inter sese*.

1. The succession of the owner having been opened in the parish where he died, and his real estate having subsequently been made part of another parish, new proceedings were instituted in the latter parish, and the property sold by order of court; *Held*: That the proceedings were null and void. The court where the deceased had his domicile had exclusive jurisdiction of the succession. 26 A. 270, *Clemens v. Comfort*.

2. Explanation of the rules of the Supreme Court, in case of death, pending the appeal. 29 A. 647, *Edwards v. Whited*.

3. The court having jurisdiction of the suit may, after making the repre-

sentative of the succession of the deceased, a party to the suit, proceed to trial. 30 A. 25, *Bussey & Co. v. Nelson*.

3) Claims for money by, and against, successions, minors, and persons absent or interdicted.

1. If the succession be plaintiff instead of defendant, the probate court is without jurisdiction. 19 A. 160, *Barrett v. Halpin*.

2. The jurisdiction of the probate court is not divested by the removal of the minors from this State, after the death of their tutor, who resided in the parish; no other court could fill the vacancy in the tutorship, except the one which appointed the tutor. 19 A. 500, *Succession Stephens*.

3. Where the heirs have been recognized as such and put in possession, they should be sued before a court of ordinary jurisdiction, even if they be minors. 27 A. 686, *De la Ferrière v. Succession England*; C. P. 996; 28 A. 875, *Mrs. Louis v. Pepin, tutrix, et als.*

4. When all the property inherited by a minor child is adjudicated at its appraised value to the surviving spouse, who is put in possession, the succession is closed, and the probate court has no jurisdiction of a suit against the minor. 29 A. 837, *Augustin v. Avila*; 22 A. 81; 25 A. 56, 220, 225.

5. Minors legally in possession of a succession must be sued before a court of ordinary jurisdiction. 30 A. 95, *Soye v. Price*. See 4), Nos. 4, 9.

6. When the heirs are in possession, the succession is closed. A suit in partition, between the co-heirs, cannot afterwards be brought before the parish court, if the property to be partitioned be worth more than five hundred dollars. 30 A. 139, *Woolfolk v. Woolfolk*; *ib. p. —*, *Succession Bayley*.

4) Partition and possession of estates; settlement of the community; questions of title, and nullity of wills and judgments.

1. Actions for debts due by successions, when heirs have been put in possession, shall be brought before the ordinary tribunals against the heirs themselves, if of age, or against their curators, if minors or interdicted. C. P. 996; 25 A. 225, *Martin v. Cannon*.

2. The probate court is without jurisdiction to entertain suits against heirs who have been put in possession. 25 A. 335, *Succession Grehan*.

3. When the heirs are all of age, residing in the State, and cannot agree upon the partition and mode of making it, the probate court has jurisdiction. 27 A. 126, *Diamond v. Diamond*. See 3), No. 6.

4. An action for debts due by the succession, when the heirs have been put in possession, must be brought before a court of ordinary jurisdiction, although the heirs be minors. 27 A. 686, *Charlotte de la Ferrière v. Succession Englund*.

5. Where the heirs have been regularly and without fraud recognized as such, and caused themselves to be put in possession, the probate court is divested of jurisdiction and the judgment cannot be disturbed. 28 A. 367, *Milton Taylor*.

6. A claim for the marital fourth is properly brought before the parish court, although it exceeds five hundred dollars. 27 A. 593, *Succession Newman*. See MARRIAGE, X.

7. In a suit for property, whether plaintiff attacks a will under which it is held, or defendant sets it up as his title, the court of ordinary jurisdiction must pronounce on its validity. The proceedings in the probate court are not binding on plaintiff, who was no party thereto. 27 A. 625, *Buntin v. Johnson*; 1 R. 116, *Rachal v. Rachal*; 10 M. 1; 7 N. S. 470; 2 L. 26; 11 L. 385, 394; 12 L. 214.

8. The widow having been recognized as widow in community, owner of one-half the property left by her husband, and entitled to the usufruct of the other half belonging to the minors, and in said capacities ordered to be put in possession, the probate court was thereby divested of jurisdiction and the application for an administration, and the obtaining of an order of sale, were nullities. 28 A. 446, *Succession Hacker*.

9. Probate courts have no jurisdiction of an action against a succession if the heirs have been put in possession. See COURTS, II. (e), No. 26; (d), No. 5.

10. Property acquired by minors with the funds inherited by them, cannot

be partitioned before the probate court, when one of them becomes of age. 30 A.—*Benedict v. Florat*.

11. The parish court has jurisdiction of a suit to annul a will and also of all incidental questions which may arise. 30 A. 752, *Succession Hoover v. York and Hoover*.

5) Accounts by tutors, administrators, etc.; their liability and that of their official sureties.

1. An action to be recognized as heir and for an account from the curator, who has not filed a final account of administration, is properly brought before the probate court. 20 A. 579, *Miller v. Rougieux*; C. C. (1181); 4 R. 9; 4 A. 223; C. P. 1000.

2. Parish courts have jurisdiction to settle tutors' accounts, even if over five hundred dollars. 23 A. 694, *Nugent v. Randolph*; 24 A. 317, *Salvant v. Salvant*.

3. The examination and correction of the tutors' account, belongs to the probate court, although they may involve over five hundred dollars. 25 A. 609, *Lay v. Succession O'Neil*.

4. The parish court is without jurisdiction to entertain a suit against the succession of the tutor, for a specific sum, instituted by the minors when the amount involved exceeds five hundred dollars. The proceeding should have been a demand for an account. 27 A. 643, *Lay v. Succession O'Neil*.

5. Cases involving accounts of tutorship which were pending in the district court before the constitution of 1868, should have been transferred to the parish court. 28 A. 602, *Knox v. Gurnett*; 23 A. 502.

6. The district court is without jurisdiction to entertain a suit for a specific amount by a ward become of age, against his tutor. The proceeding must be by demand for an account before the parish court. 30 A. 688, *Lusk v. Succession Benton*.

6) Succession sales.

1. A sale of property by executory proceedings issued by a probate court, is no probate sale, and the adjudicatees can gain no advantage by the terms of the sheriff's deed. 22 A. 471, *Ellison v. Her*.

2. Probate courts can issue no executory process. 22 A. 266, *Graham v. Succession Markey*; 11 L. 388; 11 R. 211; 20 A. 311; 23 A. 44; 1 N. S. 577; 5 R. 25; see *infra*, (e), No. 8.

3. The court of general jurisdiction having been seized of jurisdiction over the property by ordering its seizure under executory process, the subsequent order of sale of the probate court, carried into effect previously, does not convey title. The subsequent sale by the court which made the seizure first, alone has validity. 26 A. 601, *Guilbeau v. Wiltz*.

4. The property of the succession having been seized by virtue of the mortgage, the immovables by destination were sold, and a good title vested in the adjudicatee. A subsequent order to sell rendered by the probate court in the succession of the defendant should be set aside. 27 A. 657, *Rochereau v. Bobb, administrator*.

5. The Second District Court for the parish of Orleans, has jurisdiction to compel a purchaser of property at succession sale, to comply with his bid; a proceeding by rule is proper, and the judgment is valid, although a default be taken on the return day for want of appearance of defendant in rule, and confirmed two judicial days thereafter. 28 A. 87, *Succession Haggerty*. See (e), Nos. 8, 9.

6. The parish court which orders a sale, is the proper tribunal to enforce its completion or declare its illegality. 29 A. 507, *Tertron v. Durand*.

7. An order issued by the parish court, upon the petition of creditors to have the property sold to pay the mortgaged and other debts, when there is no representative to the succession, is utterly null, and a sale thereunder is of no effect. 28 A. 347, *Hawley, public administrator v. Abraham Heyman*.

8. District courts have no jurisdiction to order the sale of property to pay the debts of a succession. 23 A. 212, *Sevier v. Succession Gordon*.

(e) *City, commercial and district courts of New Orleans, and for the parish of Orleans.*

1. No order or decree was necessary to transfer a case from the First District Court to the Superior Criminal Court, where the latter had jurisdiction of the case, under act 124, of 1874. 27 A. 361, *State v. Fritz*.

2. Act 124 of 1874, which provides that the judge of the Superior Criminal Court for the parish of Orleans, shall have authority to appoint a lawyer to act in his place in case of his inability to act, is unconstitutional. It is only, under the constitution, when the judge is recused, and is not interested, that he can appoint a lawyer. A general order by which any judge would appoint a lawyer to act as judge of his court in all cases, is null and void. The convictions rendered whilst the lawyer acted as judge are null and void. 27 A. 663, *State v. Pete Phillips*; 28 A. N. R., *State v. Lawrence Williams*. O. B. 45, fo. 2. See CRIMINAL LAW, II. No. 7.

3. The acts of 1853, p. 190; 1855 and 1865, making the Second District Court of New Orleans, exclusively a probate court, and requiring all successions to be opened therein, do not divest the other district courts of New Orleans, of jurisdiction in succession cases pending therein, at the date of their passage. 20 A. 466, *State ex rel. Bakewell v. Judge Second District Court*; 21 A. 354, *Champlin v. Bakewell*.

4. The Second District Court of New Orleans has no jurisdiction of a suit where a succession is plaintiff and an individual defendant. 19 A. 257, *Bernard v. Thayer*; 6 L. 54; 5 L. 27.

5. Previous to 1853, all the district courts in New Orleans, had concurrent jurisdiction in probate matters. See acts of 1846, p. 32; 1853, No. 190; 1855; 1864, p. 84. The succession not having been opened in the Second District Court, the judgment against the *executor*, was legally rendered by the Sixth District Court. 20 A. 116, *James v. Fellowes*.

6. The Second District Court for the parish of Orleans, has no jurisdiction to entertain an action on the bond of an administrator; such a suit is not probate in its character. 25 A. 446, *Lauve v. Van Horn*. (N. B.—*This action was brought between the adoption of the constitution and the enactment of the Revised Statutes of 1870, secs. 3679, 3835, 3836, 3722, 3714; 1876, p. 109*).

7. The Second District Court has jurisdiction to condemn the surety on an appeal bond, where the appeal has been taken from that court. 27 A. 324, *Leblanc v. Succession Massieu*; R. S. 3679.

8. The Second District Court for the parish of Orleans has authority to pass on questions of title to real property seized under a writ of *fieri facias* issued by it. 29 A. 779, *Succession John Hevia*. See *supra*, (d), 6), Nos. 2, 5.

9. LUDELING, C. J., and TALIAFERRO, J., *dissenting*: The Second District Court had no jurisdiction; the litigants were living, and the property in dispute was real estate. *Ib.* (NOTE—*Further for Second District Court, see Nos. 30, 31, 32; (d), 3*).

10. The jurisdiction of the Third District Court for the parish of Orleans, is restricted under the constitution, to appeals from justices of the peace. Act No. 68, of 1870, E. S., enlarging its jurisdiction, does not contain this object in its title, and is therefore null. 23 A. 720, *State v. Wardens St. Louis Cathedral*; but see No. 28.

11. Act No. 2 of 1870, creating the Eighth District Court for the parish of Orleans, is constitutional, and under the language of the constitution there is nothing which prohibits the legislature from changing or modifying the jurisdiction of the seven courts whose existence is provided for by the constitution. 22 A. 567, *State ex rel. Pontchartrain Railroad v. Judge Seventh District Court*; 23 A. 730, *State ex rel. v. Pratts*.

12. All suits wherein injunctions and mandamuses issued, should have been immediately transferred to the Eighth District Court, after its creation. 23 A. 730, *State ex rel. v. Pratts*.

13. The legislature had authority to abolish the Seventh District Court for the parish of Orleans, although the term of office of the judge had not expired.

The salary ceased with the office. 26 A. 406, *State ex rel. Collens v. Clinton*.

14. WYLY, J., *dissenting*: The abolishment of the court could only take effect after the expiration of the constitutional term for which the judge was elected. *Ib.* (N. B.—*This dissenting opinion was maintained and the salary of the office ordered to be paid. State ex rel. Collens v. Jumel; State ex rel. Elmore v. Same; both not yet reported*).

15. The Superior District Court is without jurisdiction to restrain by injunction the trial of a suit pending in another district court. That court has no appellate or supervisory control over the other district courts. 28 A. 548, *The Rising Sun Society v. The Rising Sun Benevolent Association*.

16. The Superior District Court had no jurisdiction of a corporation not created by special act of the legislature. The law is clear and its letter must be followed, although there seems to be no reason to distinguish between the different kinds of corporations. 29 A. 13, *Union Wood Preserving Co. v. Bell*. See *infra*, No. 4.

17. The Superior District Court had no jurisdiction to restrain by injunction the execution of a judgment rendered by a justice of the peace, affirmed on appeal by the Third District Court. 28 A. N. R., *Hays v. Vidou*; 29 A. N. R., *McCormick v. Sullivan*; 30 A. 342, *Sexton v. Sullivan*.

18. The Superior District Court had jurisdiction of a tax suit against a succession. 28 A. 240, *City v. Ferguson*; 180, *Same v. Stewart*.

19. Before November 1876, the Fifth District Court had jurisdiction over the city of Jefferson, and the sixth municipal district of New Orleans. 29 A. 428, *Lafayette Fire Insurance Co. v. Remmers*.

20. Act No. 45 of 1876, making the sixth and seventh municipal districts of the parish of Orleans, a part of the second judicial district, is valid. The court to be held therein, must be considered as a district court, for the parish of Orleans. 29 A. 780, *State v. Williams*.

21. The Fourth District Court for the parish of Orleans, being a district court of general civil jurisdiction, may entertain a suit to put the purchaser, at a tax sale, in possession of the property so purchased. 27 A. 705, *State ex rel. Norcross v. Judge Fourth District Court*.

22. The act of 1874, creating the Superior Criminal Court for the parish of Orleans, is constitutional, although the word "district" be not expressed in its title. 29 A. 774, *State v. Anderson*.

23. The terms of the district courts in New Orleans commence on the first Monday in November, and end on the last Monday in July. 19 A. 292, *Bethancourt v. Stephens*; acts 1865, March 29; 29 A. N. R., *Marsoudet v. Clancey*; *ib.* *Jacobs v. Preston*; 21 A. 329, *Fisk v. Moss*; 24 A. 289. See TERM, No. 2.

24. A company, incorporated by special law, may be brought by process of garnishment before any of the district courts for the parish of New Orleans. 26 A. 531, *Smith v. Durbridge*. See *supra*, No. 16.

25. Acts of 1856, p. 117, gave to all the six district courts of New Orleans jurisdiction of contested elections; this includes the office of recorders. 21 A. 407, *Staes v. Gastinel*.

26. The probate court cannot entertain jurisdiction of an action against a succession if the heirs have been put in possession. 24 A. 114, *Succession Andrew et als. v. Urquhart et al.* See *supra*, (d), 4).

27. The judges of each of the district courts may, under the act of 1855, p. 317, sign orders, and sit in the absence or sickness of the judge presiding over one of the other courts for the parish of Orleans. N. R., *St. Rome v. Leves Steam Cotton Press Company*.

LUDELING, C. J. and TALIAFERRO, J., *dissenting*: The act of 1855 is repealed by the act of 1870, entitled an act to prevent the conflict of jurisdiction in the said parish. *Ib.*

28. If an appealable case is tried on a Tuesday, the day fixed for unappealable cases by the district courts for the parish of Orleans, objection should be made to the trial in the lower court. None can be made for the first time on appeal. 28 A. 928, *Russel & Hall v. Keefe*. (For objections, not made in the lower court), see APPEAL, IX. (g), 2).

29. The act extending the jurisdiction of the Third District Court for the parish of Orleans, to all civil cases, is constitutional. 30 A. 38, *Lord Cecil v. Board of Liquidation*; 1877, p. 218. See No. 10.

30. The Superior Criminal Court has jurisdiction to sentence the accused for petty larceny when the indictment was for grand larceny. 30 A. 61, *State v. Malloy*.

31. The Second District Court for the parish of Orleans is without jurisdiction to entertain a suit under act No. 47 of 1873, by a purchaser at a tax sale, to be put in possession. 30 A. 138, *Gordon v. Goulé*.

32. The Second District Court for the parish of Orleans is without jurisdiction to entertain a suit in partition between two successions. 30 A. 181, *Boutté v. Boutté's Ex.*

33. The Second District Court cannot entertain a suit in partition between co-proprietors, some of whom are minors. 30 A. —, *Benedict v. Florat*.

34. The district court may entertain a suit on a yearly lease of ninety dollars per month, one month of which is due, when the prayer is for such further sum as will be due when judgment is rendered. 30 A. —, *Leblanc v. Selby*.

35. Jurisdiction to interdict, divorce and emancipate, 1868, p. 18; to regulate the practice in the courts of New Orleans, 1868, No. 47; repealed, 1870, p. 42; to create the Eighth District Court, 1876, E. S., p. 2; mandamus and *fi. fa.*, not to issue against New Orleans, 1870, E. S., p. 10; rules, 1872, p. 107; creating Superior District Court, 1873, p. 38; municipal police courts created, 1873, p. 170; 1874, p. 119; recorders' courts, 1877, E. S., p. 202; amended, 1878, p. 61; Superior Criminal Court created, 1874, p. 220; sixth and seventh districts of New Orleans, made a part of second judicial district, 1876, p. 86; jury commissioners, 1877, p. 72; Superior District Court abolished, 1877, p. 85; jurisdiction of Third District Court extended, 1877, E. S., p. 218, see Nos. 10 and 28; term of Superior Criminal Court, 1878, p. 149.

(f) Parish courts.

1. Act No. 141, of 1868, defining the jurisdiction of parish courts, is unconstitutional, because the object is not contained in the title, and because the legislature has no power to change the jurisdiction, as fixed by the constitution. 21 A. 479, *Swan v. Gayle, ad'r.*

2. The parish court is without jurisdiction to entertain a demand to annul the sale of a property exceeding five hundred dollars in value. 21 A. 455, *Rogers v. Morrison, ex.*

3. The parish court is without jurisdiction *ratione materiæ* in a suit where the amount claimed is above five hundred dollars, even where a succession is defendant. 21 A. 478, *Swan v. Gayle*; 531, *Succession Bartlett*; 22 A. 81, *Chaney v. Williams*.

4. The parish court is without jurisdiction to entertain a claim of over five hundred dollars, even against a tutor or executor. 21 A. 610, *Edwards v. Edwards*; 616, *Derby v. Robertson*; 662, *Hartman v. Reutrope*.

5. Parish courts cannot entertain suits by one succession against another to recover and partition property worth more than five hundred dollars. 24 A. 127, *Bynum, ad'r v. Bynum, ad'r*; 24 A. 127.

6. A judgment of the parish court ordering the sale of succession property to pay an unliquidated claim of more than five hundred dollars, is a mere nullity. 25 A. 532, *Miguez v. Delahoussaye*.

7. The parish court has jurisdiction to entertain a rule against the administratrix to sell, even if the plaintiff's claim be more than five hundred dollars. 26 A. 203, *Succession Pipes*.

8. Parish courts have jurisdiction of a suit for partition of an estate, where it has not been accepted unconditionally, even if no administrator has been appointed. 22 A. 131, *Pennisson v. Pennisson*. See SUCCESSION, V. (c), 3).

9. Parish courts are without jurisdiction *ratione materiæ* to annul a judgment of the district court; the more so, where the amount of such judgment is above five hundred dollars. 22 A. 593, *Breuning v. Succession Weigel*.

10. The parish court is without jurisdiction to issue an injunction to restrain the order of sale which it has issued in the probate proceedings, when the

matter in dispute exceeds five hundred dollars. 24 A. 206, *Mayer v. Dayries*. See INJUNCTION, III. Nos. 2, 6.

11. WYLY, J., *dissenting*: The parish court has jurisdiction to issue the order of sale, and consequently to control it. HOWELL, *concurring*. *Ib.*

12. The parish court has jurisdiction of an opposition to a tableau even where the claim is above five hundred dollars, where a judgment has already been rendered by the district court against the succession. 22 A. 101, *Succession Bingay*.

13. Parish courts can decide the contest between creditors, on a tableau of distribution, and the administrator has no right to appear and contest their claims. 23 A. 228, *Succession Prudhomme*.

14. Parish courts have jurisdiction of a suit claiming the nullity of a will, and of the order probating the same. 22 A. 109, *Hebert v. Winn*; 140, *Succession Pardo*.

15. Parish courts have exclusive jurisdiction where the contest involves only the validity of a will. 23 A. 292, *Succession Labranche*.

16. Parish courts have jurisdiction to partition community property between the heirs and the surviving spouse. 23 A. 638, *Walker & Vaught v. Kimbrough*.

17. The parish court is without jurisdiction to enjoin the proceedings in partition, at the instance of creditors, with judgments of more than five hundred dollars. 24 A. 282, *Woolfolk v. Woolfolk*.

18. Parish courts are without jurisdiction to entertain a suit of over five hundred dollars on a mortgage note, even if held by an heir who seeks at the same time a partition. 24 A. 454, *Succession Truxillo*.

19. When the succession has been closed and the co-proprietors seek to partition lands of greater value than five hundred dollars, the parish court is without jurisdiction. 26 A. 611, *Provost v. Provost*; 25 A. 143.

20. The parish court cannot entertain a suit for partition of property in possession of the heirs for many years, and worth more than five hundred dollars. 25 A. 143, *Johnson v. Labatt*.

21. A claim for money against an executor or his succession, should be brought before the parish court in the form of a demand for an account. 26 A. 602, *Tessier v. Littell*.

22. The parish court is without jurisdiction *ratione materiae* to entertain an opposition against an account and prayer for judgment for more than five hundred dollars. The ruling in 26 A. 602, *Tessier v. Littell* is not correct. 27 A. 411, *Succession James N. Brown*.

23. Proceedings to destitute an administrator are properly brought before the parish court. The penalty under section 9, R. S., is only an incident to the suit. 26 A. 207, *Succession Williams*; 28 A. 799, *Sheppard v. Barron*.

24. Parish courts have jurisdiction of suits instituted by heirs to have themselves recognized as heirs and put in possession as such, although the estate may be worth more than five hundred dollars. 26 A. 90, *Hart v. Hoss & Elder*. See *ante*, (d), 1), No. 4.

25. The parish court is the proper tribunal where the tutor should be called on to account and deliver the property of the minor to a legal representative of said minor, removed to another State. 26 A. 620, *Bowen v. Callaway*.

26. The parish court is without jurisdiction to pass upon title to property worth more than five hundred dollars. 27 A. 366, *Succession Ricard*.

27. Parish judges have authority to sign executory process in the absence of the district judge. 24 A. 181, *Ledoux v. Ducote*.

28. The affidavit of the attorney who swears individually to the absence of the district judge, is sufficient to authorize the parish judge to sign the order of seizure and sale. 28 A. 120, *Consolidated Association of the Planters v. E. Chol*. See PROVISIONAL SEIZURE, No. 11.

29. The law limits the time during which an adjournment may be made, by the parish court, *i. e.* one week, but it does not prohibit the judge from adjourning his court oftener than once during the same term. 28 A. 858, *Willis v. Elam*.

30. When the principal is less than five hundred dollars, but the interest

being added swells the amount to much more than that sum, the case should be brought before the parish court. 30 A. 410, *Decklar v. Frankenberger*. See (a), No. 13.

31. DEBLANC, J., *dissenting*: The court can add nothing to the constitution. *Id.*

32. The parish court may emancipate minors owning more than five hundred dollars. 30 A. 534, *Cooper v. Rhodes*.

33. Terms, 1874, p. 267; 1877, E. S., p. 38, also salary of judges; jurisdiction extended, 1876, p. 52.

(g) *Jurisdiction as affected by domicile, or character of parties ; or subject matter of suit.*

1) In general.

1. A party who has sold all his property in the parish where he resided and removed from there permanently, may be sued in the parish to which he has removed, and it will be considered his domicile, even though he has made no permanent establishment there. 15 A. 213, *Landis v. Walker*.

2. No personal judgment can be rendered against a defendant who resides in another parish, when he excepts to the jurisdiction. 17 A. 277, *Dejona v. Steamboat Osceola*. See JUDGMENT, XI. (a), No. 7. NULLITY, II. No. 19.

3. The judgment rendered in 1867 against a defendant, in a court not having jurisdiction of his person, in accordance with his waiver of domicile, is null and cannot be pleaded as *res judicata*. 29 A. 160, *Payne v. Furlow*. See *ante*, (a), No. 23. JUDGMENT, XI. (a), No. 7. NULLITY, II. No. 19.

4. The prayer of the petition being that the property be declared subject to the mortgage, the court where the property is situated may entertain the action *via ordinaria*, although the defendant resides in another parish. 25 A. 508, *Gantt v. Eaton & Barstow*; 21 A. 653, *Génères v. Simon*; 168 C. P.; 2 N. S. 374; 4 L. 240; 3 A. 637; 15 A. 346; 14 L. 413; 3 N. S. 652. See EXECUTORY PROCESS, I. No. 4; 1876, p. 106.

5. The court of the parish where the movable property pledged is situate, has no jurisdiction of a personal action to enforce the pledge against defendant, who resides in another parish. C. P. 162; 26 A. 554, *Sorrel v. Laurent*. See No. 10.

6. The defendant cannot confer jurisdiction by a waiver of domicile. 23 A. 257, *Richardson v. Hunter*.

7. The waiver of domicile, before the enactment of the act of 1861, p. 137, is not affected by said law. A suit is properly instituted on such waiver, after the promulgation of said act. 18 A. 81, *Jex v. Keary*.

8. The defendant must be cited in the parish where he has resided within the last year, in the absence of the declaration of change of domicile as required by law, and the courts of his former residence have jurisdiction. C. P. 167; 23 A. 564, *King v. Watts*.

9. A court in 1866, could not render a valid judgment, even on garnishment process against a defendant, who is not a resident of the parish. Such judgment is an absolute nullity. 24 A. 515, *Alter v. Pickett*; 21 A. 258, *State ex rel. v. Watkins*; 550, *State ex rel. v. Head*; 24 A. 311. See DOMICILE, I. No. 1.

10. Where plaintiff has a privilege, he may seize the property by an action *in rem*, wherever situated, although defendant may be a resident of another parish. No judgment *in personam*, can however be rendered. 19 A. 205, *Giffen, Smedes & Co. v. Manning*; 5 A. 349. See No. 5. JUDGMENT, XI. No. 8.

11. The emoluments of the office being fixed by law at five hundred dollars, with no other fees of office, the suit under the intrusion act cannot be brought before the district court. 26 A. 631, *State ex rel. v. Richardson*.

12. The district court has no jurisdiction of a suit by a tax payer who pays less than five hundred dollars, although he seeks to enjoin the parish from issuing or paying a much larger amount of bonds. 26 A. 355, *Walton v. Police Jury Concordia*.

13. The district court is without jurisdiction to entertain an intervention

and third opposition of less than five hundred dollars. 26 A. 591, *Cross v. Parent*.

14. The district courts in the parishes, other than Orleans, have jurisdiction against successions for amounts above five hundred dollars, and to recognize the vendor's privilege; such a judgment, however, will not prevent the parish court from "*settling*" the succession and ranking the claims. 23 A. 555, *Thompson v. Comeau*.

15. The original jurisdiction of districts courts extends to all civil cases when the amount in dispute exceeds five hundred dollars, *exclusive of interest*. 24 A. 184, *Badeaux v. Blake*.

16. District courts may issue executory process against successions. 26 A. 644, *Hoss v. McWilliams*; 22 A. 266; 20 A. 311; 23 A. 44; 11 L. 388; 11 R. 211.

17. A judge has no authority to try a cause out of the parish of defendant's residence or domicile. 21 A. 550, *State ex rel. Twitchell v. Head*.

18. The district court of the parish where property has been seized, may issue an injunction and try the issues raised thereunder. 21 A. 199, *Arenstein v. Weber*; 16 A. 11; 4 N. S. 388; 2 A. 323, 492; 4 A. 84; 5 A. 648; 19 A. 206.

19. Under act No. 47 of 1873, providing for the sale of property by the State tax collectors, the application to be put in possession, must be made in the parish of Orleans before a district court having general civil jurisdiction. 27 A. 705, *State ex rel. Norcross v. Judge Fourth District Court for the Parish of Orleans*.

20. Suit must be brought before the court having jurisdiction of the person of the defendant. 27 A. 566, *Kimbrough, ad'r v. Walker & Vaught et al.*

21. What court may issue the conservatory writs. See COURTS, II. (a), No. 30. EXECUTION, V. (a), 3), D. § 1, No. 13.

22. And distribute proceeds. COURTS, II. (a), No. 31.

23. What court may issue injunctions. See INJUNCTION, III.

24. The court which rendered the judgment, must revive it, although the defendant has removed from its jurisdiction. See JUDGMENT, XVI. No. 4.

25. Where the damages are caused by a passive breach, the corporation must be sued at the place of its domicile. 30 A. 607, *Montgomery v. Louisiana Levee Company*.

26. State and parish officers and their sureties, may be sued on their bonds in the parish where they exercised their functions, although they may have removed to another parish. 30 A. 593, *School Board v. Weber*.

27. SPENCER and DEBLANC, JJ., *concurring*: The defendants having filed their answer without reserve before filing the exception of jurisdiction, waived the latter. *Ib.* See COURTS, II. (b), No. 23.

28. EGAN, J., *concurring*: The bond is a joint obligation, and the suit is properly brought as to all, where one of the joint obligors reside. *Ib.*

29. After dissolution of a commercial partnership, suit should be brought against the partners individually, in the parish of their respective domicile. 30 A. 57, *Ranlett v. Collier White Lead Company*.

2) Real actions; warranty; and estates under administration.

1. Where a note is secured by a mortgage which imports confession of judgment, the suit may be brought in the parish where the property is situated. 15 A. 346, *Scott v. Turner*.

2. The court where the property is situated, has the right to issue executory process, although the defendant resides in another parish. 22 A. 428, *Allen v. Tarleton*. See EXECUTORY PROCESS, I. No. 4.

3. As courts of probate can issue no seizure and sale, nor *feri facias*, the Bank of Louisiana, or its subrogees, can proceed before a court of ordinary jurisdiction, either *via executiva* or *via ordinaria*, and issue a writ of *feri facias* to have the property mortgaged to it, seized and sold, notwithstanding the mortgagor's death and the opening of his succession. 20 A. 317, *State ex rel. Sauvé v. Judge Third District Court*; 7 R. 508; 11 R. 212; 22 A. 266,

Graham v. Succession Markey; 12 A. 82; 19 A. 177. See SUCCESSION, VIII. (e), 8), No. 5.

4. When there is a doubt as to what parish the property forms part, the court of the parish wherein the deeds are recorded, may issue executory process. 23 A. 561, *Stewart & Theus v. Walsh et al.*

3) Partnership; and obligations joint, or joint and several.

1. The partners, although residents of different parishes, may be sued at the domicile of the partnership, for a settlement thereof. 24 A. 297, *Lobdell v. Bushnell*; 6 L. 685; 13 L. 484; 3 N. S. 188; 2 Woods, 138, *Goodrich v. Hunton*.

2. Joint obligors may be sued at the domicile of any one of them. 25 A. 528, *Adams & Co. v. Scott*; C. P. 165. See 1871, p. 19.

3. Suit against each partner, where brought after dissolution. See II. (g), 1), No. 29.

III. OF CONTEMPTS OF COURT.

1. The judge *a quo*, who does not know what proceedings have been had in a case, disclaiming any intention to disobey or disregard the mandates of the Supreme Court, cannot be punished for contempt, for granting an injunction arresting the judgment of the Supreme Court, on grounds alleged to have arisen since its rendition. 24 A. 213, *Villavaso v. Walker*.

2. A judge who obstructs the mandates of the Supreme Court is in contempt of its authority, and should be fined and imprisoned. 24 A. 621, *Bovee v. Herron*.

3. To use abusive language and commit an assault upon one of the members of the Supreme Court, during a recess, and in the court room, is a contempt of court. 25 A. 532, *State v. Garland*.

4. It being determined under a writ of prohibition that the property sequestered should be returned to the defendant in the sequestration, a new writ of sequestration was issued and plaintiff therein bonded; *Held*: That this was a subterfuge to evade the order of the court, and that the plaintiff and sheriff were in contempt of court and should be fined. 28 A. N. R., *State ex rel. Gourgotte v. Waggaman, sheriff*.

5. The governor may pardon a conviction for contempt. See CONSTITUTION, II. (d), No. 5.

6. The interposition of a State court, in a matter pending before the United States Circuit Court, is a contempt. See COURTS, I. No. 10.

7. The Supreme Court has no jurisdiction to issue a writ of *habeas corpus* in a case of contempt of court. See APPEAL, I. (b), 2), A. No. 2.

IV. OF THE FEDERAL COURTS.

(a) *In general.*

1. A suit to annul a will as a muniment of title, and to restrain the enforcement of a decree admitting it to probate, is, in essential particulars, a suit in equity, and if, by the law obtaining in a State, customary or statutory, such a suit can be maintained in one of its courts whatever designation that court may bear, it may be maintained by original process in the Circuit Court of the United States, if the parties are citizens of different States. 92 Otto, 10, *Gaines v. Fuentes et al.*

2. A suit to which an assignee in bankruptcy is afterwards made a party, may be continued in the Circuit Court of the United States. The court entertains suits by or against an assignee. 92 Otto, 179, *Burbank v. Bigelow*; 91 Otto, 516, *Lathrop, assignee v. Drake et als*; 521, *Eyster v. Gaff*.

3. The courts of the United States have no probate jurisdiction and must receive the decrees of the State courts in testamentary matters as conclusive. 18 H. 470, *Fonvergne v. New Orleans*.

4. When the provisional court of Louisiana ceased to exist, its judgments and decrees were directed to be transferred into the Circuit Court and to stand as the judgments and decrees of that court; an appeal will therefore lie to the

Supreme Court of the United States from a judgment of the Provisional Court after its transfer to the Circuit Court, in the same manner and under the same regulations that an appeal would lie from a judgment of the Circuit Court itself. 7 Wall. 563, *The Grapeshot*.

5. The provisional court for the State of Louisiana, established by proclamation of President Lincoln on the 20th October, 1862, was a legal tribunal, organized by the president in the lawful exercise of his constitutional authority. 9 Wall. 29, *The Grapeshot*.

(b) *Removal of suit from the State, to the Federal courts.*

1. An alien who is sued in a State court by a citizen of the State, may, by complying with the requirements of the act of congress of 1789, remove the case to the Circuit Court of the United States, but he cannot claim a dismissal of such suit. 15 A. 65, *Webre v. Duroc*.

2. When several parties are plaintiffs, all must be citizens of a State different from that of the defendant, to entitle them to a removal of the cause from the State to the Federal courts. 24 A. 170, *Martin, Cobb & Co. v. Coons*. Acts of congress of March 2, 1867.

3. The affidavit made to obtain the removal, should show that the affiant is not simply a resident, but a citizen of another State, and defendant a citizen of this State. 24 A. 170, *Martin, Cobb & Co. v. Coons*.

4. A defendant corporation and all its corporators being domiciled in other States, have a right to a transfer of the suit from the State to the United States court. 21 A. 233, *Rosenfield v. Adams Express Co.* Judiciary act 1789, sec. 12.

5. A removal of the suit from the State to the Federal court, cannot be made by motion, nor during the trial. *Edwards v. Fairbanks & Gilman*, not reported. See *infra*, Nos. 22, 29.

6. An application to remove a cause to the United States court, under the provisions of the statute of March, 1867, should be made in the lower court, before final judgment; the Supreme Court having only appellate jurisdiction, cannot entertain such an application. 24 A. 55, *Williams v. Succession Williams*.

7. If there are several plaintiffs or defendants, each must be competent to sue or be sued before the United States court, to authorize a transfer of the suit to said court. 26 A. 249, *Tesson v. Gusman*. Acts of congress of July 27, 1866.

8. A citizen of another State cannot except to the jurisdiction of our State courts, he may have the cause transferred to the United State court, if he so desires. 27 A. 229, *Perkins & Billiu v. Morgan*.

9. If the transferrer of the note could not have the case transferred to the United States court, the transferee cannot, although he may be a citizen of another State. 27 A. 291, *New Orleans Canal and Banking Company v. Recorder of Point Coupée et als*. See *infra*, Nos. 21, 23. But see the acts of congress of 1875, 18th Stat. 470.

10. A suit which could not have been brought in the United States Circuit Court for want of jurisdiction over one of the defendants, cannot be transferred. 27 A. 291, *New Orleans Canal and Banking Company v. Recorder Pointe Coupée et als*.

11. The order of transfer of the suit was vacated by the subsequent order to reinstate the case on the docket, when it was sent back by the United States court. 28 A. 70, *Bird & Thompson v. Cockrem*.

12. An application to remove from one court to another, is analogous to a plea to the jurisdiction, and if granted, an appeal will lie. 21 A. 233; 23 A. 29, *State ex rel. Coons v. Judge Thirteenth Judicial District Court*; 29 A. 372, *Goodrich v. Hinton*; N. R., *Shook & Palmer v. Coswell*. O. B. 45, fo. 49. See No. 33; APPEAL, I. (b), 2), H.

13. The act of July, 1866, is applicable only where there are two defendants, and the requisites for removal are: 1st. That the suit be brought in a State court by a citizen of that State; 2d. That one of the defendants be a citizen of the State in which the suit is brought and the other defendant be a

citizen of another State; 3d. The suit must be brought for the purpose of enjoining the citizen of another State; 4th. Requisites one and two concurring, it must be a suit in which there can be a final determination, so far as the defendant of the other State is concerned, without the presence of the other defendant. 29 A. 373, *Goodrich v. Hunton*.

14. The act of March, 1867, is applicable to those cases alone in which the party, plaintiff or defendant, who desires to remove the suit, files his affidavit in the State court before the final hearing, stating that he has reason and does believe that from prejudice or local influence he will not be able to obtain justice in the State court. *Ib.*

15. A removal under the judiciary act of a suit brought to enjoin an execution and claim the nullity of a judgment rendered by the State court cannot be claimed. An injunction bill which is not an original bill cannot be considered a suit "commenced" in a State court. *Ib.* 8 Peters, 1; 24 Howard, 460; 16 Wal. 195; 4 Cranch, 179; 7 Howard, 625; 91 Otto, 254. See *infra*, 17, 32.

16. The judge before granting an application to remove a case to the Federal court may enquire whether the party is entitled to a removal. 29 A. 399, *State ex rel. Jumel v. Johnson*.

17. A suit by injunction to prevent the seizure of a third person's property, cannot be removed from the State to the Federal courts. *Watson v. Bondurant*, not reported. See *supra*, 15; *infra*, 32.

18. A suit for the revocation of a will and its probate, cannot be transferred to the Federal courts which have no probate jurisdiction, even if one of the parties be a citizen of another State. 25 A. 90, *Fuentes et als. v. Mrs. Gaines*.

19. In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests with congress to determine at what time and upon what conditions the power may be invoked; whether originally in the Federal court or after suit brought in the State court; and in the latter case at what stage of the proceeding, whether before issue or trial, by removal to a Federal court or after judgment upon appeal or writ of error. 92 Otto, U. S. 10, *Gaines v. Fuentes et al.*

20. As the constitution imposes no limitation upon the class of cases involving controversies between citizens of different States to which the judicial power of the United States may be extended, congress may provide for bringing, at the option of either of the parties, all such controversies within the jurisdiction of the Federal judiciary. *Ib.*

21. The act of congress of March 2, 1867 (14th Statutes 558), in authorizing and requiring the removal to the Circuit Court of the United States, of a suit pending or afterwards brought in any State court, involving a controversy between a citizen of the State where the suit is brought with a citizen of another State, thereby invests the Circuit Court with jurisdiction to pass upon and determine the controversy when the removal is made, though that court could not have taken original cognizance of the case. *Ib.*

22. A case cannot be removed from a State court to the Circuit Court of the United States, after judgment has been rendered in the State court of original jurisdiction, and while the case is pending in the appellate court. 19 Wall. 572, *Stevenson v. Williams*. See *infra*, No. 29; *supra*, Nos. 5, 6.

23. Although the judiciary act declares that no Circuit or District Court of the United States shall have jurisdiction to recover the contents of any promissory note, or chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made (except in cases of foreign bills of exchange); yet the restriction does not apply to cases originally brought in a State court and transferred to the United States court, under the acts of congress. 9 Wall. 387, *Bushnell v. Kennedy*. See *supra*, No. 9; *infra*, No. 25.

24. A marshal sued in a State court for trespass, for the wrongful execution of a writ, cannot claim the right to have the suit removed to the United States court when he is a citizen of the same State with the plaintiff. 10 Wall. 22, *McKee v. Raines*.

25. The act of congress of 1867, which authorizes the removal of suits from a State court to the United States courts, either by the plaintiff or the defendant, who shall make oath that he cannot have a fair trial on account of local prejudice and influence, overrides the provision of the eleventh section of the judiciary act, which declares that those courts shall not have cognizance of any suit to recover the contents of any notes or other choses in action in favor of an assignee, unless suit might have been prosecuted in such court to recover said contents, if no assignment had been made. 1 Woods, 254, *Barclay v. The Levee Commissioners*.

26. The provision of the eleventh section of the judiciary act in regard to suits in the United States courts on notes or other choses in action, held by assignment, was intended to prevent fraudulent assignments of choses in action, made for the purpose of giving the court jurisdiction; and was not founded on any constitutional principle. 1 Woods, 254, *Barclay v. The Levee Commissioners*.

27. Receivers of national banking associations, as such, have not the privilege in all cases of being sued in the United States courts, and cannot remove such cases against them from State courts to the United States courts. 2 Woods, 32, *Bird's executors v. Cockrem, receiver*.

28. The trial, before which application must be made for the removal of a case from the State to the Federal court, in order to warrant such removal under section three, of the act of March 3, 1875 (18 stat. 470), is such a trial upon either the law or facts of the case, or both, as settles and concludes the controversy between the parties. 2 Woods, 117, *Lewis v. Smythe*.

29. When such a trial has been commenced, though not concluded, the application for removal comes too late. *Ib.* See *supra*, Nos. 5, 22.

30. In a case which can be removed under the act of congress, of March 3, 1875, the timely presentation of the petition and bond for removal, is effectual to suspend all the powers of the State court where the suit is pending. *Ib.*

31. The facts that defendants, in a cause pending in a Louisiana State court, have called in warranty parties who are citizens of the same State with the plaintiff, furnishes no good ground against the removal of that part of the cause which concerns the original parties, notwithstanding the fact that the Statute of Louisiana declares that the trial of the call in warranty cannot be separated from the trial of the main issue. 2 Woods, 120, *Ellerman v. N. O., M. & T. R. R. Co.*

32. Where a citizen of one State filed a petition in a court of the State of which he was a citizen, against a citizen of another State, to restrain the execution of a judgment obtained in a State court by the latter against the former, such cause is removable to the Federal court, under the act of March, 3, 1875, notwithstanding the fact that the Federal courts were prohibited by section 720, Revised Statutes, from granting an injunction to stay proceedings in a State court. 2 Woods, 166, *Watson v. Bondurant*. See *supra*, 17, 15.

33. The remedy for an improper removal is by appeal and not mandamus. See *MANDAMUS*, I. (a), 2), No. 11; see *ante*, No. 12.

34. No transfer of a suit to annul a judgment rendered by a State court, should be made to the United States court. 30 A. 56, *Ranlett v. Collier White Lead Company*; U. S. Statutes, 1789.

35. A petition for removal, under the act of 1867, known as the "local prejudice act," need not contain mention of applicant's citizenship, when that fact appears of record; the affidavit should be made by the applicant, and not the attorney. 30 A. 474, *Tunstall v. Parish of Madison*.

36. A corporation's domicile is considered, not that of the corporators, in a question of removal. *Ib.*

37. Exceptions and pleas are not proper proceedings to obtain the judgment of the court on a question of the right of removal. *Ib.*

CRESCENT CITY GAS LIGHT COMPANY.

Incorporated, 1870, E. S., p. 216. See New Orleans Gas Light Company, under the head of CORPORATION, X. (t).

CRIER.

No such officer known. See Costs, II. No. 5.

CRIMINAL LAW.

I. IN GENERAL.

II. OF CRIMINAL JURISDICTION; AND THE GENERAL POWERS OF THE COURT.

III. OF INDICTABLE OFFENSES.

V. OF BAIL AND RECOGNIZANCE.

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| (a) <i>In general.</i> | (d) <i>Forfeiture of the bond; and surrender of the principal.</i> |
| (c) <i>Order admitting to bail; and the bond.</i> | 1) <i>In general.</i> |
| 1) <i>In general.</i> | 2) <i>When and how a forfeiture may be declared; proceedings on forfeited bonds; the evidence and judgment.</i> |
| 2) <i>The order; amount and execution, approval and acceptance, of the bond.</i> | 4) <i>Release of forfeiture; and bail's power to take and surrender the principal.</i> |
| 3) <i>Form, condition, and return of the bond; and description of the offense.</i> | |

VI. OF THE GENERAL STRUCTURE OF INDICTMENTS AND INFORMATIONS.

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| (e) <i>Forgery.</i> | (ii) <i>Receiving stolen property.</i> |
| (f) <i>Gaming.</i> | (j) <i>Rape.</i> |
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| 2) <i>The indictment.</i> | 1) <i>Cruelty to slaves.</i> |
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| | 3) <i>Other crimes relative to slaves.</i> |

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XI. OF PLEAS; AND A NOLLE PROSEQUI.

XII. OF THE EVIDENCE.

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| (b) <i>Circumstantial evidence; and admissibility of evidence under the pleadings.</i> | (f) <i>Witnesses.</i> |
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- (a) *Right of trial; and discharge of the jury.*
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- 1) In general.
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- (a) *In general.*
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XVII. OF JUDGMENT, PARDON, AND EXECUTION.

XVIII. OF THE CRIMES OF SLAVES; AND THEIR TRIAL.

- (c) *Verdict and sentence; the punishment; crimes for, and laws under, which it may be inflicted.*

XIX. OF THE COSTS OF CRIMINAL PROCEEDINGS.

I. IN GENERAL.

1. The revisory legislation of 1870 did not abrogate the criminal laws of this State, but continued them in existence in a different shape. 22 A. 273, *State v. Brewer*; 23 A. 327, *State v. McCart*.

2. The act approved March 15, 1855, entitled "an act supplemental to an act relative to crimes and offenses," is not restricted in its application to bank officers, but embraces all classes of persons. 15 A. 337, *Burkett v. Lanata*.

3. If the appearance bond be taken and approved by the judge before whom the preliminary examination is had, no order committing the accused or admitting him to bail need be shown. 26 A. 612, *State v. Herpin*.

4. Act No. 124 of 1874, relative to the Superior Criminal Court, is null in certain particulars. See COURTS, II. (e), No. 2.

5. Governor to order arrest by another sheriff, etc.,—1870, E. S., p. 94.

II. OF CRIMINAL JURISDICTION; AND THE GENERAL POWERS OF THE COURT.

1. In a prosecution against a party for cruel treatment to a slave, the justice of the peace is without authority to place the slave beyond the reach or control of the master. That right and privilege is conferred upon the judge and jury who try the prosecution for the cruel treatment. The justice's court is intrusted only with the preliminary investigation of the charge preferred; and beyond the duties of a committing magistrate the justice is without authority. 15 A. 603, *Ney v. Richard*.

2. The legislature has the right, under the constitution, to confer upon the recorders courts in New Orleans such criminal jurisdiction as may be necessary for the punishment of minor crimes and offenses, and as the police and good order of the city may require. 15 A. 190, *State v. Gutierrez*.

3. The issuing of a bench warrant is a ministerial act which the clerk may perform. 18 A. 528, *State v. Gordon*.

4. Under the act of 1855, relative to crimes and offenses, recorders of the city of New Orleans have power to sentence on the charge of vagrancy, without indictment or information. The law is not in conflict with section 105 of the constitution of 1864. 20 A. 325, *State ex rel. v. Noble et al.*

5. The parish court, under article 87, constitution of 1868, has jurisdiction in criminal cases, where the penalty is not necessarily imprisonment at hard labor or death, and when the accused shall waive trial by jury. The offense being punishable by imprisonment, with or without hard labor, the court had jurisdiction to condemn with hard labor. 23 A. 600, *State v. Reily*; 29 A. 642, *State v. Lartigue*.

6. The Supreme Court has no jurisdiction in criminal cases, unless the punishment of death or imprisonment at hard labor, or a fine exceeding three hundred dollars, is actually imposed. The plea of *autrefois acquit* having been maintained, no appeal lies. 27 A. 236, *State v. Brown et als.*; 21 A. 188, *State v. Redding*; 22 A. 460, *State v. Gay*; 23 A. 142, *State v. Welsh et als.*

7. The judge of the Superior Criminal Court had no authority, by reason of sickness, to enter a general order in the minutes, appointing an attorney at law to act as judge in all cases during his sickness; convictions under said acting judge, are null. 27 A. 360, *State v. Fritz*. See COURTS, II. (e), No. 2.

8. No appeal lies from a judgment quashing an indictment. 28 A. 92, *State v. Banks*.

9. The law having declared that a certain class of cases should be transferred from the First District Court to the Superior Criminal Court, any error in the motion of transfer, is of no consequence when the proceedings of the trial are regular. 28 A. 35, *State v. Harper & Linn*.

III. OF INDICTABLE OFFENSES.

1. The counts of an indictment which charge the defendant with having banded and conspired to injure, oppress, threaten and intimidate citizens of the United States of African descent, therein named; which in substance respectively alleged that the defendants intended thereby to hinder and prevent such citizens in the free exercise and enjoyment of rights and privileges granted and secured to them in common with other good citizens by the constitution and laws of the United States; to hinder and prevent them in the free exercise of their right, peacefully to assemble for lawful purposes; prevent and hinder them from bearing arms for lawful purposes; deprive them of their respective several lives and liberty of person without due process of law; prevent and hinder them in the free exercise and enjoyment of their several and respective rights to vote at an election to be thereafter by law had and held by the people in and of the State of Louisiana, or to put them in great fear of bodily harm, and injure and oppress them because being and having been in all things qualified, they had voted at an election, theretofore had and held according to law by the people of said State—do not present a case within the sixth section of the enforcement act of the 31st of May, 1870. (16 Stat. 141). To bring a case within the operation of that statute, it must appear that the right, the enjoyment of which the conspirators intended to hinder or prevent, was granted or secured by the constitution or laws of the United States. If it does not so appear, the alleged offense is not indictable under any act of congress. 92 Otto, 543, *United States v. Cruikshank et al.*

2. By the act under which this indictment was found, the crime is made to consist in the unlawful combination with an intent to prevent the enjoyment of any right granted or secured by the constitution, etc. All rights are not so granted or secured, whether one is so or not, is a question of law to be decided by the court. The indictment should therefore state the particulars, to inform the court as well as the accused; it must appear from the indictment that the acts charged will, if proved, support a conviction for the offense alleged. *Ib.*

3. Felony, for car drivers who injure any person, 1870, p. 58; destroying,

etc., criminal records, crops, stock, false weights, murder, rape, arson, perjury, forgery, conspiracy, assault, shooting, 1870, E. S., p. 49; bribery, 1873, p. 42; extortion in office, 1873, p. 62; usurping an office, 1873, p. 80, 1878, p. 27; destroying, etc., tombs, 1873, p. 117; cutting levees, 1875, p. 49; defacing fire alarm apparatus, 1875, p. 103; selling unginned cotton in the night time, 1877, E. S., p. 23; selling liquor to minors, 1877, E. S., 187; rape and poison, 1878, p. 46; officers who mutilate their records, 1878, p. 47; bribery and corrupt practices, 1878, p. 97.

V. OF BAIL AND RECOGNISANCE.

(a) *In general.*

See *ante*, I. No. 3.

(b) *Right of admission to bail; by whom it may be claimed or granted.*

1. A bail bond taken by a justice of the peace, in a case where he is prohibited from admitting the accused to bail, is null. 19 A. 142, *State v. Whittaker*.

2. The bail bond is null when taken by a magistrate in the parish in which the accused is arrested, if the offense has been committed in another parish. 19 A. 145, *State v. Collins*.

(c) *Order admitting to bail; and the bond.*

1) *In general.*

1. When on the presentment of the indictment, the court ordered the accused to be released on a bond fixed by the judge, and that the sheriff be authorized to take and approve said bond, the sheriff may act as authorized. 18 A. 528, *State v. Gordon*. See *infra*, 2), No. 1.

2. Where the accused does not sign the bail bond the surety is not liable thereon. 19 A. 145, *State v. Taylor*. See *infra*, (d) 1), No. 6.

2) The order; amount and execution, approval and acceptance, of the bond.

1. An order of the judge authorizing the sheriff to discharge the prisoner on giving bond in a fixed amount, is a sufficient authority to the sheriff to receive the bond and file it in court. 21 A. 599, *State v. Loeb*. See *ante*, 1), No. 1.

3) Form, condition, and return, of the bond; and description of the offense.

1. The condition in the bond being that the prisoner shall not depart without leave of the court; the sureties will be bound, although the offense be not accurately described. 21 A. 599, *State v. Loeb*.

2. The bond given to release the accused, cannot be forfeited, if it defines no crime known to the law; of which the accused stands charged. 23 A. 698, *State v. Gibson*; see *infra*, (d), 1), No. 3.

(d) *Forfeiture of the bond; and surrender of the principal.*

1) *In general.*

1. The State is not entitled to a judgment on a bail bond taken by the Sixth District Court of New Orleans. 15 A. 565, *State v. Branner*.

2. The State has a right to the presence of a party indicted for a felony, and he has no right to be heard in a motion to quash, while he is absent and a fugitive from justice, his surety on a bail bond cannot, therefore, be heard on this subject. 15 A. 495, *State v. Marion*.

3. A recognizance bond on a charge of "enticing away from ——'s plantation certain freedmen, laborers," cannot be enforced, no such offense exists. 19 A. 71, *State v. Sypher*. See *supra*, (c), 3), No. 2.

4. The defendant being in the custody of the sheriff at the time of furnishing the bond, whereby he was released, cannot now be allowed to question the regularity of the arrest. 16 A. 141, *State v. Canady*; 13 A. 299; 14 A. 783.

5. Instead of being an objection to the forfeiture, the pendency of two pro-

ceedings against the defendant for the same offense, one for stabbing with intent to commit murder and the other for murder, is an additional ground for forfeiture. *Ib.*

6. Where the principals have not signed the bail bond, the sureties thereon are not liable. 19 A. 77, *State v. Doax*; 2 R. 367. See *supra.* (e), 1), No. 2.

7. It matters not that the indictment be irregular, the security having failed to comply with the condition of the bond in not producing the accused when called upon, must be held to his obligation. 23 A. 597, *State v. Snow and Hope.*

2) When and how a forfeiture may be declared; proceedings on forfeited bonds; the evidence and judgment.

1. A penal bond, conditioned that the accused will appear before the First District Court, when called upon, cannot be forfeited by the District Court of Jefferson. 20 A. 397, *State v. Young et als.*

2. The minutes signed by the judge is a sufficient judgment of forfeiture of a bail bond. 30 A. 629, *State v. Nicol, Bowman et al.*

3. The sureties on a bail bond which has been forfeited, cannot gainsay the regularity of the proceeding wherein it was given, when the principal obtained the benefit of the bond. 30 A. 630, *State v. Nicol, Bowman et al*; 13 A. 299; 14 A. 783; 16 A. 141.

4) Release of forfeiture; and bail's power to take and surrender the principal.

1. The bond having been forfeited for want of appearance of the accused, the surety is not released by a new arrest and new bail furnished. The accused must be *finally* tried and convicted or acquitted. 18 A. 104, *State v. Defesse & Benoit.*

VI. OF THE GENERAL STRUCTURE OF INDICTMENTS AND INFORMATIONS.

(a) *In general.*

1. It is not necessary, in charging an offense in an indictment, to follow the words of the statute; it is sufficient if it be distinctly charged in other words. 15 A. 166, *State v. Butman.*

2. Indictments need not describe the court nor the jurors by whom they are found, nor need they aver that the court has jurisdiction of the offense. 15 A. 495, *State v. Marion.*

3. The essential averments in a bill of indictment, required by the common law, have not been dispensed with by the statutes of 1855, which merely simplifies the system and corrects some supposed deficiencies. 20 A. 145, *State v. Cook.*

4. An indictment by a grand jury, drawn from any other list of jurors than the last list of all the qualified jurors, will be quashed. 20 A. 442, *State v. Morgan & Wilson*; 20 A. 356, *State v. Da Rocha.*

5. In criminal trials all objections of a strictly formal character to the informations or indictments, must be urged before the jurors are sworn. R. S., 1870, section 1047; 22 A. 162, *State v. Durbin.*

6. The mark of the foreman of the grand jury to the indictment is sufficient. 26 A. 461, *State v. Tinney.*

7. There need be no record of the names of the grand jury, nor must it appear that twelve of said jurors concurred in finding the indictment. 26 A. 582, *State v. Giroux*; 27 A. 693, *State v. Coleman.*

8. In an indictment for larceny the court may allow the description of the article stolen to be amended. 29 A. 718, *State v. Johnson.*

9. The offense of marking a calf is not larceny. 29 A. 719, *State v. Johnson.*

10. In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation," the indictment must set forth the offense with clearness, and all necessary certainty to apprise the accused of the crime with which he stands charged, and every ingredient of which the offense is composed, must be

accurately and clearly alleged. It is an elementary principle of criminal pleading, that, where the definition of an offense whether it be at common law, or by statute, includes generic terms; it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species, it must descend to particulars. The object of the indictment is, first to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause, and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. For this, facts are to be stated, not conclusions of law alone; a crime is made up of acts and intents, and these must be set forth in the indictment with reasonable particulars of time, place, and circumstances. 92 Otto, 544, *United States v. Cruikshank et al.*

(b) *Caption and commencement.*

1. The caption to indictments is here uniformly dispensed with. 15 A. 595, *State v. Marion*.

2. "Upon their oaths present," etc., with a clerical omission of the word oath, in connection with the statement that the grand jurors were duly impanelled and sworn, is no defect in an indictment. 26 A. 63, *State v. Smith*.

(c) *Time and venue.*

1. No time of the commission of the crime need be alleged in an indictment, nor, if alleged, need be correctly stated, but proof thereof must be made. 16 A. 401, *State v. Walters*.

2. An indictment must negative on its face that prescription has run against the offense. 19 A. 76, *State v. Bilbo*; 16 A. 400, *State v. Walters*.

3. The facts which interrupt prescription must be set forth in the indictment, which will otherwise be defective. 19 A. 90, *State v. Peirce*; 435 *State v. Bryan*.

4. A mistake in an indictment, as to the parish for which the grand jury was impaneled and sworn in, is not a ground upon which to quash. 15 A. 495, *State v. Marion*.

5. An indictment found within a year next after the offense was made known to the public officer having power to direct investigation, is good, although such indictment may not be filed long afterwards. 26 A. 461, *State v. Finney*.

6. Although more than a year has elapsed previous to the filing of the information, yet the statute of limitation does not apply if an indictment had been found within the legal delay and had been *nol. pros.* 28 A. 40, *State v. Cason*.

7. The plea of prescription will be maintained where more than a year has elapsed from the day the accused was taken into custody to the day when the last information was filed, although different indictments and informations had previously been filed and even tried. 28 A. 450, *State v. Frank Bennison*.

8. A statement to avoid the statute of limitation may follow the charge and the words, "against the peace and dignity of the State." 30 A. 301, *State v. Thomas*.

9. When a year has elapsed between the commission of the offence and the new bill found under the direction of the Supreme Court, which reversed the first verdict, prescription will not bar the prosecution. 30 A. 301, *State v. Thomas*.

(d) *Statement of the offense, and description of persons.*

1. The method of stating, the same accusation, in separate counts, is adopted to prevent a variance from the proof, on trial. 20 A. 145, *State v. Cook*.

2. It matters not, if the name of the accused be substituted by another, if he was identified as the person who committed the crime. 25 A. 573, *State v. Turner & Reid*.

3. The amendment of the indictment, by correcting an error in the name of

the accused, may be made during the trial. R. S. 1870, sec. 1047; 23 A. 604, *State v. Holmes*.

4. An indictment charging that the accused did "feloniously steal, take and carry away a cow of the value of fifty dollars," is a substantial charge of petty larceny. 29 A. 643, *State v. Lartigue*.

5. The counts of an indictment, which in general language, charge the defendants with an intent to hinder and prevent citizens in the enjoyment of the rights, privileges, immunities and protections, granted and secured to them respectively as citizens of the United States, and of the State of Louisiana, because they were persons of African descent, and with the intent to hinder and prevent them in the several and free exercise and enjoyment of every, each, all, and singular the several rights and privileges granted and secured to them by the constitution and laws of the United States, do not specify any particular right, the enjoyment of which the conspirators intended to hinder or prevent, are too vague and general, and lack the certainty and precision required by the established rules of criminal pleading, and are therefore, not good and sufficient in law. 92 Otto, 544, *United States v. Cruikshank et al.*

(e) Joinder of offenses.

1. The rule that the defendant must not be charged with having committed two or more offenses in any count of the indictment, does not apply to cumulative offenses denounced in the same statute. 15 A. 498, *State v. Markham*.

2. Several offenses of the same nature and upon which a similar judgment may be given, may be charged in the same indictment. 20 A. 145, *State v. Cook*.

3. An indictment charging the accused with intent to commit murder, whilst in the perpetration of robbery, must define the two offenses distinctly, else the indictment is not valid. 21 A. 347, *State v. Brown*.

4. The stealing of a wagon and horse harnessed to it, is but one act, for which only one indictment can be found. 29 A. 119, *State v. Augustine & Paul*; R. S. 1055.

5. Two offenses cannot be charged in one count of the indictment. 30 A. 311, *State v. Ford*.

6. An indictment may charge in several counts, kindred offenses growing out of the same act, such as burglary and larceny. 30 A. 61, *State v. Malloy*.

(g) Conclusion.

1. An indictment concluding "contrary to the form of the statute in such cases made and provided" must be intended to mean the statute of the State of Louisiana. The criminal statutes of no other government are cognizable, properly speaking, by our courts. 16 A. 184, *State v. Karn*.

2. An indictment which fails to conclude with the words "against the peace and dignity of the State," is fatally defective. 29 A. 589, *State v. Nunn*; 10 A. 195.

VII. OF THE GRAND JURY; FINDING OF INDICTMENT; AND SERVICE OF COPY.

1. The objection to the manner of impanneling the grand jury comes too late after the first day of the term. Acts 1857, p. 180, section 1; 16 A. 141, *State v. Canady*.

2. The act approved March, 1858, relative to the drawing of grand jurors, requires the foreman to be selected from the whole *venire*, and the remainder to be placed on slips of paper in a box, from which the sheriff draws fifteen names; any other drawing is not legal. 19 A. 436, *State v. Texada*.

3. Where one of the grand jury's panel is disqualified, the indictment is null. 21 A. 251, *State v. Parks*.

4. The objection being made, after verdict, that the accused was not served with a correct list of the jury, comes too late. 23 A. 620, 621, *State v. Vester*; *Same v. Axiom*.

5. Defendant must be served with a copy of the indictment and a list of jurors two entire days before his trial. 27 A. 206, *State v. Guidry*.

6. Exception to the capacity of the grand jurors must be made before going to trial. 28 A. 187, *State v. W. L. Thompson*.

7. The names of the grand jurors who found the indictment need not be mentioned. 30 A. 116, *State v. Shay*.

VIII. OF CRIMINAL INFORMATION.

1. The prosecution by information is not contrary to the constitution of the United States, which does not apply to State courts. 21 A. 574, *State v. Smith*; 12 A. 743; 13 A. 243; 14 A. 570; 5 How. 434; 7 Pet. 551; 7 Pet. 243.

2. The 977th article of the Revised Statutes, which provides that prosecutions for offenses not capital may be by information, is not in conflict with the fifth amendment to the constitution of the United States. 21 A. 574, *State v. Jackson*; 25 A. 382, *State v. Kelly*.

3. An objection to the capacity of the district attorney who filed the information, if allowable, should be made before judgment. 26 A. 605, *State v. Nunez*.

4. Prosecutions for offenses not capital, may be by information, with the consent of the court first obtained. 28 A. 351, *State v. Maxwell*; 30 A. 557, *State v. Anderson*.

IX. OF PARTICULAR CRIMES AND THEIR INGREDIENTS; PROSECUTIONS, LIMITATION THEREOF, AND STRUCTURE OF INDICTMENTS OR INFORMATION UPON THEM.

(a) *Arson.*

1. The offense of willfully or maliciously setting fire to, and burning a crib of corn, falls within the provisions of the third section of the act approved March 18, 1858, entitled "an act to amend and re-enact certain sections of an act entitled an act relative to crimes and offenses," approved March 14, 1855. 15 A. 557, *State v. Millican*.

2. The law makes no distinction whether the building burnt belongs to the accused or any other person. The allegation of ownership in the indictment, is to identify the object of the crime. 21 A. 157, *State v. Elder*.

3. The possession, control or occupancy of a house, barn or stable, destroyed by fire, may be shown by parol. 21 A. 157, *State v. Elder*.

4. The State will be allowed to amend, in all matters of form, the indictment for arson. 21 A. 157, *State v. Elder*.

(c) *Breach of trust, embezzlement and larceny.*

1. An indictment for embezzlement of — dollars, must give a description of the money, whether it be in gold, silver, currency, one or more pieces or bills. 21 A. 442, *State v. Muston*. See Nos. 4, 8, 9.

2. An indictment for larceny will not lie unless brought within one year after the offense shall have been made known to the officer having power to direct an investigation. 19 A. 435, *State v. Bryan*.

3. Larceny is the felonious taking and carrying away of the personal goods of another without his consent, with intent to convert them to the use of the taker. 22 A. 78, *State v. Davis*.

4. It is not necessary in an indictment for larceny of money, to specify the kind or denomination of the gold or silver coin stolen. 22 A. 425, *State v. Walker*; 27 A. 598, *State v. Green*. See *supra*, No. 1; *infra*, Nos. 8, 9, 10.

5. An indictment for the stealing of a horse need not set forth the value of the animal. 25 A. 372, *State v. Wells*.

6. In an indictment for having entered a vessel in the day time with intent to steal (R. S. 854), the law does not say that the precise article intended to be stolen, shall be described. 25 A. 383, *State v. Kelly*.

7. Unless the prisoner has fled from justice, or the crime has not been dis-

covered or denounced within one year before the information was filed, except for wilful murder, arson, robbery, forgery, and counterfeiting, one cannot be prosecuted. R. S. 1870, section 986; 23 A. 433, *State v. Forrest*.

8. An indictment for larceny of "ten dollars in United States currency," includes United States national bank notes. 23 A. 609, *State v. Castaing*. See Nos. 1, 4.

9. An indictment for larceny of "greenbacks, lawful money of the United States," is defective. 20 A. 48, *State v. Cason*. See Nos. 1, 4, 8.

10. An indictment charging that defendant forcibly carried away "— dollars, paper currency of the United States," is sufficient. 26 A. 377, *State v. Carro*.

11. In the proof of the taking, it is necessary to show that the goods were actually or constructively in the accused's possession. 26 A. 423, *State v. Shonhausen*.

12. Act No. 124 of 1874, did not repeal the law in relation to the crime of larceny, but simply divided the crime into two classes, grand and petty larceny, and a conviction under a previous indictment of larceny is good. 28 A. 24, *State v. Milton Carrodine*.

13. The value of the article stolen being mentioned in the indictment, is sufficient to determine whether it be grand or petty larceny. 28 A. 315, *State v. Powell & Gibson*.

14. To constitute larceny there must be an original felonious intent. 30 A. 602, *State v. Bill Thomas*.

15. Want of proper description in an indictment for larceny, should be taken on a motion to quash, before the jury is sworn. 30 A. 601, *State v. Bill Thomas*.

16. In an indictment for larceny, the addition that the accused killed the animal, will not vitiate it. 30 A. 305, *State v. Johnson*.

(cc) *Burglary*.

1. An indictment charging the felonious and burglarious breaking and entering a dwelling house at a certain hour of the night of a certain day, with the unlawful and felonious intent then and there to commit the crime of rape, in and upon a certain person, then lawfully in said dwelling house, the accused being armed at the time, with dangerous weapons, is sufficient. The crime of rape need not be detailed. R. S. 850; 25 A. 473, *State v. Jean Gay, fils et al*.

(e) *Forgery*.

1. In a case of forgery it is sufficient if there be at any time a bare possibility of fraud. 19 A. 396, *State v. Dennett*.

2. The forged order being copied in the indictment, this was sufficient. 27 A. 361, *State v. Fritz*.

3. In an indictment for forgery, it is sufficient to describe the instrument by its name or purport. 28 A. 43, *State v. Jules Pons*; *Same v. Same*; 46, *State v. Nelson*; R. S. 1051.

4. For evidence of handwriting, see *infra*, XII. (b), No. 3.

5. An information for forgery and uttering as forged, etc., a consolidated return of election, should contain the fact that the accused was a public officer, charged with the duty of compiling the returns. The omission vitiates the information against a member of the returning board. 30 A. 557, *State v. Anderson*.

6. The information having charged the accused with forging, uttering, etc., the consolidated statement of votes of the parish of Vernon, made by the supervisor of registration, and this statement not having any value as evidence of the return of the election, nor being considered as a public document, and the returning board officers being required to compute the election from the original return of the commissioners of election, the forging of the document charged, was not a crime. 30 A. 560, *State v. Anderson*.

7. A prosecution for forgery is not barred by one year, but the passing as genuine, of the forged document, is barred by that period. 30 A. 401, *State v. Snow*.

(f) *Gaming.*

1. It is not necessary that the State should prove the dealing of *faro*, several times, in order to show a violation of the statute; once will be sufficient. 15 A. 498, *State v. Markham*.

2. To keep a house where a banking game is carried on, as well as to keep a banking game, is an offense under the statute; there is no real difference between keeping a banking house, where money is bet or hazarded, and keeping a house where a banking game is carried on. 15 A. 498, *State v. Markham*.

3. The prosecution for keeping a banking game or banking house, is governed by the prescription of one year. 15 A. 498, *State v. Markham*.

(g) *Homicide.*

1) In general.

1. When all the circumstances of the homicide are shown, the presumption of malice is often established, and the accused must show an alleviation, an excuse or a justification. 22 A. 454, *State v. King*.

2. It is not a sufficient excuse for the accused to believe from appearances, that his life was in danger. *Ib.*

3. The indictment is not void because it does not mention the family name of the murdered, it suffices even to say that it is unknown. 23 A. 79, *State v. Bayonne et als.*

4. Malice and passion cannot co-exist. 28 A., *State v. Alex. Newton*.

5. The accused must show that the wounded man died from mal-treatment and not from the effects of the wound inflicted by him. 30 A. 433, *State v. Briscoe*.

6. For evidence of threats, see *infra*, XII. (a), Nos. 21, 23, 24.

7. For charges of threats, see *infra*, XIII. (f), No. 5.

2) The indictment.

1. No law requires an indictment for murder to be found within a year after the commission of the crime. 18 A. 141, *State v. Abellanado*.

2. An indictment for murder reciting that the accused did shoot upon a man, etc., is equivocal, and the judgment should be arrested; it should be, did shoot a man, etc. 18 A. 720, *State v. Charles*.

3. The specification that the accused "willfully, feloniously, and maliciously, while lying in wait * * * did shoot, to-wit: with a shot gun, with the intent to kill and murder one—— in the peace of the State, then and there being, contrary to the form of the statute," etc., is sufficient. 24 A. 192, *State v. Forney*.

4. An indictment charging defendant as to time, and place, with having "willfully, maliciously, and feloniously killed, slain, and murdered one——" contains animus and victim, and is therefore sufficient. 24 A. 494, *State v. Phelps and Brown*; 10 A. 195, *State v. Heas*, overruled.

5. HOWELL, J., *dissenting*: on the authority of, *State v. Heas*.

6. In an indictment for murder, the word willful is not sacramental, if it charges that the accused did murder with malice aforethought. 27 A. 572, *State v. Harris and Nellum*.

7. An indictment charging that the accused did willfully, and of his malice aforethought, kill and murder one M. L., is good. 28 A. 945, *State v. Joaquim Florenza*; 30 A. 341, *State v. Robertson*.

8. An indictment which charges "with intent to murder" and does not aver "willfully and feloniously" done, is defective. 29 A. 601, *State v. Thomas*.

(h) *Keeping grog-shops without license.*

1. The ninety-fourth section of the act of 1855, relative to crimes and offenses, which punishes by fine and imprisonment the selling by retail of spirituous liquors without a license, is not repealed by the act of 1855, relative to drinking houses, but is still in force. 15 A. 231. *State v. Parker*.

2. The ninety-fourth section of act of March 14, 1855, inflicting a fine on persons keeping a grog shop, is not inconsistent with the second section of 1855, p. 178; whereby the State relinquishes all right to grant licenses in any town, city or parish. The penalties imposed by both the State and the corporation may be exacted. 16 A. 308, *State v. Hooten*.

3. The prescription of one year governs the prosecution of the offense of selling liquor to slaves. 16 A. 400, *State v. Walters*; 12 A. 677; 13 A. 573; 15 A. 498.

4. Before retailing liquor, a license should be procured, whether the town or parish can or cannot issue any, else the seller is amenable to the penalty prescribed by Sec. 910, of the Revised Statutes of 1870. 24 A. 475, *State v. Kuhn*.

5. See POLICE JURY, Nos. 16, 17, 18.

6. Selling liquor to minors, 1877, E. S., p. 187.

(hh) *Libel*.

1. The extra judicial declarations of the person against whom the libel was preferred, are not admissible in evidence, as the admissions of a party, he being merely a witness in the prosecution. It is otherwise in a civil suit, which the injured party may institute for the recovery of damages. 15 A. 166, *State v. Butman*.

2. When the defendant, for the purpose of discrediting the witness, offers to prove these statements, after directing the latter's attention to the fact that they had been made, the evidence is admissible. *Ib.*

3. A party is just as much responsible, criminally as civilly, for giving currency to slanderous and libelous reports and publications, as if he had originated them. His only excuse, in such a case, is to show the truth of the charges preferred, and not the truth of preferment, by others, of such charges. *Ib.*

4. Although the defendant, in a prosecution for libel, may prove the truth of the charges that gave rise to the prosecution, yet evidence of common reports, or of publications in newspapers upon the subject, is inadmissible. *Ib.*

5. Sections 804 and 1051 R. S., take the case of libel out of the strict rules of the common law, and the purport only of the libel, without stating in what language written, may be given in the information. 27 A. 247, *State v. Willers*.

6. See LIBEL AND SLANDER in civil actions.

(i) *Perjury*.

1. An indictment not charging that the accused swore falsely to a fact material to the case, is fatally defective. 26 A. 71, *State v. Gibson*; Archbold's Criminal Pleadings, v. 3, pp. 592, 12.

2. In an indictment for perjury the allegation of materiality of the evidence is sufficient, without showing how it was material. 28 A. 351, *State v. Maxwell*.

(ii) *Receiving stolen property*.

1. The charge in the indictment, that the defendants "unlawfully and feloniously did receive and buy a cow of red color * * * they then and there, well knowing that the aforesaid cow had been stolen, carried away and killed contrary to the form of the statute," etc., is sufficient. 25 A. 526, *State v. Allemand*.

(j) *Rape*.

1. Penetration and not emission, constitutes the crime of rape. 25 A. 573, *State v. Turner & Reid*.

2. 1878, p. 46.

(k) *Robbery*.

1. An indictment for robbery which does not state that the act was done feloniously, and that the goods were taken from the person of another, is defective. 20 A. 145, *State v. Cook*.

2. In an indictment for robbery from the person, the words feloniously,

violently, and against the will, are essential, and it is usual, though unnecessary, to allege, a putting in fear. 20 A. 408, *State v. Darbin*.

3. The charge in the indictment "of the felonious and violent taking of the sum of one thousand seven hundred and forty-five dollars in paper currency of the United States of America," comes within the law. 26 A. 421, *State v. Shonhausen*.

4. "Promissory notes of the value of three hundred dollars," complies with the statute without further description. *Ib*.

5. To constitute robbery there should be actual or constructive force. 26 A. 423, *State v. Shonhausen*.

6. An information for robbery which states in substance that the accused did make an assault upon, and put in bodily fear and danger of his life, one L—, and then and there feloniously and violently did seize, take and carry away from his person against his will, ———dollars, is sufficient. The omission of the word "rob" is immaterial. 29 A. 364, *State v. Robinson*.

(1) *Slaves, crimes relative to.*

1) Cruelty to slaves.

1. In a prosecution against a party for cruel treatment to a slave, it is the duty of the district judge, on application for a mandamus, and upon a proper showing, to release the slave from imprisonment, without making the magistrate a party to the proceedings. 15 A. 603, *Ney v. Richard*. See (h), No. 3.

2) Selling liquor to slaves.

1. The third section of the act of the legislature of 1859, entitled "an act for the prevention and punishment of selling liquor to slaves," which requires that the recorders in trying such offenses, should be assisted by a jury of three slaveholders, is not unconstitutional. 15 A. 190, *State v. Gutierrez*.

3) Other crimes relative to slaves.

1. The acts of the 6th of March, 1819, and the 14th of March, 1855, do not relate to the same subject matter, there being no provision of law in the latter relative to stealing, inveigling or carrying away slaves. The larceny punished by the twenty-sixth section of this statute is the common law offense, of feloniously taking and carrying away the personal goods of another. Slaves are not classed under our law as goods or personal chattels. The former act is not, therefore, repealed by the latter. 15 A. 79, *State v. Gore*.

2. Proceedings, under the act of 1859, entitled "an act relative to free persons of color coming into the State from other States or foreign countries," are of a criminal nature. 15 A. 347, *State v. Keeper of Parish Prison*.

X OF THE ARRAIGNMENT.

1. When brought to the bar by the sheriff, if the prisoner be ready for trial without a counsel, and did not ask the court to assign him one, the presumption is that he chose to be heard in his own defense. 25 A. 382, *State v. Kelly*.

2. The accused cannot be tried until arraigned. 27 A. 227, *State v. Epps*.

3. The accused, who has not pleaded to the indictment, cannot be tried. 30 A. 311, *State v. Ford*; 367, *Joseph v. Christian*.

XI. OF PLEAS; AND A NOLLE PROSEQUI.

1. A *nolle prosequi* may be entered as to larceny when the jury found defendant guilty of both robbery and larceny. 26 A. 423, *State v. Schonhausen*. See XV. No. 12.

2. An accused, who has been tried and convicted on a defective indictment, has not been put in jeopardy. The judgment may be arrested on motion and the party tried on a new indictment. 20 A. 48, *State v. Cason*.

3. The accused being found not guilty by reason of an erroneous date charged in the indictment, the plea of *autrefois acquit* will not be good as against another indictment for the same offense on another day. 28 A. N. R., *State v. Kinch and Malone*; O. B. 45, fo. 21.

4. If the accused should desire a preliminary examination, he should suggest it before pleading not guilty to the charge. 23 A. 148, *State v. Merryman et al.*

5. The plea of *autrefois convict* applies only to legal verdict, not one subject to be set aside. 16 A. 401, *State v. Walters*; 8 R. 583; 3 A. 715.

6. The plea of *autrefois acquit* will not be maintained where the verdict of the jury had been arrested for defects in the indictment. 28 A. 5, *State v. Jack Owens*.

7. The plea of *autrefois acquit or convict* must be made before verdict. 28 A. 129, *State v. Washington*; 25 A. 537.

XII. OF THE EVIDENCE.

(a) *In general.*

1. Communications made by a prisoner to his counsel in the course of professional employment, and documents placed by him in the charge of his counsel, are not admissible as evidence against him in a criminal prosecution. 15 A. 72, *State v. Hazleton*.

2. When the commission of both offenses are closely linked or connected, evidence of the whole transaction is legal, although two distinct felonies have been committed. 16 A. 377, *State v. Mulholland*.

3. If the evidence ruled out by the judge was afterwards offered to be received, and the accused refused to offer it, the judgment will not be reviewed. No injury was occasioned to him. 16 A. 385. *State v. Brown*.

4. Threats of a third person not a conspirator with the accused, but unconnected with the defendant on the trial, except as he may at particular occasions be in his company, cannot in any case be received in evidence to militate against the accused. 16 A. 444, *State v. Perry*.

5. The *onus probandi* of the facts necessary to sustain the plea of prescription in a criminal prosecution rests on the State. It must be shown that the offense has been committed within the period fixed by the statute of limitation. 16 A. 400, *State v. Wm. Walters*; 19 A. 78, *State v. Bilbo*.

6. The capacity to make a dying declaration depends on mental and physical conditions, which are questions of fact over which the Supreme Court has no jurisdiction. 18 A. 340, *State v. Ross & Rogers*; 14 A. 651. See No. 25.

7. Evidence tending to a mitigation of punishment is not admissible before the jury. 23 A. 677, *State v. Tally*.

8. The admissibility of dying declarations are limited to cases where the death of the declarant is the subject of the enquiry, and where the circumstances of the death are the subject of his dying declaration. 23 A. 559, *State v. Wilson*.

9. However, when the declarant was mortally wounded by the same shot for which the accused is indicted and the circumstances of the killing were the same, the declaration is admissible. *Ib.*

10. It may be shown, *aliunde*, that the declarant expected to and did die from the effects of the wound. *Ib.*

11. Declarations by the deceased made before the homicide, and not communicated to the accused, do not form part of the *res gestæ*, and are not admissible in evidence; the declaration and killing do not harmonize and constitute one transaction. 21 A. 473, *State v. Gregar*.

12. Evidence to show that the party assaulted, was in the peace of the State and in the discharge of his duties as a public officer, is admissible, although the defendant is not indicted for shooting at an officer. 24 A. 29, *State v. Denkins*.

13. No evidence can be received to prove facts alleged in a motion in arrest of judgment. 25 A. 370, *State v. Hardin*.

14. A letter identified as the one delivered by the accused to the witness, to be delivered to a third person, is sufficiently identified to be received in evidence. 25 A. 523, *State v. Prudhomme*.

15. To compel the accused to take his feet from under a chair where he had put them, so that the witness who saw the tracks might testify how they cor-

responded in size with the prisoner's feet, is not compelling the prisoner to give evidence against himself on his trial. *Ib.*

16. The coroner's inquest, signed by the jurors, who made their mark, and whose signatures are certified to by the coroner, is admissible in evidence. 27 A. 297, *State v. Evans*.

17. The refusal of the judge to permit the accused to contradict the official acts of the clerk by his parol evidence, is proper. 27 A. 394, *State v. Taylor*.

18. The judge may allow the State to offer another witness, although it has been announced that the case was closed for the State. 27 A. 694, *State v. Coleman*.

19. After the case is closed and before argument, the judge may allow the district attorney to offer further proof. 29 A. 715, *State v. Colbert*.

20. A leading question, even if put in the alternative, is not legal. 29 A. 717, *State v. Johnson*.

21. Threats of the deceased against the accused, are not admissible in evidence, until it be first proved that the accused had been advised of them. 29 A. 593, *State v. McCoy*; 21 A. 473, *State v. Gregor*.

22. Admissibility of evidence as to time, when not alleged. See *ante*, VI. (c), No. 1.

23. Evidence of the quarrelous disposition of the deceased offered, not as a justification, but an excuse or mitigation of the killing, is admissible. 30 A. 341, *State v. Robertson*.

24. Where no other allegation is made, the accused cannot prove the "desperate character" of the person killed by him. 30 A. 679, *State v. Burns*; 5 A. 489; 9 A. 46; 10 A. 453.

25. Declarations made when the deceased has manifested his consciousness and belief in speedy dissolution, are admissible in evidence. 30 A. 362, *State v. Judge Spencer*. See No. 6.

26. The accused cannot offer his declarations in evidence. 30 A. 538, *State v. Gunter*.

27. Declarations of the prisoner are admissible as part of the *res gestæ*. 30 A. 602, *State v. Bill Thomas*.

28. A question presuming for true, facts not proved, is not permissible. 30 A. 457, *State v. Smith*.

(b) *Circumstantial evidence, and admissibility of evidence under the pleadings.*

1. In a criminal prosecution for murder, the witnesses for the accused may, under the plea of insanity, be permitted to give to the jury the acts, declarations, conversations and exclamations they saw, had with, and heard the accused make at any time shortly before, or at the time of, or after the killing. The objection to such testimony goes to the effect. 22 A. 39, *State v. Hays*.

2. There is no positive rule to establish the weight of circumstantial evidence. 22 A. 455, *State v. Coleman*.

3. A paper or document shown to be in the handwriting of the accused, which has no relation or connection with the document forged, is not admissible in evidence to prove by a comparison of the handwriting, that the forged document is in the handwriting of the accused. 23 A. 55, *State v. Fritz or Fry*.

4. On a motion for a new trial, based on the allegation, that one of the jurors had formed an unfavorable opinion of the defense, and had made statements to a specified individual, no evidence, that he had made such statements to another person, is admissible. 16 A. 388, *State v. Gallagher*.

5. Evidence of a distinct offense not laid in the indictment, may be given to show the intent with which the act charged was done. 30 A. 601, *State v. Bill Thomas*; 3 A. 512; 16 A. 576.

(c) *Hearsay.*

1. The chief reason for the exclusion of hearsay, is the want of the sanction of an oath and any opportunity to cross-examine. But where the testimony to be proven was given under oath in a judicial proceeding in which the

adverse litigant was a party, the testimony is admitted after the death of the witness, in any subsequent suit between the same parties. 23 A. 348, *State v. Cook*.

2. Evidence of a conversation between the prisoner and one wounded by him, whilst attempting his arrest, is not hearsay. 16 A. 377, *State v. Mulholland*.

3. In giving the opinion, as to the cause of death, the medical experts summoned for said purposes may state their reasons, and in so doing relate the testimony they have heard. 26 A. 137, *State v. Baptiste et al.*

4. Unless a conspiracy be proved, the declarations of others are not admissible against the accused. 30 A. 457, *State v. Smith*.

(d) *Evidence of character and insanity.*

1. The statutes of Louisiana introduced no change in the distinction of degrees of insanity made by the common law. 19 A. 396, *State v. Dennett*.

2. Insanity when pleaded in defense of a criminal act, must be clearly shown. Vague conjectures as to a probable existence of mental aberration, from supposed predisposing causes, are quite too sublimated to possess weight in the inquiry as to the sanity or insanity of an accused. 22 A. 588, *State v. Graviotte*.

3. The presumption is in favor of sanity until the contrary is clearly proven. 2 Greenleaf, section 373; 3 Parker's Criminal Report, 299, 301; 5 Parker's Criminal Report, 631, 644; Roscoe's Criminal Evidence, 952; 25 A. 302, *State v. Burns*; 27 A. 692, *State v. Coleman*.

4. A pardon issued after execution of the sentence does not relieve the accused of his disability as a witness. 26 A. 135, *State v. Baptiste et al.* 16 A. 273; 7 A. 379.

5. ON REHEARING: A pardon must be of some effect, and even if granted after execution of the sentence, it relieves the condemned of all disabilities and he may testify. 26 A. 136, *State v. Baptiste et als.* *Contra see infra*, (f), 1), No. 2.

6. Testimony in general that the deceased was a quarrelsome man and of violent temper, is inadmissible on a trial under an indictment for murder. 16 A. 385, *State v. Brown*.

(e) *Confessions.*

1. Confessions made by an accused to the persons who arrested him, and who were not public officers, are not admissible in evidence against him. 15 A. 145, *State v. George*.

2. Confessions made under such circumstances are not admissible even when, in a case of larceny, the person to whom they are made is directed by the accused to the place where the stolen goods are to be found, and he finds them in the place designated; the fact of finding the goods may be taken into consideration by the jury, but not the admission of the accused that he had stolen and put them there; this fact must be collected from the circumstances of the case. 15 A. 145, *State v. George*. See No. 10.

3. All confessions made by a prisoner—except when they have been obtained by duress, or through inducements or promises—are legitimate evidence, whether made to private individuals or to persons in authority. Such is the common law rule and even our statutes provide that the voluntary declaration of the accused before the committing magistrate is evidence. 15 A. 568, *State v. Simon*. See No. 12.

4. Evidence of the voluntary confession made by a prisoner to an officer having him in his legal custody, is admissible. 15 A. 568, *State v. Simon*.

5. A confession is admissible in evidence where it has been elicited by questions put by a person having no authority, such as a police officer. 16 A. 377, *State v. Mulholland*.

6. The voluntary declarations of the accused, cannot under sec. 1010. R. S., of 1870, be received in evidence in behalf of the accused. The State only can use the same in evidence. 23 A. 96, *State v. Vendergraft*.

7. The declaration, in writing made under oath, by one of two accused, at a time when under arrest, and before the coroner when holding an inquest over the deceased, is not admissible in evidence; it should not have been made under oath. 25 A. 192, *State v. Garvey and Earle*

8. The confession of one of the two accused, is not admissible against the other. 26 A. 513, *State v. Monié and Fontaine*; 29 A. 354, *State v. Butler, Jackson et als.*

9. Part of the confession of the accused is not admissible. The whole admission is to be taken together. 26 A. 623, *State v. Gilcrease.*

10. It is competent to enquire whether the prisoner stated that the property stolen, or instrument of the crime, would be found by searching a particular place and to prove that it was accordingly so found, but it is not competent to enquire whether he confessed that he had concealed it there. 28 A. 925, *State v. Earle and Garvey.* See No. 2.

11. The confession of the accused should be voluntary, else it should not be admitted in evidence. 28 A. 925, *State v. Earle and Garvey*; 25 A. 191.

12. The confession made by the accused to an individual, is admissible in evidence, even if the witness does not remember the whole confession; this objection goes to its effect rather than its admissibility. 28 A. 828, *State v. Thomas.* See Nos. 2, 3.

13. The admission, confession or declaration of a party cannot be given in evidence against him, unless the witness can at least state the substance of all that was said. 29 A. 515, *State v. Hughes.*

14. Under an indictment for horse-stealing, the testimony of the accused, given in another case, in relation to the ownership of the horse, is admissible in evidence. 28 A. 828, *State v. Thomas.*

15. When the written confession of the accused has been rejected for defect of form, parol is admissible to prove the confession. 30 A. 296, *State v. Simien.*

16. An admission by the accused made during the trial, in view of the fact that the date at which the forgery was committed was not correctly charged in the information, will be admissible in evidence, after an amendment of the date, because time is not of the essence of the offense. 30 A. 403, *State v. Snow.*

17. The accused who does not deny the testimony of the State's witnesses before the committing magistrate, does not thereby confess his guilt. 30 A. 457, *State v. Smith.*

(f) Witnesses.

1) In general.

1. The declaration of an attorney, that a certain person is not a witness, will not prevent him from afterwards putting such person on the stand to testify. 15 A. 79, *State v. Gore.*

2. A pardoned convict can testify, but not one who has served his time of punishment. 16 A. 273, *State v. Benoit*; 7 A. 739, overruled. See *ante*, (d), Nos. 4, 5.

3. The testimony given by a witness at the inquest held by the coroner, is admissible for the purpose of discrediting the witness before the jury, but is not evidence against the prisoner. 16 A. 377, *State v. Mulholland.*

4. The testimony of a witness taken contradictorily with the accused at the preliminary examination, may be received in evidence on the trial, when the witness cannot be found. 28 A. 105, *State v. Moses Harvey.*

5. In criminal prosecutions the State having examined the witness and consigned him to defendant, can only re-examine him for the purpose of explaining any fact which may come out on the cross-examination. 19 A. 119, *State v. Denis*; acts 1855, No. 121, Sec. 73; 12 A. 196; *per contra*, 7 A. 84; see also No. 9.

6. The prosecutrix being examined in chief, cross-examined by the defense, re-examined by the State only on such matters as the cross-examination drew forth, cannot be re-cross-examined by defendants. 25 A. 573, *State v. Turner and Reid.*

7. A witness in a criminal trial is not bound to criminate himself, but this is a right he may waive. 20 A. 145, *State v. Cook*.

8. Witnesses who are not physicians may testify to prove the cause of the death of the deceased. 22 A. 468, *State v. Smith et al.*

9. It is the universal practice in our courts to permit a witness, after having been examined in chief, consigned and cross-examined, to be again examined by the party introducing him upon points touching which he had not before testified, and subsequently to be recalled and interrogated in relation to facts material to the issue which had not been previously elicited, either from inadvertence or ignorance, that they were within the knowledge of the witness. 24 A. 162, *State v. Scott*. *Per contra*, see No. 5.

10. An accomplice, joined in the same indictment with the prisoner to be tried, may testify, provided he be not put upon his trial at the same time. 23 A. 78; *State v. Bayonne & Abriël*; 25 A. 522, *State v. Prudhomme*.

11. To be entitled to an attachment, for a witness upon whom personal service has not been made or a temporary continuance, the defendants must show due diligence. 25 A. 526, *State v. Allemand*.

12. Physicians are properly allowed to remain in the court room when the other witnesses are separated, being summoned as medical experts as to the cause of the death. 26 A. 136, *State v. Baptiste et al.*

13. A witness may refer to his books out of the presence of the court to refresh his memory. 26 A. 423, *State v. Shonhausen*.

14. The separation of witnesses is a matter of sound discretion with the judge *a quo*. 26 A. 583, *State v. Giroux*.

2) Competency.

1. A juror cannot be heard to impeach the verdict which he has rendered. He is not allowed to prove the misconduct of his fellow jurors, nor to show that they erred in the formation of their verdict, either by disregarding or misconstruing the charge of the judge. 15 A. 557, *State v. Millican*. See EVIDENCE, XVI. (b), 7), Nos. 2, 9; *infra*, No. 7.

2. In criminal matters, the competency of a witness depends upon his intelligence, reason, judgment, capacity and understanding, which are all matters left to the discretion of the judge and jury. 18 A. 340, *State v. Ross and Rogers*.

3. The competency of a witness depends upon his intelligence, judgment, capacity and understanding, all of which are left to the discretion of the judge and jury. 19 A. 119, *State v. Denis*; 18 A. 342, *State v. Ross and Rogers*.

4. An accomplice may be a witness. His credibility merely is affected. 20 A. 145, *State v. Cook*.

5. A child six years old, may be a witness in a criminal case, if after enquiry, the judge should be of the opinion that he is of sufficient understanding. 28 A. N. R., *State v. Ritchie*.

6. The wife is not a competent witness for or against her husband, but after she has testified, her evidence cannot be stricken out. 28 A. 604, *State v. Williams*.

7. The testimony of a juryman as to what transpired in the jury room, is not admissible, to obtain a new trial. 28 A. 658, *State v. Frugé*. See No. 1.

3) Examination and privileges; opinion and credibility.

1. The opinion of a witness deduced from certain acts, is not admissible in evidence. 27 A. 692, *State v. Coleman*.

XIII. OF THE TRIAL AND ITS INCIDENTS; THE JURY AND THEIR VERDICT.

(a) *Right of trial, and discharge of the jury.*

1. Article 103 of the constitution, which guarantees to an accused the right of trial by jury, and requires that there should be an indictment or information, has no application to that class of offenses which are to be tried sum-

marily, and without the intervention of an impartial jury from the vicinage. 15 A. 190, *State v. Gutierrez*.

2. Such cases as fall within the jurisdiction of the recorder, mayor or aldermen, under article 124 of the constitution, form an exception to the general rule, as laid down in article 103, with regard to the right of trial by jury. *Ib.*

3. An error in spelling the word "foreman" "fourman," is not important, as the pronunciation is not thereby changed. 16 A. 184, *State v. Karn*.

4. In capital cases, jurors are not permitted to separate, after they are sworn. 21 A. 321, *State v. Evans*; 23 A. 213, *State v. Frank*. See (g), 3).

5. In cases not capital, the jury after being impaneled, may be permitted to separate. 24 A. 310, *State v. Dubois et als*.

6. The jury being unable to agree, came into court and asked for instructions from the judge, who gave the required information, but refused to allow defendants' counsel to be heard; *Held*: that the judge erred, and the case should be remanded. 26 A. 137, *State v. Baptiste et al*.

7. HOWELL, J., *dissenting*: If the judge refused to listen to counsel, this does not prove that what counsel desired should have been granted. *Ib.*

8. The absence of a part of the jurors at the time when the case was called for trial, does not deprive the accused from enquiring into the character and qualifications of the jurors. A sufficient number of jurors being present to form the panel, the court does not err in ruling the accused to trial. 26 A. 600, *State v. Hooser*.

9. Persons on trial for alleged crimes, have a right to demand that all the regular venire of jurors present, and not then engaged on jury duty, shall be submitted to their acceptance or rejection, before talesmen are resorted to for the formation of the jury. 29 A. 543, *State v. Atkinson*.

(b) Change of venue.

1. The judge is bound to order a change of venue whenever an application is made by the district or parish attorney. The act of 1868 repeals that of 1855, so that he has no discretion in the matter. He has, however, a discretion of changing or not, without application. 23 A. 711, *State ex rel. v. Judge Thirteenth Judicial District Court*.

2. The act of 1868 does not require proof, where the district attorney applies for a change of venue. 29 A. 593, *State v. McCoy*.

3. DEBLANC and EGAN, JJ., *concurring*: Proof of the necessity of the change of venue should be made, but the affidavit of the district attorney when not contradicted, is sufficient. *Ib.*

4. By the effect of law, cases were transferred from the First District Court for the parish of Orleans to the Superior Criminal Court. Acts 1874, No. 124; 27 A. 361, *State v. Fritz*.

5. The application for a change of venue, on the ground that the accused cannot have a fair and impartial trial because of the existence of prejudice against him in the public mind, is a matter of fact not reviewable on appeal. 30 A. 364, *State v. White*.

6. Change of venue, how made, 1876, p. 150.

(c) Continuance.

1. If the counsel, appointed by the court, fail to appear at the trial without the connivance of the accused, the latter is entitled to a postponement of the trial for the purpose of obtaining other legal assistance. 16 A. 425, *State v. Ferris*.

2. The Supreme Court cannot pass on a bill of exception taken to the ruling of the judge, refusing a continuance applied for, on the grounds that the accused had just found out that the members composing the grand jury were not registered voters, and four days were necessary to procure the evidence. 21 A. 290, *State v. Watkins and Nelson*.

3. The Supreme Court cannot revise a refusal to grant a continuance; a decision thereon involves a question of fact. 23 A. 559, *State v. Wilson*.

4. A refusal of the lower court to grant a continuance for the second time.

on account of the absence of the prisoners' counsel, is correct. The counsel might be absent by the prisoners' connivance. 24 A. 310, *State v. Dubois et als.*

5. It makes no difference if the murdered person be the nephew of the accused, so the case need not be continued to obtain a commission to examine witnesses in Europe to prove said fact. 26 A. 136, *State v. Baptiste.*

6. Three days between the appointment of counsel and the day of trial, is sufficient for preparation, where no special cause is shown for a longer delay. 26 A. 422, *State v. Shonhausen.* See *infra*, (d), No. 3.

7. The affidavit of the accused for a continuance, on the ground that an absent witness would prove that the killing was unavoidable and necessary to preserve his own life, is not sufficient; this is a legal inference to be arrived at by the jury, it is not a fact. 29 A. 595, *State v. McCoy.*

8. The admission by the district attorney, that if the witnesses of the accused were present they would testify to certain facts, does not preclude the State from contradicting their evidence. 29 A. 715, *State v. Colbert.*

9. The discretion of the lower court was properly exercised in refusing a continuance where it did not appear that proper diligence was had to obtain the witnesses. 28 A. 46, *State v. Nelson.*

10. The affidavit of the accused for a continuance, cannot be contradicted; it must be taken as true. 30 A. 296, *State v. Simien.*

DEBLANC, J., *dissenting*: The State should be permitted to prove its falsity. *Ib.*

11. When the cause is continued, as to all the defendants, good cause being shown by the State, section 999, R. S., does not apply. 30 A. 336, *State v. Brooks.*

12. For continuance in civil cases, see CONTINUANCE.

(d) *Defense by, assignment and powers of counsel; argument.*

1. When brought to the bar by the sheriff, if the prisoner be ready for trial, without a counsel, and does not ask the court to assign him one, the presumption is that he chose to be heard in his own defense. 25 A. 382, *State v. Kelly.*

2. The State's attorney, in a public prosecution, is entitled to the opening and close of the argument, although the prisoner offers no evidence. 15 A. 557, *State v. Millican.*

3. The counsel appointed by the court to defend the accused, is entitled to a reasonable time, to be regulated by the judge, for preparation. 16 A. 425. *State v. Ferris.* See *supra*, (c), No. 6.

4. A magistrate can only appoint one counsel to defend the accused, and any other who may assist the counsel so appointed, has no right to recover a fee from defendant. 16 A. 428, *Jones v. Goza.*

5. The judge has no right to prevent counsel from arguing a plea of prescription to the jury. 28 A. 40, *State v. Cason.*

6. Where the counsel of the accused are working for delay, the judge may interfere. 29 A. 364, *State v. Robinson.*

(e) *Composition of the jury; challenges; jury list, and notice of trial.*

1) *In general.*

1. Where the offense charged was committed the first day of the term, it is impossible for the accused to file his objections to the mode of drawing the grand jury on the same day. 19 A. 436, *State v. Texada.*

2. Until the box is exhausted, the jury may be drawn therefrom, although fifteen months have elapsed since the list of jurors was furnished by the sheriff. 25 A. 386, *State v. Henry Petrie.*

3. The parish judge, with a deputy clerk and a deputy sheriff, may draw the jury. 25 A. 472, *State v. Jean Gay, fils et als.*

4. Where two parties are tried together for the crime of murder, each one is entitled to twelve peremptory challenges. 21 A. 546, *State v. McLean*; 8 A. 114.

5. All objections to the formalities of forming, drawing, or summoning the

grand jury, must be made on the first day of the term. 21 A. 609, *State v. Hoffpauer*; R. S., p. 296.

6. The State is not bound to furnish the accused with a list of the talesmen as they are summoned. 15 A. 297, *State v. Henry*; 30 A. 536, *State v. Gunter*.

7. If the jury be incomplete, the sheriff may send out into the town where the court is held to bring in talesmen. 23 A. 148, *State v. Merryman et al.*

8. It is sometimes necessary that talesmen should be resorted to, for the speedy and proper administration of justice. 22 A. 424, *State v. Ferray*; 1868, p. 143.

9. If the jury cannot be completed with the talesmen present, recourse may be had to other persons not within the presence of the court. 26 A. 46, *State v. Gallagher*.

10. Talesmen need not be drawn and summoned as such. 36 A. 62, *State v. Smith*.

11. The sheriff may summon talesmen without written summonses, which are mere surplusage. 28 A. N. R., *State v. Alex. Newton*.

12. A challenge to the array, because the jury was not drawn from the latest list of registered voters at the date of the drawing of the panel, should be maintained. 20 A. 356, *State v. Da Rocha*; 442, *State v. Morgan and Wilson*.

13. No law authorizes attachments against absent jurors on the list, in order to bring in a greater number, where there are enough present to complete the panel. 26 A. 422, *State v. Shonhausen*.

14. The title of act of 1873, p. 168, relative to the drawing of juries, indicates the subjects embraced therein. 26 A. 579, *State v. Miller*.

15. The defendant is entitled to a copy of the venire; it is immaterial if all the persons named thereon did not answer to the summons, either because they were excused or could not be found. 28 A. 631, *State v. Guidry*.

16. In the selection of the persons from whom the regular juries are drawn, the jury commissioners cannot delegate their duty to other persons. 29 A. 824, *State v. Newhouse*; 1874, No. 124.

17. The selection must be made from all the qualified voters of the parish of Orleans. *Id.*

18. It is too late after judgment to urge the informality of the drawing of the jury. 28 A. 794, *State v. Courtney*.

19. A jury commissioner who has accepted another office and qualified in it, is thenceforth constitutionally disqualified as jury commissioner. 29 A. 824, *State v. Newhouse*; constitution, 1868, art. 117.

20. Talesmen in New Orleans, how summoned, 1877, E. S., p. 209; the attendance of jurors and their fees, 1878, p. 84.

22. How juries, in the several parishes are drawn and summoned, see the name of such parish.

2) Qualifications of jurors and challenges.

1. Jurors must be qualified electors. Acts 1868, No. 110; 21 A. 251, *State v. Parks*; 30 A. 335, *State v. Brooks*.

2. It is not necessary to be a registered voter, to be a qualified talesman. 28 A. 789, *State v. Courtney*; act 94, of 1873.

3. The decision in the case of the *State v. Ward*, re-affirmed, to the effect that the fact of a juror having made up his mind as to the punishment to be inflicted on the prisoner in case of a verdict of guilty, does not affect his competency. 15 A. 114, *State v. Bill*.

4. The objection after the verdict, that one of the jurors was not a registered voter, comes too late. 21 A. 546, *State v. McLean et al.*

5. The answer of a juror, on his *voir dire*, that from what he had read in the public prints, he has formed an unfavorable opinion of the character of the accused, but has formed no opinion as to his guilt or innocence of the crime charged, does not disqualify him from sitting on the jury. 22 A. 43, *State v. Schnapper*; 27 A. 692, *State v. Coleman*.

6. An opinion based on rumor, where there is no bias or prejudice against the prisoner, does not disqualify a juror. 23 A. 148, *State v. Merryman et al.*; 29 A. 642, *State v. Lartigue*.

7. The juror who has only an impression, which would easily yield to evidence, is a good juror in a criminal case. 27 A. 375, *State v. Hugel*; 23 A. 148; 14 A. 462; 28 A. 632, *State v. Guidry*.

8. A juror able to understand all the pleadings and proceedings, as they must be considered by them, is competent if he speaks only French. 25 A. 472, *State v. Jean Gay, fils et als.* See XVI. (a), No. 4.

9. It is within the discretion of the judge to decide upon the competency of a juror, caused by his ignorance of the English language. 28 A. 579, *State v. Rousseau*; acts 1873, No. 94.

10. To believe or not in a future state of rewards and punishments, is not a legal cause for the disqualification of a juror. 27 A. 400, *State v. Hamilton*.

11. The State is only entitled to six challenges, in any criminal prosecution, even if there should be more than one defendant on trial. 24 A. 38, *State v. Earle and Garvey*; 25 A. 472, *State v. Jean Gay, fils et al.*

12. Injury and fraud should be alleged to challenge the whole array, or set aside the *venue*, on the ground that some of the jurors are not qualified. 26 A. 580, *State v. Miller*; acts 1873, p. 168, § 9.

13. No distinction can be made between grave and minor offenses, in regard to the right of peremptory challenges of jurors. 28 A. 187, *State v. W. L. Thompson*.

14. A bill of exception charging that the accused was injured in his defense, because his objection for cause to a juror was overruled, and he was forced to challenge the said juror, is not sufficient; it must be shown that he exhausted the challenges allowed him by law. 28 A. N. R., *State v. Eveque and Godin*.

15. The judge has the right on his own motion to strike a juror from the regular panel, if satisfied that said juror is morally unfit to return a just verdict. 29 A. 642, *State v. Lartigue*.

16. The grand jurors not having been drawn from the panel for the month of April, in the Superior Criminal Court, when the act of April 2, 1878, became law, the panel for that month was vacated, and the court being without a jury, a mandamus will not lie to compel the judge to try a case in which he has not otherwise refused to act. 30 A. 603, *State ex rel. Maurice v. Judge Superior District Court*.

3) Calling and swearing the jury ; jury list ; service of copy and notice of trial.

1. If the *venire* be not filed in the clerk's office, after the list of the jury drawn is completed, the verdict will be set aside. 19 A. 105, *State v. Vegas*.

2. It is too late after trial to urge that the list of jurors has not been served on the accused. 20 A. 145, *State v. Cook*. See No. 7.

3. It matters not, if the word "*filed*" was not written upon the *venire*, if it was received by the clerk and by him posted in such a way that it might be conveniently examined. 23 A. 148, *State v. Merryman*.

4. The jury may change their clothing when the trial lasts several days. 23 A. 149, *State v. Caulfield*.

5. During a lengthy trial, alcoholic liquors, in moderate quantity, may be given to the jurors who become exhausted. 23 A. 149, *State v. Caulfield et al.*

6. The criminal sheriff for the parish of Orleans, under section 2144, R. S. of 1870, is the proper officer to furnish a list of persons liable to jury duty before the criminal court. 25 A. 302, *State v. Burns*.

7. The objection that some of the jurors impaneled do not appear on the list of jurors drawn to serve for that term of the court, must be made before the trial is entered upon. 25 A. 573, *State v. Turner and Reid*. See No. 2.

8. Where the record fails to show that the jury were sworn, the verdict will be set aside and the case remanded. 28 A. 425, *State v. David King*; 387, *State v. Philips and Reid*; 425, *State v. Elijah Douglas*; 30 A. 367, *State v. Christian*; 9 A. 94.

9. LUDELING, C. J. and WYLY, J., *dissenting*: It must be presumed that the officers of the court did their duty. *Ib.*

10. For service of copy of *venire* on the accused, see (e), 1), No. 15.

(f) *Charge; submission of cause; and powers of the jury.*

1. In his charge to the jury, the judge may give them a knowledge of the law, but he must not comment on the testimony. 22 A. 43, *State v. Schnapper*.

2. The charge of the judge to the jury, "that violence may be committed as well by actual unlawful force as under pretense of rightful proceedings," could not mislead the jury, when no evidence was offered showing that the accused acted under legal authority in forcibly taking money. 22 A. 154, *State v. Durbin*.

3. The court is not bound to give instructions in the words asked for, however material might be the instructions; but they should be given substantially, so as to meet the whole of the point which is material. 25 A. 407, *State v. Carr*.

4. The judge should not refuse to charge the jury that the fact "that the defendant has offered no evidence, is in no way to be taken as an admission of guilt." 25 A. 408, *State v. Carr*.

5. The court did not err in refusing to charge the jury that if the accused believed his life to be in danger, although it was not, he had the right to kill. 22 A. 454, *State v. King*.

6. The judge correctly charged that a jury may convict on the uncorroborated testimony of an accomplice; that they are the judges of his credibility and that the rule requiring the judge to charge that the testimony of an accomplice needs confirmation, is rather a rule of practice than a rule of law. 25 A. 524, *State v. Prudhomme*.

7. Where the accused does not object to the dying declarations, but referred to them as evidence in the argument, he cannot ask a charge that the dying declarations should be complete in themselves or else should not be received. 26 A. 583, *State v. Giroux*.

8. If the judge refuses to reduce his charge to the jury in writing, the judgment will be reversed. 26 A. 599, *State v. Gilmore*; R. S. 2133.

9. After trial, the judge had the right to refuse to hear read to him, in presence of the jury, special charges which counsel for the accused desired to be made, and require that the written paper should be sent directly to him without comment in the presence of the jury. 28 A. 311, *State v. Hill*.

10. There is no law which declares that if the accused was handcuffed when recognized by the wounded man, that such recognition is not legal. No such charge should be made to the jury. 27 A. 400, *State v. Hamilton*.

11. "The killing being once proved, the burden of extenuation is on defendant;" "sanity is presumed until proof of the contrary;" "drunkenness is no excuse;" are properly charged to the jury. 27 A. 692, *State v. Coleman*.

12. Where, to exclude the evidence of a material witness for defense, an indictment is preferred against him, if the judge consider the evidence of sufficient weight to question the innocence of the party sought to be made a witness for the principal defendant, he should not order his acquittal. 27 A. 395, *State v. Gustave et als*.

13. After the jury has retired in a capital case, the judge is not permitted to give separate or private instructions to any of the jurors, out of the hearing, and without knowledge of the counsel. 19 A. 143, *State v. Frisby*.

14. Hearsay should not be admitted, and the accused has a right to require the judge to charge the jury, that in making up their verdict, they must disregard this part of the evidence. 28 A. 279, *State v. Brown*.

15. The accused has no cause of complaint if the judge charge the jury to return a verdict of guilty or not guilty, under an indictment of burglary and larceny, because if not guilty of both offenses, he will be found not guilty. Therefore a refusal to charge the jury that they might find a verdict of guilty of larceny only, is no reason to reverse the verdict. 28 A. 827, *State v. Thomas*.

16. The judge properly refused to allow an affidavit offered in a criminal case to be taken in the jury room. The jury must only rely on their memory. 29 A. 715, *State v. Colbert*.

17. It is for the jury to determine whether or not the witnesses, who impeach

the veracity of another, have heard a majority of the people in the neighborhood of the impeached witness, express their opinion of his character., 28 A. 828, *State v. Thomas*.

18. Where the judge, in his charge to the jury, does not state or recapitulate the evidence, so as to influence their decision on the facts, nor state, nor repeat to them the testimony of any witness, nor give them any opinion as to what facts have been proved or disproved, the charge is not liable to the objection, that it touched upon the facts. 15 A. 498, *State v. Markham*.

19. What is a proper charge, relative to circumstantial evidence. 30 A. 299, *State v. Simien*.

20. The charge that, unless it was shown that the homicide was committed in actual combat and scuffling, it was done through malice, is erroneous. 30 A. 366, *State v. White*.

21. The judge correctly charged that the jury could believe the confession, or any part thereof, as true or false. 30 A. 537, *State v. Gunter*.

22. If the charge of the judge be incomplete, as shown by the bill of exception, the case must be remanded for a new trial. 30 A. 602, *State v. Bill Thomas*.

23. The district attorney has no right to read from a manuscript, definitions of malice and refuse to show his authority to defendant's counsel. 30 A. 433, *State v. Briscoe*.

24. The judge has no right to deny the assertions of facts made in argument by counsel, if he does, the verdict is vitiated. 30 A. 49, *State v. George Washington*.

(g) Verdict.

1) In General.

1. In criminal cases the verdict of the jury may be given orally, but whether returned orally, or in writing, it must be recorded in the minutes in the English language. 15 A. 648, *State v. Walters*.

2. The court cannot, after the jury are discharged, order the translation into English of the record of their verdict, which was made in French. 15 A. 648, *State v. Walters*.

3. A verdict rendered in the French language is an absolute nullity. 16 A. 401, *State v. Walters*.

4. The only verdict, in a criminal case, that the jury can render under the law, is a general one of guilty, or not guilty, which is a decision both on the law and the facts. 17 A. 71, *State v. Jurche*.

5. A recommendation to the mercy of the court in a verdict of guilty, is no addition or qualification of the verdict, and is mere surplusage. 22 A. 27, *State v. O'Brien*; 6 A. 555; 26 A. 76, *State v. Rosa*.

6. It doubtless would be a safe rule for the jury to take the law from the judge as their guide; but they are not bound to do so. They have the right to judge both of the law and the facts in forming their verdict. 17 A. 72, *State v. Jurche*; 11 A. 429, 206, 81; 10 R. 81.

7. The jury are the judges of the law and the facts. 18 A. 35, *State v. Saliba*.

8. A general verdict of guilty on two counts, the one for forgery and the other for passing off the forged document as genuine, will be good although one of the counts was barred by the statute of limitation. 30 A. 404, *State v. Snow*.

2) Its sufficiency, qualification, and conformity to the offense as charged.

1. A verdict of "guilty as accessory" is insufficient, and will be set aside; it must declare whether it be before or after the fact. 20 A. 143, *State v. Rose and Abrahams*.

2. The jury may render a verdict for a lesser offense, included in the greater one with which the prisoner is charged. 23 A. 326, *State v. McCort*; 30 A. 313, *State v. Ford*. See No. 7.

3. A special verdict finding accused "guilty for keeping a banking house

or gambling house," is defective, where the statute adds, "at which money, and bone or ivory checks representing money, were bet and hazarded," etc. 20 A. 354, *State v. Davis*; 3 A. 512.

4. Under an indictment for burglary, under section 850, R. S., the jury may find a verdict of guilty as charged, but without dangerous weapon, under section 851, R. S., 1870. 27 A. 480, *State v. Morris*.

5. Under an indictment for murder, the jury may return a verdict of "guilty of assault with a dangerous weapon, and inflicting wounds less than mayhem." 28 A. 434, *State v. M. Delaney*.

6. The words "with capital punishment" added to a verdict of guilty on an indictment for murder, will not vitiate the verdict. 30 A. 679, *State v. Burns*.

7. A verdict of petty larceny is responsive to an indictment for grand larceny. 30 A. 61, *State v. Malloy*. See No. 2.

3) Its avoidance; separation and misconduct of the jury.

1. The presence of the sheriff in the jury room is not misconduct. 23 A. 149, *State v. Caulfield et al.*

2. In capital cases, it is well settled that jurors are not permitted to separate, else misconduct and abuse will always be presumed. 23 A. 213, *State v. Frank*; 21 A. 321, *State v. Evans*.

3. The verdict will be set aside if the jury were permitted to retire from the court room and inspect the premises where the burglary was alleged to have been committed, accompanied by a witness of the State to point out the places marked out on the diagram already in evidence; this inspection and the explanations of the State witness taking place out of the presence of the accused. 24 A. 46, *State v. Bertin and Capdeville*.

4. It would be pushing technicality too far to say that the verdict should be set aside because, before the jury had been impaneled and before the indictment had been read to them, or any evidence adduced, one of those already sworn left the court room for a necessary purpose and went into an adjacent alley, spoke to no one, and returned to his seat before the trial began. There is no room for any reasonable hypothesis of misconduct. 24 A. 192, *State v. Forney*.

5. The verdict of the jury cannot be set aside because a juror was for a moment out of the presence of the officer under whose charge he was, when it does not appear that he had communication with any other person. 25 A. 573, *State v. Turner and Reid*.

6. In cases not capital, after being impaneled the jury may separate. 24 A. 310, *State v. Dubois et al.*

7. The jury should retire to their room with neither book nor evidence; if otherwise, this fact must appear by a bill of exception. 30 A. 539, *State v. Gunter*.

XIV. OF NEW TRIALS.

1. The affidavit of the accused, that he is not familiar with the English language, is not a good cause for a new trial. 22 A. 93, *State v. Orsini*.

2. The Supreme Court cannot review a judgment refusing a new trial, which was asked, on the ground of newly discovered evidence, because it is a question of diligence, and not an unmixed question of law. 22 A. 468, *State v. Smith*; 21 A. 473, *State v. Gregor*.

3. An objection raised on a motion for a new trial, that the interpreter did not transmit to the jury the exact testimony of the witnesses, is too late. 23 A. 16, *State v. Lemodelio*.

4. If the prisoner does not ask the court to assign an attorney to defend him and chose to appear by himself, and is convicted, the want of counsel is no good reason for a new trial. 25 A. 382, *State v. Kelly*. See XIII. (d).

5. The proper time to object to the qualification of the juror, is when he is offered, such objection is too late when made on a motion for a new trial. 26 A. 383, *State v. Bower*.

6. The accused shows want of diligence by not asking a severance, so that

the other defendant may be a witness in his behalf. No relief can be granted after the verdict. 28 A. 89, *State v. Wm. Woodworth et al.*

7. In an affidavit for a new trial on the ground of newly discovered evidence, it is not sufficient to allege that one of the witnesses made contradictory statements out of court; it must be shown that the conviction was had on his evidence, and that his testimony was not true. 30 A. 305, *State v. Johnson.*

8. Where from the whole case as presented, the Supreme Court is left with an impression that there may have been irregularities in the trial, although all the points made by the accused have been properly ruled against him, the case will be remanded for a new trial. 30 A. 540, *State v. Gunter.*

9. The accused who, after discovering that the list of jurors served upon him is not correct, proceeds with the trial, without asking for a continuance, cannot complain after the verdict. 30 A. 114, *State v. Shay.*

XV. OF THE MOTION IN ARREST OF JUDGMENT.

1. In a criminal prosecution, no defect of form, either in the proceedings or in the indictment, however apparent on the face of the papers, will be a good ground for a motion in arrest of judgment. 15 A. 557, *State v. Millican.*

2. It is no ground for a motion in arrest of judgment, that the prisoner was not served with a true copy of the venire and indictment. 23 A. 194, *State v. Clark.*

3. Such motions must be based on errors patent on the face of the record. 25 A. 370, *State v. Hardin*; 28 A. 129, *State v. Washington*; 15 A. 185, *State v. Addison.* See No. 10.

4. The accused having been found guilty of larceny, cannot urge in arrest of the judgment that the charge of burglary is not properly set out in the information. 21 A. 265, *State v. O'Brien.*

5. Defendant cannot complain of the want of qualification in the juror, having once accepted him. 25 A. 417, *State v. Socha*; 370.

6. One cannot take the chances of a verdict in his favor, and after conviction object to the jury. 7 A. 284; 8 A. 515; 25 A. 537, *State v. Jackson*; 573, *State v. Turner and Reid.*

7. The objection that the judge had no right to excuse a juryman, must be made whilst the jury is being empaneled. A motion in arrest of judgment is not the proper proceeding for such an objection. 25 A. 573, *State v. Reid and Turner.*

8. The objection that the jurors were guilty of misconduct, urged in a motion in arrest of judgment when a new trial has been refused, comes too late. 26 A. 462, *State v. Tinney.*

9. The filing of a motion in arrest of judgment four days after refusal of the new trial comes too late. 27 A. 362, *State v. Fritz.*

10. On the trial of a motion in arrest of judgment, evidence is not admissible to prove the error complained of. 30 A. 91, *State v. Harris et als*; 8 R. 513; 10 A. 265; 14 A. 827. See No. 3.

11. It is too late after verdict to urge the disqualification of the jurors, or the irregularity of their summons. 30 A. 91, *State v. Harris*; 7 A. 284; 8 A. 515; 25 A. 537.

12. A *nolle prosequi* as to one of two offenses, after a verdict of guilty has been found as to both, will not be a good ground to arrest the judgment. 30 A. 367, *State v. White.* See XI. No. 1.

XVI. OF THE APPEAL; BILLS OF EXCEPTION; AND ASSIGNMENT OF ERROR.

(a) *In general.*

1. If the record in a criminal case contains neither bill of exception nor assignment of errors apparent on the face of the papers, and the accused does not appear to suggest any error, the judgment will be affirmed. 20 A. 389, *State v. Behan.* See (b), No. 1.

2. In a criminal case where there is no bill of exception nor error apparent

on the face of the record, the judgment will be affirmed. 20 A. 402, *State v. Kreppel et al.*, and *State v. Morel et al.* See (b), No. 1.

3. Whether the jury is drawn properly or not, is a question of fact upon which the Supreme Court has no jurisdiction in criminal cases. 22 A. 9, *State v. Bruington*.

4. A juror who does not speak or understand the English language, may be challenged by the State, although he be a qualified elector. 23 A. 14, *State v. Push*. See XIII. (e), 2), No. 8.

5. The objection that there was no order of court authorizing the filing of the information comes too late, when made for the first time in the Supreme Court. 23 A. 326, *State v. McCort*.

6. The only mode of bringing the facts before the Supreme Court is by bill of exceptions; the court is not authorized to refer to the reasoning of the judge for the facts. 25 A. 418, *State v. Socha*.

7. If the finding of the judge can be based upon a question of fact, in a criminal case, the Supreme Court is unable to review the bill of exception, which does not give the reasons of the finding. 26 A. 383, *State v. Bower*.

8. No appeal lies in criminal matters where a fine of less than three hundred dollars has been imposed, and in default thereof a confinement in the parish jail. 21 A. 188, *State v. Redding*. See COURTS, II. (c), No. 15; *et seq.*

9. Appeal, return day, delay and preference docket in Supreme Court; 1878, p. 56.

10. See also APPEAL, I. (i).

(b) *Modes of presenting questions of law; necessity and requisites of the bill or assignment; and assignable errors.*

1. Favoring the liberty of the citizen, the Supreme Court will entertain the appeal, although there was no motion to quash, no bill of exception, no motion in arrest of judgment nor formal assignment of errors. 23 A. 433, *State v. Forrest*. See (a), Nos. 1, 2.

2. The appellate court is unable to pass on a bill of exception, relative to a charge by the judge to the jury, on an abstract proposition, when it is unable to say whether the proposition was pertinent or not, to the facts. 22 A. 456, *State v. Nelson*. See (a).

(c) *Questions of fact, or matters resting in the discretion of the lower court.*

1. The Supreme Court can only examine facts, either by the certificate of the clerk, that the evidence was adduced or by a statement of facts, not otherwise. 20 A. 236, *Mortee v. Edwards*; C. P. 896.

2. The Supreme Court cannot review the decision of the Criminal Court on questions of facts. Constitution, art 74. 23 A. 149, *State v. Merryman*; 22 A. 9, *State v. Bruington*.

3. A question of complicity is one of fact. 30 A. 92, *State v. Harris*.

4. Evidence offered in support of a motion for new trial, cannot be examined on appeal, unless brought up in the shape of affidavits made part of the motion, or by bill of exception taken to the ruling of the judge, and containing a statement of the facts proved. 30 A. 539, *State v. Gunter*.

(d) *Finality of the judgment; and the penalty.*

1. No appeal lies from an order granting the State a re-hearing on a motion to discharge. 22 A. 460, *State v. Gary*.

2. No appeal lies from a judgment quashing an indictment for manslaughter. 22 A. 564, *State v. Fournet*.

3. The judgment of the court, on a verdict of "guilty without capital punishment," being that the convict be "imprisoned in the State penitentiary for the space of his natural life," leaving out the word "hard labor," is sufficient. These words are not sacramental. 25 A. 525, *State v. Prudhomme*.

XVII. OF JUDGMENT, PARDON AND EXECUTION.

1. The imprisonment allowed, in default of the payment of any fine imposed

by a sentence of the court, cannot exceed one year. Acts 1855, p. 151, Sec. 4. 15 A. 498, *State v. Markham*.

2. It is not necessary to ask the accused if he had anything to say why judgment should not be pronounced against him. 27 A. 393, *State v. Taylor*.

3. The remark in the decree, "and having nothing to offer in arrest of judgment," implies that the defendant was asked if he had anything to say why the sentence of the law should not be pronounced on him. 27 A. 694, *State v. Coleman*.

4. The record showing that the accused was brought into court, "and had nothing to offer in arrest of judgment," it is to be presumed that he was asked if he had nothing to say why sentence should not be pronounced against him. 27 A. 376, *State v. Hugel*.

5. It is no objection to the validity of the order, that the State has not given its consent to the use of its penitentiary as a place of confinement of a convicted offender against the laws of the United States. So long as the State suffers him to be detained by its officers in its penitentiary, he is rightfully in their custody, under a sentence lawfully passed. 93 U. S. (Otto's), 396, *ex parte Karstendick*.

6. The governor can only pardon, he cannot commute the sentence of a court. 29 A. 755, *State ex rel. Daniel v. Rose*.

7. The governor may pardon for a contempt of court. See CONSTITUTION, II. (d), No. 5.

8. Where a court, in passing sentence of imprisonment in the penitentiary, finds, that, in the district or territory where the court is holden, there is no penitentiary suitable for the confinement of convicts, or available therefor, such finding is conclusive and cannot be reviewed by the Supreme Court upon a petition for *habeas corpus*; and where the attorney general has designated a penitentiary in another State or territory for the confinement of persons convicted by such court, it may order the execution of its sentence at the place so designated. 93 U. S. (Otto), 396, *ex parte Karstendick*.

9. Imprisonment to hard labor, when prescribed by statute, as part of the punishment, must be included in the sentence of the person convicted; but where fine and imprisonment alone is required, the court is authorized, in its discretion, to order its sentence to be executed at a place where, as part of the discipline of the institution, such labor is exacted from the convicts. *Ib.*

10. Effect of a pardon as to capacity to testify. See *ante*, XII. (d), Nos. 4, 5; 1873, p. 157.

XVIII. OF THE CRIMES OF SLAVES AND THEIR TRIAL.

(c) *Verdict and sentence; the punishment; crimes for, and laws under which it may be inflicted.*

1. Although the day fixed for execution by the magistrates, before whom a slave has been tried for a capital offense, has elapsed, pending an appeal; on the judgment being affirmed, it is the duty of the sheriff to execute the sentence. 15 A. 118, *State v. Joshua*.

2. Convicts to work on public roads, etc., 1878, p. 63.

XIX. OF THE COSTS OF CRIMINAL PROCEEDINGS.

1. Municipal corporations can only regulate the costs of keeping prisoners. 15 A. 43, *Parker v. New Orleans*. See Costs, II. Nos. 1, 2.

2. When the clerk of the Superior Criminal Court is allowed to charge, in addition to his salary. See Costs, II. No. 8.

CRUELTY.

See CRIMINAL LAW, IX. (k), 1).

CUMULATION.

See PLEADING, II. CRIMINAL LAW, V. (d). CORPORATIONS, VIII. (a).

CURATORS.

1. See SUCCESSION, VII. VIII.
2. Curators of minors. See MINORS, I. PLEADING, I. (c), 2).
3. Curators of absentees. See ABSENTEES, II. III. ATTACHMENT, V. VIII.
4. Curators in cases of appeal, 1878, p. 129.

CURRENCY.

1. A judgment should be rendered without specifying in what currency it is payable. The treasury notes are made legal tenders for all kinds of debts. 18 A. 15, *Galliano v. Pierre*; 616, *Alanyer v. Blanchard, Jr.* See JUDGMENTS, I. Nos. 7, 8.
2. A note payable in gold can be satisfied in treasury notes. 18 A. 193, *Jump v. Peltier*. See Nos. 5, 6.
3. The United States Supreme Court is the proper tribunal to decide finally upon the validity and effect of the acts of congress, and State courts should follow its decisions; the legal tender act of 1862 does not apply to contracts made before its passage. 22 A. 507, *Flicking v. Marshall*.
4. The statute of the United States, providing a national currency, directs the comptroller, when satisfied that any bank has failed to pay its obligations, to appoint a receiver who shall take charge of the books and collect all dues and claims belonging to the association. The power to collect debts, carries with it, the means necessary to arrive at that end. Statutes at large, 1864, p. 114, section 50. 22 A. 322, *Case v. Berwin*.
5. A contract made payable in gold, should be enforced in gold. 7 Wall. 229, 259; 8 Wall. 609; 23 A. 32, *Lafitte, Dufilho & Co. v. Rivera*. See No. 2.
6. A check accepted in 1862, may be discharged in United States currency, and is not necessarily payable in gold. 26 A. 728, *Partegas v. State National Bank*.
7. For deposit of gold coin, see DEPOSIT, I. No. 1.

CUSTOM.

See LAWS, II. (j). USAGE. OBLIGATIONS, III. (c), 2), B.

DAMAGES.

1. For damages arising *ex delicto*, see OFFENSES AND QUASI OFFENSES. MALICIOUS PROSECUTION. PRESCRIPTION, III. (c), 3). REGISTRY, II. (e). 1). LIBEL AND SLANDER. SHIPPING, VII. NEW ORLEANS, II. (e), 5), c. MANDATE, II. (a), No 1; V. (a); (b), 6); VI. DEPOSIT, III. No. 6.
2. For damages arising *ex contractu*, see OBLIGATIONS VII. (a), 5), B. § 2. ATTACHMENT, IV. (c). INJUNCTION VIII. SEQUESTRATION, II. (c), 2). SHIPPING V. (b); IX. X. (c). SALE, III. IV. VIII. (c). MANDATE, III. V. OFFENSES AND QUASI OFFENSES, II. (g), 3), No. 2. DEPOSIT III. BILLS AND NOTES, XIV. For difference between the two actions *ex delicto* and *ex contractu*, see PRESCRIPTION, III. (c), 1), Nos. 7, 8, 9, 10.
3. Liquidated or unliquidated damages. See COMPENSATION, II. OBLIGATIONS, VIII. (g).
4. For the rule that where one of two innocent persons must suffer, etc., see QUASI CONTRACTS, I. No. 21. MANDATE, I. (c), Nos. 2, 3; V. (b), 4), No. 7.
5. For interest on damages, see OBLIGATIONS, VII. (a), 5), B. § 1, No. 12.
6. Measure of damages, see *ib.*, § 2, Nos. 3 *et seq.*; SHERIFF, II. (b), 2), A. Nos. 1, 4.

DATE.

See BILLS AND NOTES, V. (a); VI. (b). JUDGMENT, IV. PRESCRIPTION, III. IV. V. LAWS, I. (b). TIME.

DATION EN PAIEMENT.

See SALE, IX.

DAY.

1. See **BILLS AND NOTES**, VI. (b); VII. (b). **APPEAL**, II. (c); VII. (b). **EXECUTION**, II. V. (c). **ADVERTISEMENT**. **CRIMINAL LAW**, V. (c), 2).
2. Days of public rest, 1870, E. S., p. 98; *mardi gras*, 1872, p. 95; fourth of March, 1874, p. 64; bills and notes, 1876, p. 27.

DEATH.

1. For evidence and registry of death, see **EVIDENCE**, XXIII. (d). **NEW ORLEANS**, II. (g), 4).
2. For death of parties *pendente lite*, see **APPEAL**, VIII. (d). **PLEADING**, I. (d). **COURTS**, II. (d), 2).
3. Effect of death in other matters, see **SUCCESSION**, I. (a); (b); VIII. (e), 8).
4. For civil death, see **BANKRUPTCY**. **CORPORATIONS**, VII. VIII. **INSOLVENCY**. **INTERDICTION**. **PLEADING**, I. (c), 6).

DEBT.

1. Of the State, see **CONSTITUTION**, II. (c), 1), Nos. 3, 4, 5, 6, 7, 8, 15, 18, 26, 27, 28, 29. **CORPORATIONS**, X. (g), Nos. 6, 7; (dd), Nos. 1, 2. **DRAINAGE**, Nos. 14, 15; floating debt, 1870, E. S., p. 153; right to test validity of, 1875, p. 110.
2. Of corporations, see **CORPORATIONS**, II. (b), Nos. 9, 10. See **BONDS**. **POLICE JURY**, No. 8.
3. Premium bonds of New Orleans, 1876, p. 54.

DEDICATION TO PUBLIC USE.

See **THINGS**, I. (a).

DEED.

Signifies "act."

DEFAULT AND DEFAULTER.

1. For the mode of putting *in mora*, see **OBLIGATIONS**, VII. (a), 2); 3).
2. For judgment by default, see **JUDGMENT**, IX.
3. For defaulter, see **CRIMINAL LAW**, VI. (d); IX. (c). **TAXES**, III. (e), 4); (d).

DEFINITION.

See **LAWS**, II. (d).

DEMURRER.

1. See **EVIDENCE**, VI. **PLEADING**, VI. (c), 3).
2. A demurrer in equity is substantially an exception of no cause of action. See **PLEA**.

DELIVERY.

See **SALE**, III. (b). **SHIPPING**, X. **DEPOSIT**, II. No. 3.

DEPOSIT.

I. IN GENERAL.

II. OF ITS NATURE, REQUISITES AND DIFFERENT KINDS.

III. OF THE RIGHTS AND OBLIGATIONS ARISING OUT OF THE CONTRACT.

I. IN GENERAL.

1. In case of a deposit of a particular thing, such as gold coin, the depositary may be condemned in the alternative, to return the thing deposited, or pay its value in money. 22 A. 16, *Beyris v. Spor*.

II. OF ITS NATURE, AND DIFFERENT KINDS.

1. The relations of bank and depositor, are those of creditor and debtor. 20 A. 568, *Gumbel v. Abrams*; 10 A. 344; C. C. (2934).

2. Plaintiff who deposited gold in a bank, can only recover legal currency. 20 A. 568, *Gumbel v. Abrams*. See CURRENCY.

3. Delivery is of the essence of a contract of deposit, and where cotton was to be weighed, no delivery could take place until then. 21 A. 619, *Tanneret v. Marshall*.

4. A banker who receives the valuable tin boxes of his customers and depositors, for safe keeping, cannot be considered as a gratuitous depositary; he must be held responsible for the loss of the box stolen, whilst left on a table within the reach of an outsider, no one watching it, during a few moments. 25 A. 632, *Levy v. Pike, Bro. & Co.*

5. ON RE-HEARING: The deposit was gratuitous, and there was no gross negligence, the probability of the theft could scarcely have been conjectured. *Ib.*

III. OF THE RIGHTS AND OBLIGATIONS ARISING OUT OF THE CONTRACT.

1. The proof of negligence on the part of the depositary, is sufficient to render him liable for the loss of cash deposited with him; but in order to establish his liability for a draft that has disappeared, it is necessary that the depositor show some loss he has incurred by its disappearance. 15 A. 280, *Hills v. Daniels*.

2. Where the contract of deposit stipulates no reward for the preservation of the thing deposited, and the depositary acts at the request of the owner. he is not bound to use more than ordinary prudence. 15 A. 280, *Hills v. Daniels*.

3. The Bank of Louisiana having paid out all deposits under the authority of the United States military authorities which it could not resist, is not liable to the depositors. 19 A. 392, *Mandeville & Montgomery v. Bank of Louisiana*.

4. The Confederate State authorities having taken forcible possession of the cotton, and the United States having subsequently taken possession of the same as Confederate property, the depositary is not answerable for the cotton. 20 A. 399, *Babcock & Kernochan v. Murphy*.

5. A deposit in a bank, of Confederate money, does not give to plaintiff a right to exact legal tenders; the transaction was illicit. 17 A. 261, *Schmidt v. Barker*.

6. The defendants having held the property by virtue of orders from the United States' agents, acting in good faith, are not liable for the damages occasioned by the wrongful detention of the goods. 23 A. 63, *Britton v. Aymar, etc.*

7. A bank which paid the money of its depositors to the quartermaster of the United States, under orders from the general commanding, cannot be made liable for the loss. 24 A. 266, *Grivot v. Louisiana State Bank*.

8. Payment in Confederate money to the officers of the quartermaster's department, under military orders, of a deposit of money in lawful currency made in the bank, by a Confederate officer, does not relieve the bank from a payment to the depositor. 21 A. 332, *Nelligan v. Citizens' Bank*.

9. A deposit of drafts payable in bankable funds, in 1862, when Confederate money was almost exclusively used, will be presumed to have been paid in Confederate money, so that the depositor will be entitled to nothing. 21 A. 338, *McAllister v. Bank of New Orleans*.

10. The depositary who allows property to be taken away from him when no overpowering force is used, and without the authority of the owner, becomes responsible therefor. 20 A. 297, *James v. Greenwood*.

11. Where the depositary who was not remunerated, used due diligence to preserve the cotton, he is not responsible for the burning of the same during the war. 20 A. 290, *Levy v. Bergeron*.

12. If the depositary has not exercised the diligence of a faithful custodian, he should be held responsible for the loss, even if it occurred by overpowering force. 22 A. 413, *Thomas v. Darden*.

13. A depositary is not answerable for loss by fire, unless he failed to use proper diligence. 17 A. 89, *McCullom v. Porter et als.*

14. The proceeds of a shipment deposited in the name of the shipper, does not divest the ownership of the real owner, who may recover the proceeds. 20 A. 31, *Taylor v. De Goicouria & Co.*

15. Merchandise stored, may be recovered by the owner, notwithstanding that the store keeper became insolvent and made a surrender to his creditors. 20 A. 218, *Rose v. Smith.*

16. A warehouse keeper who receives goods subject to the order of a third person, is bound to obey the orders of the latter, or else incur liability towards him, if he deliver the goods to other persons. 24 A. 563, *Copes v. Phelps & Co.*

17. A depositor who had ordered the payment of a certain claim and afterwards revoked his order, cannot recover the deposit where he is aware *extra judicially* that suit has been brought against the depositary to recover the amount, and he allows judgment to be rendered against the depositary who paid. 25 A. 634, *Guidry v. Jeanneaud & Co.*

18. A defense made by a bank, to a claim for a deposit, that the same was in Confederate notes, in order to shield the latter's responsibility, should be made out by clear and explicit evidence. 22 A. 228, *Greeves, ad'r v. Louisiana State Bank.*

19. Where the cotton stored was damaged before delivery to the storekeeper, and the owner sues for damages done to the same whilst on storage, the extent of the damage so suffered must be shown. 19 A. 9, *Farley, Jury & Co. v. Van Wickles & Co.*

20. The depositary is not liable where the cotton was destroyed during the war by overpowering force. 21 A. 454. *Yale, Jr. v. Oliver & Drake.*

21. Where the depositor is unable to identify the money deposited, as a real deposit, he cannot recover that which he sequestered. 18 A. 208, *Williams v. Landry*; 9 L. 50.

22. To be exonerated, the warehouse keeper must show that the loss occurred without his fault, and that he has used all possible means to preserve the property. 21 A. 601, *Schwartz et al. v. Baer.*

23. A depositary cannot impeach the title of the depositor. 21 A. 594, *Graham et al. v. Thompson Williams.*

24. The order of the owner on the depositary to pay the funds to his agent, for the benefit of certain creditors, does not transfer the funds to the creditors and give them a right of action thereagainst. 16 A. 41, *Connelly v. Harrison.*

25. The depositor has no privilege on the property or effects of the depositary who has disposed of the money on deposit. He has a privilege only on the price of sale of the particular movable deposited. 25 A. 478, *Lanoue, ad'x v. Dumartrait, ad'r*; C. C. 3217, No. 5; 3223 and 2962.

26. Where a depositor entrusts funds for use and interest into the hands of another, who keeps no separate account of the same in bank, in the name of such depositor, the depositary will be held responsible in legal currency, whatever may have been the loss sustained by such depositary of the funds placed in bank. 18 A. 356, *Guenivet v. Perrett.*

27. The putting in default of the depositary is a prerequisite to enable the depositor to recover. 20 A. 297, *James v. Greenwood.*

28. A depositary who converts the deposit to his own use, is responsible to the depositor for its value. 24 A. 45, *Short v. Lapeyrouse.*

29. The depositary who disclaims ownership, cannot be heard to plead defenses which another has a right to plead. 25 A. 234, *Ducros v. Gottschalk.*

30. Under agreement, plaintiff held a lot of cotton for defendant, on a margin; the price fell and the margin not being sufficient to cover the loss, plaintiff notified defendant to remit a further sum as margin, else he should sell the cotton, which he did, in default of remittance; under these circumstances plaintiff may recover the difference between the amount of the loss and the margin. 28 A. 9, *Bower v. Johnson, et als.*

31. Plaintiff delivered certain goods in the hands of defendants, and joined the Confederate army. It was agreed that defendant was not liable for greater

risks than for his own goods. When Gen. Butler took New Orleans, defendants' store was put under charge of a person having influence with the military, and plaintiff's goods were used or disposed of. Under these circumstances, defendant is not liable for their value. 28 A. N. R., *Charles R. Railey v. Pinkard, Steele & Co.*

32. The rule that trust property may be followed into whomsoever hands it comes, with notice of the trust, does not apply to a case where an officer of a bank being a member of a partnership without due security, lends to his firm money of the bank which becomes mingled with the other property of the partnership. 1 Woods, 126, *Case, receiver v. Beauregard et als.*

33. Compensation cannot be set up by depositaries. See COMPENSATION, II. Nos. 4, 11; III. Nos. 1, 2.

34. One holding a note for collection, who returned it to the one from whom he received it, cannot be held liable to any other person. See MANDATE, I. (c), No. 8.

35. Payment to the real owner will discharge the consignee of goods shipped by other persons. See MANDATE, V. (b), 5).

36. A notary who deposits with his own funds in bank, money left to his official charge, is liable to the depositor, if the bank should fail. See NOTARY, No. 4.

37. A ship carpenter who deposits money with the captain, has no lien on the boat. See PRIVILEGE, III. (c), 2) A. No. 7.

DEPOSITION.

See EVIDENCE, XI. XVIII. (d), 2); XIX. CONTINUANCE, III. (b). CRIMINAL LAW, (f), 1).

DEPUTY.

See APPEAL, VIII. (e), 2).

DERELICT.

See SHIPPING, XII. THINGS, II. (b), 1).

DICTATION.

See DONATION, VI. (a), 5), No. 5.

DIGEST.

Walker's digest purchased, 1870, E. S., p. 194.

DIMINUTION.

For diminution of record, see APPEAL, VIII. (f). CERTIORARI. SALE, (b), 2), c; (c), 4); (d). PLEADING, IV.

DIRECTORS.

See CORPORATIONS, III. IV. (b); VI. MANDATE, V. (b), 1). MANDAMUS, I. (b).

DISCONTINUANCE.

1. The plaintiff may discontinue a part of his demand, provided it does not tend to defeat the reconventional demand. 24 A. 225, *Davidson, v. Executors Silliman*; 4 N. S. 439; 7 N. S. 405; 3 L. 457; 9 L. 310; 7 R. 422; 9 R. 133, 210; 10 A. 703; 15 A. 70. See REMITTITUR.

2. No answer can be filed nor proceeding had after discontinuance. 6 H. 163, *Shelton v. Tiffin*.

3. If the one who sues for the benefit of another discontinues, no one is then before the court. See PLEADING, I. (c), 9), No. 5.

4. Plaintiff under an intrusion in office suit may discontinue. 1873, p. 80.

DISCUSSION.

See SURETYSHIP, II. (a), 4), c. APPEAL, III. (e), 3). DONATIONS, II. (d). MORTGAGE, VI. (c), 7).

DISTRESS AND DISTRINGAS.

1. The remedy of distress is not allowed.
2. For writ of *distringas*, see EXECUTION, III.

DIVISIBILITY.

See CRIMINAL LAW, XII. (e). EVIDENCE, XII. (i); (j), 2). OBLIGATIONS, VIII. (f). PARTNERSHIP, IV. (b). PLEADING, I. (e). PARTITION, II. SALE, III. (b), 2), B; (c), 4). SHIPPING, X. (d), 2).

DIVISION.

1. See APPEAL, IX. (h). SURETYSHIP, II. (a), 4), B.
2. For division of land into lots, see EXECUTION, V. (a), 4), Nos. 3 *et seq.* SALE, X.

DIVORCE.

See MARRIAGE, II.

DOMICILE.

I. IN GENERAL.

II. OF THE CHANGE OF DOMICILE WITHIN THE STATE.

III. OF THE DOMICILE OF MINORS AND MARRIED WOMEN.

I. IN GENERAL.

1. The defendant cannot waive his domicile. 23 A. 257, *Richardson v. Hunter*. See COURTS, II. (g), 1).

2. If a person wishes to protect himself from being sued in the parish from which he removes, he should make an express declaration of his intention to change his domicile. 15 A. 533, *Berry v. Gaudy*.

3. The act of residence does not alone constitute the domicile of a party, but it is the fact of residence coupled with the intention of remaining permanently, which constitutes it. 15 A. 637, *McKowen v. McGuire*.

4. The fact that a person has voted in this State, and even become a candidate for the legislature here, is not sufficient to show a change of domicile from another State, if it be proved that he never made a permanent change in his residence. 15 A. 281, *Mandeville v. Huston*.

5. A residence only for a year in this State, even if the party be appointed police juror and votes, does not constitute a domicile, unless coupled with the intention of acquiring a domicile. 20 A. 313. *Sanderson v. Ralston*.

6. ON REHEARING: These facts, however, coupled with acts of the party *ante litem motam*, showing his intention, will preserve his domicile when once acquired. *Ib.* LABAUVE and HOWELL, JJ., *dissenting*.

7. The return of the sheriff showing that the citation was served at domicile, is *prima facie* evidence of the domicile. See EVIDENCE, VIII. No. 7.

II. OF THE CHANGE OF DOMICILE WITHIN THE STATE.

1. When the defendant by his own acts renders his place of domicile uncertain, he may be sued at either place of residence, otherwise he should have made the public declaration required by law. 23 A. 516, *Villere v. Berthenau*.

2. Where a party has removed from one parish into another, and has acted in the latter parish in such a manner as to manifest sufficiently his intention to change his domicile but has not made a formal declaration to that effect, if a year has not elapsed since his removal, it is optional with a party desiring to sue him to bring the suit in either parish. 15 A. 533, *Berry v. Gaudy*.

3. Defendant who sets up a domicile in another parish admits that he has abandoned the one already acquired. 20 A. 246, *Alter v. Waddill*.

4. Defendants had their domicile and residence in one parish, where they had resided for a number of years; they removed to another parish to avoid the dangers of the war and there engaged in business and participated in one or two elections by voting, without signifying their intention to change their domicile; *Held*: That they may be sued at their former domicile. 19 A. 323, *Folger & Son v. Slaughter*.

5. One, appointed a resident physician at the quarantine station, and who goes in the parish of Plaquemines with the intention to make it his domicile, should be sued in the parish of Plaquemines. 28 A. 243, *Board of Health v. Southworth*.

6. The question of domicile is one of great nicety, which must be decided on the facts of each case, in the absence of the formal declaration. The defendant who resides alternately in two parishes may be sued in either. 30 A. 498, *Evans v. Payne & Harrison*.

III. OF THE DOMICILE OF MINORS AND MARRIED WOMEN.

1. The domicile of the husband is that of the wife, though she may have remained in another country. 23 A. 372, *Succession of McKenna*; 20 A. 283, *Succession Christie*.

2. The domicile of the tutor is that of the minor. 19 A. 500, *Succession Stephens*.

3. A wife who, after the death of her husband, comes to live with her parents, in this State, and obtains the appointment of testamentary executrix, without giving bond, by alleging that she resides in this State, thereby makes her domicile here. 29 A. N. R., *Watson v. Bondurant*.

DONALDSONVILLE.

1. The bonds issued in 1866, by the town of Donaldsonville, under the authority of act No. 69, of 1861, are valid, and the holder can recover judgment against the corporation for the matured interest, and force the levy of a tax to pay the same. 28 A. 558, *Felix Braud v. Town of Donaldsonville*.

2. Charter amended, 1870, p. 122.

DONATIONS.

I. OF THE CAPACITY TO DISPOSE OR RECEIVE.

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| (a) <i>In general; and herein of uncertainty in the donee.</i> | (d) <i>Capacity to receive as affected by illegitimacy, concubinage, or slavery; and herein of interpolation.</i> |
| (b) <i>Capacity to dispose.</i> | |
| (c) <i>Capacity to receive in general.</i> | |

II. OF THE DISPOSABLE PORTION AND ITS REDUCTION.

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|---|---|
| (a) <i>In general.</i> | (c) <i>Reservation in donations inter vivos.</i> |
| (b) <i>Disposable portion as affected by illegitimacy or concubinage.</i> | (d) <i>Reduction; how made; by whom it may be claimed; and its effects.</i> |

III. OF DISPOSITIONS REPROBATED BY LAW.

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| (a) <i>In general.</i> | (d) <i>Donations of usufruct; and fidei-commissa de residuo.</i> |
| (b) <i>Fidei-commissary substitutions.</i> | |
| (c) <i>Trusts and perpetuities.</i> | |

V. OF DONATIONS INTER VIVOS.

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| (a) <i>In general.</i> | (c) <i>Revocation; by whom it may be claimed; and charges imposed.</i> |
| (b) <i>Formalities and conditions essential to their irrevocability.</i> | |

VI. OF DONATIONS MORTIS CAUSA.

(a) *Formalities.*

- 1) In general.
- 2) Olographic will.
- 4) Nuncupative will by public act.
- 5) Nuncupative will by private act.

(b) *Particular and universal legacies, and legacies under a universal title.*

- 1) In general.
- 2) Different kinds, description, and requisites of legacies; and the interest passed.
- 3) Payment of legacies; charges thereon and debts.

(c) *Revocation and caducity of testamentary dispositions; and accretion.*

- 1) In general.
- 2) Revocation by subsequent will.
- 3) Revocation by subsequent birth of a child.
- 4) Accretion.

(d) *Interpretation of wills.*(e) *Opening and probating of wills.*

- 1) In general.
- 2) Foreign wills.

(f) *By what law governed; and wills made in other States.*

VII. OF DONATIONS TO, AND BETWEEN, MARRIED PERSONS.

I. OF THE CAPACITY TO DISPOSE OR RECEIVE.

(a) *In general; and herein of uncertainty, in the donee.*

1. For capacity to dispose or receive, see C. C., 1470, 1471, and 1482.

(b) *Capacity to dispose.*

1. The vendor cannot donate the property sold, and even if the sale be unrecorded, the donee acquires nothing. 16 A. 96, *Zunts v. Courcelle*.
2. A person generally insane from frequent attacks of *mania a potu*, is competent to make his will, if *compos mentis*, at the time of making the will. 24 A. 386, *Hébert v. Winn*.
3. Community property disposed of by the husband, whether in fraud of the wife's rights, under gratuitous title, may be recovered in kind by the wife or her heirs, after dissolution of the community. 21 A. 216, *Bister v. Mengé*.
4. A donation made by an emancipated minor is not an absolute, but a relative nullity, which is intended for the minor's protection, and when he becomes of age, he may ratify the obligation. 15 A. 505, *Johnson v. Alden*.
5. If the testament presents a series of wise and judicious dispositions, it is for the heirs who attack it to prove unsoundness of mind, at the date of the testament. 21 A. 60, *Chandler v. Barrett*.

(c) *Capacity to receive in general.*

1. Individuals associated together under a common name, if not incorporated, have no capacity to receive. 22 A. 332, *Succession of Hardesty*.
2. The individual members, in such a case, cannot take the legacy. *Ib*.

(d) *Capacity to receive as affected by illegitimacy, concubinage, or slavery; and herein of interposition.*

1. A donation of immovable property made by a man to his concubine is, under the prohibition contained in article 1468, C. C., radically null and void and not susceptible of ratification or confirmation. Such a contract being absolutely null, all parties interested, such as all the heirs of a deceased party who has made such a donation, have a right to set up this nullity for the purpose of defeating the fraud practiced upon the law. This right is not confined to the forced heirs only. 15 A. 599, *Dazarre v. Jacques*.
2. Where it is charged that the legatee was the concubine of the testator, such a legacy being in contravention of public policy, the legal heirs of the testator will be permitted to prove an illicit connection between the deceased and the legatee. 15 A. 46, *Philbrick v. Spangler*.
3. Where the evidence shows a sale, made *in extremis* by the deceased to his concubine, to be simulated, it will be set aside on the prayer of the forced heirs. 18 A. 206, *Cure, tutrix v. Porte*.

4. The slave who has acquired the right of being free at a future time, is capable of receiving by testament or donation. 17 A. 174, *Succession Chappel*.

5. The slave who had acquired the right of being free at a future time, was from that time capable of receiving by testament or donation, C. C. (193); and under this article the court will presume that a donation accepted for the slave by a third person was preserved for him, and that the donation was perfected. 25 A. 207, *Morgan v. Morgan*.

6. In the absence of corroborating evidence, letters showing a degree of familiarity highly unbecoming in the correspondence between a gentleman and a lady, will not be considered as establishing that the parties were living in open concubinage, and therefore that the testator was incapable of bequeathing his property to the lady. 27 A. 44, *Succession Elliot*.

7. An illegitimate child, who is not acknowledged, cannot receive a legacy above mere alimony from the father. 18 A. 591, *Bennett v. Cane*.

II. OF THE DISPOSABLE PORTION AND ITS REDUCTION.

(a) *In general.*

1. Where a forced heir sued to set aside a sale made by his ancestor on the ground that it was a disguised donation, and operated to his injury; *Held*: That the burden of proof was on him to show that no price had been paid for the property, or that the price was below one-fourth of the real value of the property at the time of the sale. 15 A. 641, *Carter v. McManus*. See (b), No. 2.

2. Forced heirs who are made universal legatees, are bound to discharge all particular legacies, but they may free themselves by abandoning the legacy reserving to themselves the legitime. 30 A. 719, *Eskridge v. Farrar, agent*.

(b) *Disposable portion as affected by illegitimacy or concubinage.*

1. The legacy of movables, which can be bequeathed to a concubine, cannot exceed the one-tenth part of the whole value of the donor's estate. 16 A. 246, *Carmena v. Blaney*.

2. In an action to nullify a disguised donation to a concubine, the plaintiff must prove that the purchase money was not defendant's, and that the property exceeded in amount one-tenth of the movable property of the deceased. 24 A. 229, *Veazie v. Stokes*. See (a), No. 1.

(c) *Reservation in donations inter vivos.*

1. The settled construction of article 1520 of the Civil Code is, that a reservation of the usufruct to the donor of immovable property renders the entire donation radically null, and not simply the illegal reservation of the usufruct. 15 A. 585, *Martin v. Martin*.

(d) *Reduction; how made; by whom it may be claimed; and its effects.*

1. Where the evidence in a suit by the heir to set aside a sale as being a disguised donation is so slight as to create but a suspicion against the payment of the price, and to make out but a doubtful case in favor of the heir, this is too uncertain to justify the court in setting aside the sale. 15 A. 641, *Carter v. McManus*.

2. To set aside pretended acts of sale, averred to be donations in disguise made by the testator, the forced heirs should proceed by virtue of articles (1324), (1326) and (2419), Civil Code. 21 A. 368, *Succession Forsyth*.

III. OF DISPOSITIONS REPROBATED BY LAW.

(a) *In general.*

1. Conditions inserted in donations, which are contrary to law or to morals, are reputed not written. 15 A. 700, *Hoggatts v. Gibbs*.

2. A legacy of a sum of money to be used by the legatees until death, and in case they should leave no heir of their body, whatever may be left of the legacy

to be divided among the testator's legal heirs, is not a substitution, because the legatees are not required to *preserve and return the same*. 19 A. 79, *Succession Hudson*; 5 A. 552; 18 L. 21; 18 L. 95.

3. Plaintiff, who sues to recover property purchased by him in the name of his concubine, who was his slave, and whom he emancipated, shows a cause of action contrary to good morals; he cannot be heard. 30 A. 587, *Monatt v. Parker*.

(b) *Fidei-commissary substitutions.*

1. A disposition in a will, which is reprobated by law, such as a substitution, is not susceptible of confirmation or ratification. 15 A. 700, *Hoggatt v. Gibbs*.

2. The trust estates of the common law were intended to be prohibited under the general term of *fidei commissa*. 15 A. 154, *Perin v. McMicken*.

3. A bequest vesting a merely legal or apparent estate in a person, to be preserved and returned to his children and grandchildren, with the obligation upon such person during his possession, to apply the fruits and revenues, of the property devised to the benefit of a third person, who is neither owner nor usufructuary in the sense of our law, constitutes a *fidei commissum* reprobated by the law. 15 A. 154, *Parin v. McMicken*.

4. The article of the Civil Code of Louisiana abolishing *fidei commissa*, does not reach nor affect that trust which equity implies from a fraud of an individual who has against conscience and right, possessed himself of another's property; such person will be considered, in a court of chancery, as holding the property in trust for the rightful owner. 2 H. 619, *Gaines v. Chew*.

5. The will of N. H. contained the following clause: "*I give, devise and bequeath to the legitimate children of my son, Anthony, who may be living at the time of his death, and the legal descendants of such as may previously die, in such portions as my son Anthony may by deed or will appoint, and in default of such appointments, in equal portions, the descendants of any deceased child taking but one share, all the lands, slaves and movable effects belonging to me, in the parish of Madison, in the State of Louisiana, or which may be thereon at the time of my death; and I appoint my son Anthony, guardian of his said children, and will and require that he shall manage and control said lands, slaves and movable effects to the best advantage of said children, and with the income thereof provide for the genteel support and liberal education of said children, and their descendants, according to his judgment and discretion. I further will and devise, that, as such of said children shall arrive at the age of twenty-one years, or marry, that said Anthony shall set apart and give the usufruct of a portion of such property to such child to such amount as he may deem just, after which he shall not be accountable for the receipt or disbursement of the income of such property, so set apart, nor for the support of the children so advanced. I wish it well understood that if Anthony should die before his children arrive at the age required by this will, to take charge of the property in that case, I wish my executors to take charge of every species of property herein mentioned, for my son Anthony's children, and set according to this will. Also, I give and bequeath to Anthony's children, at his death, all that plantation on which he now resides, in Adams county, which I purchased from William P. Grayson, and others, and all the slaves and personal effects which may be permanently settled thereon and under his control at the time of my death. I wish it well understood, that all the property mentioned in this will for my son Anthony's children, goes to them and their descendants forever.*" *Held*: That the interest of Anthony's children depended on the previous demise of their father, and the title did not vest in the children or descendants of Anthony at the death of the testator, and that the disposition was a prohibited substitution. 15 A. 700, *Hoggatt v. Gibbs*.

6. A legacy worded, "I give and bequeath to my wife the further sum of ten thousand dollars, which I desire her to use for the benefit of her brothers and sisters according to her best judgment and discretion," etc., does not contain a substitution. If it be a *fidei-commissum*, it does not carry the nullity of the donation to the wife. 20 A. 164, *Succession Yancey*; 5 A. 481.

7. A contract wherein the father and mother of the husband agree in case of

his failure, bankruptcy or death, to pay to the wife a certain sum of money in consideration of advances made by the parents to the wife, the money to be placed in the hands of a trustee to be designated by the wife, constitutes no substitution, inasmuch as the trustee or agent was not directed to keep the thing for and return it to another. 17 A. 231, *Pecquet v. Pecquet*.

8. Two of the particular legatees died after the testator, but before the age of twenty-one years, and unmarried. Their legacies went to the universal legatees and not to their heirs, under the following clause of the will: "I hereby give and bequeath to the three children of my niece, M. H. S., who married in Alabama, and is now dead, the sum of fifteen thousand dollars, payable to them by my executors in the following manner: Each of said three children shall receive five thousand dollars without interest, and in case of death of either of said three children, his or her share amounting to five thousand dollars, shall go to and be received by my universal legatee, and I also will and direct that each of said three children shall receive his or her share of five thousand dollars, when he or she marries or attains the age of twenty-one years." 28 A. 890, *Pinkston v. Morse & Zunts*.

9. A substitution and *fidei commissum* cannot be ratified. 29 A. 120, *Anderson v. Pike, tutrix*.

10. "I leave to P. one hundred acres of land, etc., at the death of P. said land to become the property of A. and in case of his death to revert back to my heirs," contains a substitution and *fidei commissum*. A cannot recover the land after the death of P. 29 A. 120, *Anderson v. Pike, tutrix*; 13 A. 574; C. C. (1507), 1520; 14 A. 578.

11. I give to the little daughter of A. five thousand dollars, the said sum to be invested in such a way that she may receive the interest annually and the principal at her becoming of age. In the event of her death the said donation to go to the daughter of my niece, M. —, is neither a substitution nor *fidei commissum*. The case of death provided for is meant to apply to the death of the donee before that of the testator. 29 A. 232, *Succession Cochrane*.

12. The proof must show not only the intention on the part of the testator to create a trust, but also that the interposed person was aware of, or discovered such intention and has either executed or intends to execute it. 23 A. 130, *Shepherd v. Ellen Brooks et als*.

(c) Trusts and perpetuities.

1. A disposition in a testament having for its object the foundation and maintenance of colleges, under the administration of a municipal corporation as trustees forever, is a prohibited *fidei commissum* and substitution. 15 A. 154, *Perin v. McMicken*.

2. The absence of interest in the trustee will not take the trust out of the prohibition of our Civil Code. 15 A. 154, *Perin v. McMicken*.

3. A donation of slaves to be held *in trust* by the executor for —, and to be conveyed, after the donee's death, to her children, in full ownership, is null. 19 A. 68, *Whitehead v. Watson*.

4. A testator residing in Mississippi, and who leaves his property to trustees, to be by them sold and the proceeds divided between his wife and brother, is neither a substitution (5 A. 480) nor a *fidei commissum*. 5 N. S. 302; 5 A. 472; 24 A. 526, *Coleman v. Baker*. See (d) No. 3.

(d) Donations of usufruct; and *fidei-commissum de residuo*.

1. The will of a party contained a clause, by which more than the disposable portion of his property was to belong to his wife during her natural life, to be used or disposed of as she thought best, either in her lifetime or at her death, for her benefit and the benefit of their children; *Held*: That the tenure of the widow, under this clause, is not that of a usufructuary, that such a disposition of property is at variance with the provision of the code respecting the legitime. 15 A. 511, *McCutcheon v. McCutcheon*.

2. The tenure of the children, as heirs, under such a clause, is not one recognized by our laws, and must be considered as not written. The will is, in that respect, null and void. *Ib*.

3. Where a fund is placed in trust, to be held for the benefit of a certain person during his life, and to be paid over at his death, to another person specified; *Held*: That such specified person cannot be considered as deriving title from the beneficiary, whose estate was a mere life estate in the fund. 15 A. 622, *Hullin v. Faure*. See (c).

4. "I want my wife to keep and manage all my estate, both real and personal, during her life, and to be allowed to sell any of the land for not less than the appraisement," is neither a substitution nor *fidei commissum*. The usufruct of the estate is given to the wife. 25 A. 603, *Halsey v. Halsey*.

5. The following bequest is not a *fidei commissum*, and may be enforced: "*Je donne trois mille piastres à ma sœur et tout le reste à ma femme légitime. Si ma femme mourait avant ma sœur, sa succession lui serait redevable de trois mille piastres de plus.*" 30 A. 313, *Succession Michon*.

V. DONATIONS INTER VIVOS.

(a) *In general.*

1. An act under private signature is not a good donation *inter vivos* of a usufruct of real estate 27 A. 534, *Lee v. Cummings*.

2. The ancestor may make a partition between his children, during his lifetime, but he must comply with the requisites of donations *inter vivos*. See PARTITION, I. No. 1.

(b) *Formalities and conditions essential to their irrevocability*

1. Where the evidence shows that an act of sale was intended for an act of donation, and it is clothed with the formalities required by law for the validity of donations *inter vivos*, effect will be given to it as a donation. 15 A. 666, *Harper v. Pierce*.

2. Where the act of donation made by the mother to a minor was accepted by the grandmother, evidence to show that she was the illegitimate ancestor is admissible. 18 A. 150, *Barnabé v. Snaer*.

3. The acceptance by the illegitimate grandmother of a donation made by the mother and tutrix to her minor child is a relative nullity, of which the child alone can take advantage. *Ib.* See ESTOPPEL, No. 59.

4. A donation of stock and cattle by a father to his daughter is not perfected until delivery, and may be revoked if the daughter contracts marriage contrary to the wishes of her father. 22 A. 144, *Johnson v. Stevens*.

5. A donation "as an extra portion over and above the child's share in the donor's succession," with an estimated value, the donor, warranting and binding himself to "defend said property against all claims and demands whatsoever," cannot be revoked when the property has been inherited from the donee. 26 A. 449, *Wade v. Eames*.

6. A transfer of real estate as a recompense for services, with no fixed price, vests nothing in the transferee. See SALE, I. (d), No. 3.

7. Advances in money made by a father, and paid over to the husband of his daughter, need not be evidenced by a notarial act, nor accepted in express terms. 17 A. 230, *Pecquet v. Pecquet*; C. C. (1528); 2 L. 41.

8. Corporeal movables, generally may pass by manual gift, accompanied by real delivery. 19 A. 96, *Bogan v. Finlay*; 11 A. 467.

9. A manual gift of money need not be made before a notary and two witnesses. 26 A. 195, *Succession Hale*.

10. A manual gift may be made of a check drawn to the order of a donor simply by his indorsing and delivering it to the donee. The donor's death before collection of the check, will not affect the donation. 27 A. 466, *Burke v. Bishop*.

11. Article 1526, C. C., means the giving of corporeal movables which must be actually delivered, and is not subject to any other formality. This includes a check. 22 A. 97, *Succession of De Pouilly*.

12. A promissory note is not a corporeal, but an incorporeal thing, (451), C. C., and must come within operation of article 1523, C. C.; the act of dona-

tion must therefore be passed before a notary and two witnesses, under pain of nullity. *Ib.*

(c) *Revocation; by whom it may be claimed; and charges imposed.*

1. When a donation *inter vivos* made by an emancipated minor, is entered into with sincerity, while the emancipated minor might seek for protection from it on account of his legal incapacity, yet creditors whose claims have sprung into existence since the donation was executed, cannot avail themselves of this defect. 15 A. 505, *Johnson v. Alden*.

2. The birth of an illegitimate child after the execution of a donation *inter vivos*, does not revoke it. 18 A. 153, *Barnabé v. Snaer*; C. C. (1546), (1556); 3 R. 441; 1855, p. 79, § 16.

3. Where the donation was made by the judgment debtor, to his daughter, in consideration of an indebtedness mentioned, but not extinguished, the presumption is that the act is fraudulent, and the burden of proof falls on the donee, to show the validity of the donation. 21 A. 195, *Chase v. McCay*.

4. The executor of the donor may continue a suit brought by said donor, to annul a donation *inter vivos*. 30 A. 718, *Eskridge v. Farrar, agent*.

5. The husband cannot dispose of the community effects by gratuitous title. See I. (b), No. 3.

6. Of the action to have the contract set aside. See OBLIGATIONS, VII. (b), 2), B. § 6.

VI. OF DONATIONS MORTIS CAUSA.

(a) *Formalities.*

1) In general.

1. A will in the nuncupative form, made in the State of Mississippi, and attested by only three witnesses, in the absence of any evidence with regard to the laws of the State where it was made, will be, in this State, declared invalid. 15 A. 137, *Abston v. Abston*. See EVIDENCE, XX. No. 2.

2. The following is not a testamentary paper: "New Orleans, 29th November, 1871. Mary, I have shown you notes, for loaned money, for over eighty thousand dollars, secured by first mortgage on valuable real estate. There is a large margin allowed, that is, if house and ground is worth twelve thousand dollars, only six thousand dollars would be loaned on it. If I die, this is for you. Signed, H. Elliot." 27 A. 44, *Succession Elliot*. See (c), 1), No. 3.

3. A document made in this form, "good for ten thousand dollars, payable five years after my death, to ———," dated and signed, is neither good as a promissory note, a donation *inter vivos*, a will, or an onerous contract. 22 A. 358, *Farrar v. Michoud*.

4. The place where a will was made may be proved by parol, *dehors* the will. 28 A. 57, *Succession of Virginia H. Hall, wife of Chas. Robb*.

2) Olographic will.

1. An olographic will, written in *pencil*, is valid. 15 A. 46, *Philbrick v. Spangler*.

2. An olographic will, not entirely written by the testator, is null. 15 A. 286, *Williams v. Hardy*.

3. "New Orleans, September 15, 1859, Mrs. Sophie — is my heiress," written, dated and signed by the testator, is a good olographic will. 21 A. 281, *Succession Ehrenberg*.

4. The rule that an olographic will must be proven by two credible witnesses who have seen the testator often write and sign, does not exclude other and corroborating evidence. 18 A. 444, *Fox v. McDonough's succession*.

5. The date is composed of the year, month and day, any one of which being missing, is fatal. 25 A. 85, *Fuentes et als. v. Mrs. Gaines*.

6. Two credible persons, who have often seen the testator write and sign, are necessary to prove the will. *Ib.*

7. The formalities of the will being complied with, the will should be probated. 25 A. 603, *Halsey v. Halsey*.

8. "At Home Mch 4th, 1870, I this day make my will; I want my wife to keep and maneg all my estate, both reil and personel, deuren her life time and be lowed to sell eney of the land for not less than the appraisement, and I appoint my wife administrator." Signed, —, being entirely written by the testator, is a good will. *Id.*

9. The date of an olographic will may be placed below the signature. 27 A. 273, *Succession Mrs Fuqua*.

10. Article 1655, of the C. C., declares that the olographic testament must be acknowledged and proved by the declaration of two creditable persons, who must attest that they recognize the testament as being entirely written, dated and signed in the testator's handwriting, as having often seen him write and sign during his life time; but this article contemplates the production of the will itself, before the probate judge, and when this cannot be done on account of the will having been secreted or destroyed, other evidence may be admitted to establish its execution and genuineness. 24 H. 553, *Gaines v. Hennen*.

4) Nuncupative will by public act.

1. The interpolation of words accidentally omitted in a will, made in the nuncupative form, by public act, cannot be considered as an interruption or turning aside to other acts. 15 A. 627, *Carter v. McManus*.

2. In all nuncupative wills by public act, where the testator does not sign but affixes his mark, there must be made, under pain of nullity, express mention of the *testator's declaration* of his inability to sign. Express mention is required and it cannot be inferred. The case of *Stafford v. Stafford*, 12 L. 439, is overruled. 16 A. 9, *Shannon v. Shannon*.

3. The expressions, thus done and signed by the testatrix, the witnesses "and the undersigned notary, the said testatrix having declared she could not write, made her usual mark," are sufficient to indicate the "hindering cause" that the testatrix knew not how to sign. 24 A. 628, *Brand v. Baumgarden*.

4. "The said testator being illiterate, signs his mark," does not contain the declaration of the testator in accordance with article 1579, C. C.; the will is therefore null. 26 A. 89, *Succession Whittington*; 28 A. 388, *Succession Mary Carroll*.

5. The following language, although ungrammatical, leaves no ambiguity as to the fact that the concluding part of the sentence was the language of the testator and not an inference of the notary; to-wit: Et le dit testateur ayant déclaré ne rien avoir à ajouter au présent testament, je lui ai donné lecture à haute et intelligible voix en présence des témoins sus nommés et le dit testateur nous a déclaré le bien comprendre et entendre et y persévérer, comme contenant ses dernières volontés, révoquant en outre tous autres testaments, codicils ou autres dispositions pour cause de mort voulant et entendant que le present testament soit seul valable et soit executé dans tout son contenu. 16 A. 136, *Acosta v. Marero*.

6. It is well settled that since a nuncupative will by public act makes full proof of itself, it must bear upon its face the evidence that all the formalities required by law for its validity have been complied with, and they cannot be established *aliunde*. C. C. (1640) 1647; 16 L. 82; 20 A. 203, *Devoll v. Balms*; 21 A. 115, *Succession Wilkin*; 25 A. 480, *Thibodeaux v. Voorhies*.

7. Any language conveying plainly the idea that the will was written by the notary "as dictated," is sufficient. 24 A. 377, *Hoover v. York & Hoover et als*.

8. A statement in a will that the witnesses came with the testator to the office of the notary, that the will was read to the testator in their presence, concluding with "done in presence of —," etc., is not sufficient. 25 A. 663, *Connor v. Brashear*.

9. Express mention must be made that the witnesses were present when the testament was dictated by the testator to the notary, and written by the notary, as dictated. 21 A. 145, *Succession Wilkin*.

10. It suffices if from the whole instrument it can be inferred that the witnesses were present. 26 A. 338, *Rongger v. Kissenger*.

11. LUDELING, C. J. and MORGAN, J., *dissenting*: Express mention thereof must be made. *Ib.*

12. A will written by the notary's clerk is null. 28 A. 452, *Mary Ann King v. Vairin et als.*

13. Parol is admissible to prove that the formalities were not fulfilled. *Ib.*

5) Nuncupative will by private act.

1. Where a nuncupative will by private act is neither dictated as prescribed in art. (1574) C. C., nor presented by the testator to the witnesses, the affirmative answer of the testator to the question whether this was his last will, is not equivalent to the presentation. 16 A. 333, *McCaleb v. Douglass.*

2. A nuncupative will by public act, witnessed by five witnesses, if not good as such, is good as a nuncupative one by private act; the reading to the testator in presence of the other witnesses by the notary who then becomes a witness, is valid. 25 A. 204, *Succession Payne*; 479, *Thibodeaux v. Voorhies, executor.*

3. The validity of the will must be tested under the provisions of articles 1574, 1575, C. C., and no other. 16 A. 219, *Pendergast v. Pendergast*; 10 A. 212.

4. The testator must either dictate his will, or must present the instrument which he has caused to be written, and declare that it contains his last intentions. *Ib.*

5. Dictation means to pronounce orally what is destined to be written at the same time by another. *Ib.*

6. If it will suffice to comply with some formalities in the absence of the witness, *a fortiori*, if all the formalities were carried on in the presence of the witnesses, will the testament be valid. *Ib.*; 11 A. 676, *overruled*; 16 A. 267, *Succession Marigny.*

7. MERRICK, C. J., *dissenting*: It is declared by article (1588), C. C., that the formalities must be observed, or the will is null. The magistrate has no discretion. *Ib.*

8. If the will is not good as a nuncupative will by public act, it will be good as a nuncupative will by private act, if there be four witnesses and the notary present. 16 A. 267, *Succession Marigny.*

9. A paper presented by the testatrix to the notary, in presence of the witnesses, with the statement that said paper contained her last instructions, read by the notary to the testatrix in presence of the witnesses, and copied by him, is a sufficient compliance with the law to render the will good as a private act. *Ib.*

10. MERRICK, C. J., *dissenting*: The dictation must take place in presence of the witnesses, else the will must be written *out of their presence*, and presented afterwards to them as the will of the testator. *Ib.*

11. A nuncupative will under private signature is valid, when the subscribing witnesses, being all present, the will was read by one of them aloud to the testator, who declared that it was his will, thereupon signing it by making his mark. 28 A. 796, *Buntin v. Johnson.*

(b) Particular and universal legacies, and legacies under a universal title.

1) In general.

1. A donation to indigent illegitimate children under seven years of age, and their indigent mother, is not immoral. 25 A. 446, *Succession Milton Taylor.*

2. Where, by a posterior will a legacy is less than in the former will, the first legacy is tacitly revoked. 28 A. 564, *Succession Mercer.*

2) Different kinds, description and requisites of legacies, and the interest passed.

1. "I acknowledge owing to my son, — dollars, money advanced by him to me at different times for various purposes, and I desire that this amount should be reimbursed and paid to him after my death, with eight per cent. interest from this date," constitutes a remunerative legacy. 2 R. 292; 4 R. 397; 13 A. 87; 8 A. 362; 25 A. 371, *Succession Dubreuil.*

2. The legacy of a usufruct, no matter how general, is neither a universal legacy nor one by universal title. It is a particular legacy. 30 A. 272, *Succession Dougart*.

3) Payment of legacies; charges thereon; and debts.

1. The legatees who claim the legacies made to them by the wife, from the succession of the husband, who, in his will, recognized them as valid, are entitled to interest from the day the legacies were due, even if they made no formal demand therefor. 24 A. 125, *Succession Johnson*. See No. 8.

2. Where the legatee has obtained possession of money and assets of the succession, in violation of law, he cannot set up that his possession was in payment of his legacy, in an action by the executor to recover the assets. 21 A. 184, *Morel v. Surgi*.

3. Where a will contains no express bequest of the revenues of the property bequeathed prior to delivery, and no corporeal delivery is made, the legatee is not entitled to said revenues. 26 A. 240, *May v. Ogden, etc., ex'x*.

4. The universal legatee cannot be put in possession by an *ex parte* order. He must demand the legacy contradictorily with the forced heir. 28 A. 154, *Succession Bellocq*.

5. The condition of the will being, that the instituted heirs shall collate, they must comply with the condition. 28 A. 747, *Succession Bougère*.

6. A testator may declare the use to which he destines a legacy to a city, when such destination is for purposes within the range of the powers and duties of its public authorities. 15 H. 367, *McDonogh's Executors v. Murdock*.

7. A particular legacy is to be discharged in preference to all others, out of the funds of the succession; and in default of funds, it is to be paid, as long as the estate is administered by executors, indifferently out of the personal and real estate. It becomes a charge upon the whole estate, and descends to the heir as a personal debt when he takes possession. 1 Woods, 144, *Labatut v. Prewett*.

8. A legacy of money under a particular title, bears interest, only from the day the demand of delivery was formed. 28 A. 603, *Succession Breaux*; 24 A. 125. See No. 1.

9. A legacy, which is "the right to rent at five hundred dollars per month a certain piece of property," the duration of which right is afterwards fixed by the court, and carried into effect by the execution of a lease between the executor and legatee, cannot be afterwards so changed as to reduce the rent. 29 A. 406, *Succession McCloskey*.

(c) *Revocation and caducity of testamentary dispositions; and accretion.*

1) In general.

1. By the death of the legatee, previous to that of the testator, the will would read as if the legatee's name had never been mentioned. 18 A. 410, *Succession Mrs. Foucher*; 7 L. 230.

2. Testaments are more easily avoided than contracts, only in cases of notoriety and interdiction, and not in the amount of intellect required in a testator. 6 A. 106, *Aubert v. Aubert*; 21 A. 59, *Chandler v. Barrett*.

3. An ordinary letter written, dated and signed by the testatrix, not intended as a solemn act, will not revoke a will. 21 A. 451, *Hollingshead v. Sturgis, executor*. See (a), 1), No. 2.

4. A will in possession of the testator, when last seen, and not afterwards found, is presumed to have been destroyed by the testator, *animo cancellandi*. 25 A. 103, *Fuentes et als v. Mrs. Gaines*.

5. The influence to vitiate the will, must amount to force and coercion, destroying free agency; there must be proof of coercion by importunity which could not be resisted. Janin on Wills, 114; 24 A. 387, *Hebert v. Winn*.

6. A bequest to a city is not void, because the testator coupled with it various conditions contrary to public order; such conditions are reputed, not written. 15 H. 367, *McDonogh's Executors v. Murdock*.

7. In suing for property illegally donated, the heirs may prove the violation of the law by every species of evidence. See EVIDENCE, IX. (a), No. 4.

2) Revocation by subsequent will.

1. The act of revocation of a will must be made in one of the forms prescribed by a testament, to be of any validity. 21 A. 451, *Hollingshead v. Sturgis, ex.*

2. For tacit revocation of legacy, see (b), 1), No. 2.

3) Revocation by subsequent birth of a child.

1. The testament falls by the subsequent legitimacy of the children. 24 A. 571, *Succession Caballero*; 26 A. 113, *Caballero v. Maduel, ex.*

2. A will is annulled by the subsequent birth of a legitimate child; the proceedings carried thereunder are without effect. 28 A. 697, *Mrs. J. M. Buelow, tutrix v. A. A. Mandal et als.*

4) Accretion.

1. A legacy to two persons "to be divided equally between them" is a joint one. If but one of them survived the testator he is entitled by accretion to the whole of the thing bequeathed. 93 U. S. Otto, 589, *Mackie et al. v. Story.*

2. Under the following clauses of a will the bequest to the testator's mother having lapsed by her death, which occurred before his, the bequest remained undisposed, and went to the legal heirs of the testator, subject to the widow's legal usufruct: "I give and bequeath unto my mother one-third of the property of which I may die possessed." "I give unto my wife the usufruct, during her natural life, of all the balance of the property of which I may die possessed, and at her death I give and bequeath the whole of said property to my sister's children." 30 A. 268, *Succession Dougart.*

3. Accretion does not take place in favor of the widow, legatee of the usufruct of the balance of her husband's estate, as to the one-third thereof bequeathed to the testator's mother, which lapsed by the legatee's death. 30 A. 271, *Succession Dougart.*

(d) Interpretation of wills.

1. Declarations in a testament will not outweigh the declarations made by the testator in authentic acts. 21 A. 367, *Succession Forsyth.*

2. The word children, used in a will, does not include grand-children. 22 A. 343, *Wharton v. Silliman.*

3. The testator having left in blank the amount of a particular legacy he intended to make; nothing can be given to the legatee. 28 A. 743, *Succession Bougère.*

4. The will of H. S. contained the following dispositions, to-wit: "Item 1st—I give and bequeath my entire estate, of all and every description, to my children and their representatives, it being my wish that the same should be divided among them, in a manner pointed out by law, subject to and under the condition hereinafter expressed. Item 2d—It is my will and wish that my entire estate, in the event of my wife, M. S. Skipwith, surviving me, shall be kept and worked together as it now is, and managed and controlled by her; and that no partition of the same be made among my heirs until the youngest of my children I shall have surviving me, shall have arrived at the age of majority, or become emancipated by marriage, unless my wife should die previously thereto, in which event the partition may take place at her death; my said wife to enjoy the usufruct of my share of the community during her life, as is provided by law; and the net revenues of my separated estate during the time the same shall remain together and undivided, to be divided equally among my said children and heirs." It was shown that at the death of the testator he had no separate property; Held: That the true construction of the will is to consider it as having the usufruct given by the act of 1844 undisturbed, and as keeping the property in a state of indivision for the longest period allowed by law, viz:

for five years; *Held also*: That the right conferred by the will, of keeping of the property together and working the same, implies an accountability on the part of the widow and executrix for the crops only. 15 A. 209, *Succession Skipwith*.

5. Where the condition, upon which the legacy is made, does not happen, the legacy lapses. 29 A. 33, *Succession Mrs. O'Brien*; 7 L. 226.

6. A bequest, which is unambiguous, cannot be changed for the purpose of following the supposed intention of the testator. 29 A. 33, *Succession McAuley, wife of O'Brien*.

7. "I give to E. four thousand dollars; I also give to her, for the benefit of her little daughter, all the furniture," etc., is a naked trust, uncoupled with an interest, and which is to be executed immediately. 29 A. 232, *Succession Cochrane*; 5 N. S. 302; 7 A. 395, *Succession Franklin*; 8 A. 171, *State v. Succession McDonough*; 4 A. 441, *Henderson v. Rost*.

8. Declarations in an act outweigh those in a will. See EVIDENCE, I. No. 9.

9. Parol is not admissible to prove the intention of the testator. See EVIDENCE, XV. (e), No. 8.

10. A direction that the particular legacies be paid out of the revenues of the property, does not authorize the universal legatees, who obtain possession of the estate, to postpone their payment. 30 A. 725, *Eskridge v. Farrar*.

(e) Opening and probating of wills

1) In general.

1. A decree of the probate court ordering a will to be executed, does not amount to a judgment, which is binding on those who were not parties to it, and when the will thus probated is offered as the title, in virtue of which property is claimed or withheld, its validity may be enquired into collaterally. 15 A. 137, *Abston v. Abston*; 2 How. 619, *Gaines v. Chew*.

2. The probate of a will does not estop a legal heir from disputing any of its dispositions, or demanding of the courts an interpretation of the same. 15 A. 209, *Succession of Skipwith*.

3. Legatees, by a former will, who are parties to the probating of a subsequent will, are entitled to be heard when assailing the validity of the will sought to be probated. The object of the probate is to procure the execution of the will. The judgment will be a bar as between the parties, to a subsequent action in nullity. 16 A. 335, *Hollingshead v. Sturges*.

4. The validity of the will must expressly be put at issue, so as to estop the parties from subsequently contesting its validity; the probate establishes a *prima facie* case. 18 A. 444, *Fox v. McDonough's succession*.

5. The State cannot be styled an heir, for it acquires by title of *escheat*; therefore it is not necessary for the party praying for the opening and proof of a will, under article 935, C. P., to give notice to the State. 23 A. 70, *State v. Ames*.

6. The rules for the opening and proof of testaments, commencing at article 1649, C. C., do not pronounce the penalty of nullity for their non-observance, and they nowhere say that other cases may not arise, in which the strict letter of these rules may not be inapplicable, and the judge may not receive, in extraordinary cases, other equally satisfactory proof that the requirements of law have been fulfilled. 11 A. 128; 23 A. 72, *State v. Ames*.

7. In case of a lost or destroyed will or testament, the legatee may establish it by secondary evidence. 11 A. 124; 23 A. 120, *Lucas v. Brooks*.

8. WYLY, J., *concurring*: The olographic testament must be acknowledged or proved by the declaration of two credible persons; this proof is indispensable even if the will be lost or destroyed. *Ib.*

9. TALIAFERRO, J., *dissenting*: A will may be written on as many pieces of paper as a testator may choose. The character and contents of the lost instrument have been sufficiently shown. *Ib.*

10. It seems to be settled that when a will is once admitted to probate in a court of competent jurisdiction, in this or another State, it creates *prima facie*, a presumption that the will was executed and probated in accordance with the

laws of such place, and the party who attacks it must defeat such presumption. 24 A. 388, *Hebert v. Winn*.

11. In order to probate an olographic will, which has been lost, it is necessary that the date be proven, and that the witnesses should swear that they have seen the testator write and sign his name, and that they are acquainted with his hand writing. 28 A., N. R., *Succession of O. J. Donnella*.

12. A legatee, not a witness to the will, is a competent witness to prove any fact in relation to the will. 28 A., N. R., *Succession Mrs. Robb*.

13. When one of two witnesses to a will is dead, the signature of the dead witness should be proven by other witnesses. 28 A., N. R., *Succession Mrs. Robb*.

14. An application to probate a will does not exclude a claim to property disposed of in the will. See ESTOPPEL, No. 8.

15. A will should be probated, although the estate has already been turned over to the legal heir. See MANDAMUS I. (a), 2), No. 6.

16. The prescription of five years is not applicable to a purchaser who, when sued, pleads the nullity of the will. See PRESCRIPTION, III. (g), 4), No. 3.

2) Foreign wills.

1. A foreign will may be probated in Louisiana, before any probate elsewhere. 28 A. N. R., *Succession Mrs. Robb*.

2. A probate in Louisiana of the will of a person who died domiciliated in New York, is valid until set aside in the Louisiana court, though the order of the surrogate in New York, on which the Louisiana probate was rendered, has been reversed in the appellate court. 14 Wall. 113, *Foulke v. Zimmerman*.

(f) By what law governed; and wills made in other States.

For will made in Mississippi, see (a), 1), No. 1.

VII. OF DONATIONS TO, AND BETWEEN MARRIED PERSONS.

1. A donation from one spouse to another, made during coverture, and without the forms of a donation *inter vivos*, is invalid. 15 A. 491, *Atkinson v. Atkinson*.

2. Jewels and other valuables donated by the husband to the wife, and returned by her when her husband was in pressed circumstances, do not constitute a claim against her husband's estate, although he desired to return the same to her. 26 A. 195, *Succession Hale*.

3. A donation by the husband to the wife, in his marriage contract, of \$——, payable out of his succession, creates an obligation against the succession of the husband, which must be discharged in preference to the legacies made by the husband in his will. 29 A. 237, *Succession McCloskey*.

3. The deceased, who had three or more children, bequeathed the whole of his property to his surviving wife; *Held*: That the donation should be reduced to one-third and the balance should accrue to the forced heirs free from the widow's usufruct. 28 A. N. R., *Forstall v. Durel*; C. C. 916, 1493.

5. The manual gifts made by the husband to the wife, during marriage, if extant in kind, become vested in the children, in case the wife should contract a second marriage. See MARRIAGE, IV, No. 6.

6. A widower having children living, cannot give to his second wife more than one-fifth of his property, and that in usufruct only. 15 A. 286, *Williams v. Hardy*.

7. In default of proof of delivery, or of a notarial act, the husband's gifts to his wife are not exempt from the pursuit of his creditors. 30 A. 223, *Kirpatrick, wife of O'Brien v. Finney & Byrnes et als*.

8. SPENCER, J., *dissenting*: The delivery is proved. *Id.*

9. The husband's separate estate, as well as his share in the community, must be computed in calculating the disposable portion in favor of the widow by second marriage. 30 A. 193, *Succession Bollinger*.

DRAINAGE.

1. The mortgage and privilege given by the act of 1835, entitled "an act to provide for the drainage and clearing of the marshy grounds and cypress swamps situated between the city of New Orleans, its incorporated suburbs, and Lake Pontchartrain," does not create a mortgage or privilege with a potestative condition on the part of the property holders; the potestative condition was in favor of the draining company, and the act of the legislature, by its terms, declares that "such privilege and first mortgage," takes precedence over all other mortgages whatsoever contracted after the passage of the law, and attaches to the property. 15 A. 343, *Ranney v. Burthe*.

2. Where a party purchased certain lots of ground in 1847 and 1850, situated within the second draining section, and after the drainage had been completed, the tax assessed, the tableau confirmed by a final judgment, and an order of seizure and sale issued upon the mortgage and privilege given by the act of 1835, against the property, he paid the tax and brought suit against his vendor to recover the amount; *Held*: That in the absence of a special warranty against the mortgage and privilege of the draining company, the action cannot be maintained. 15 A. 343, *Ranney v. Burthe*.

3. Under the provisions of the act of March 10th, 1858, prohibiting the city of New Orleans, at the end of five years, from draining into Bayou St. John, the lessee of said bayou has a right to claim from the city an indemnity for any injury resulting therefrom. 23 A. 208, *Gagnet v. City*.

4. Act No. 49, of 1839, to enforce the mortgage of the New Orleans Draining Company, is fully complied with, if the assessment was made on the whole square bounded by certain designated streets, as belonging to unknown owners, and the advertisement was made of the whole square; it will be presumed that the receiver did his duty and did not find the owner after diligent enquiry; nor is the sale affected by a sale of one-half when the whole is advertised. 24 A. 234, *Clay v. O'Brien*.

5. The city was not bound to continue its draining in Bayou St. John, or to pay anything after it had ceased to drain therein. 26 A. 336, *State ex rel. Gagnet v. Administrator of Public Accounts*.

6. The drainage tax may be collected in advance of the completion of the work. 27 A. 21, *In the matter of the First Draining Commissioners*.

7. Under the drainage act of 1858, the land drained under act No. 49, of 1839, and specially and forever exempted from further assessment, may be taxed for more drainage. *Ib.*

8. More than three hundred and fifty thousand dollars may be assessed by the drainage commissioners, under act No. 191, of 1859. *Ib.*

9. A mandamus may issue, on the application of the pledgee of drainage warrants, to compel the administrators of New Orleans to collect the judgments for drainage assessments. 27 A. 469, *State ex rel. Van Norden v. Administrators, etc.*; 497, *Same v. Same*; 1871, No. 30.

HOWELL, J., *dissenting*: There is no law which makes it the ministerial duty of the administrators of the city to issue writs of *feri facias* on the drainage judgments. *Ib.*

10. Under act No. 30, of 1871, the administrators of the city of New Orleans, are bound to provide funds, by collecting the drainage judgment, to pay the drainage warrants, issued to the Mississippi and Mexican Gulf Ship Canal Company. 27 A. 469, *State ex rel. v. Administrators, etc.*

11. Act No. 30, of 1871, entitled "an act for the draining of New Orleans, does not repeal the act of 1858; a draining tax paid under the first law, cannot be recovered, although the property has not been drained up to 1871, and was not included in one of the draining districts, by the act of 1871. 27 A. 506, *New Orleans Canal and Banking Company v. City*.

12. A sale, under the draining privilege, cancels neither city nor State taxes. 28 A. N. R., *In the matter of the Drainage Commissioners First Draining District; on rule to erase mortgages*.

13. Property situated in the second drainage district, was exempted from drainage by act 30, of 1871, but those who had already paid their tax are not

for that reason entitled to a repetition of the amount. 27 A. 506, *New Orleans Canal and Banking Company v. City of New Orleans*.

14. Act 116 of 1869, provides means for the payment of the debt created for the Mississippi and Mexican Gulf Ship Canal Company. 28 A. N. R., *State ex rel New York Guaranty, etc. Company v. Board of Liquidation*.

15. The legislature has the right to construct a canal, or to authorize a corporation to do the work, and issue its bonds to assist the corporation. 28 A. N. R. *State ex rel New York Guaranty, etc. Company v. Board of Liquidation*.

16. Draining act of N. O., 1858, repealed, 1869, p. 49; the latter repealed, 1870, E. S. p. 5; 1871, p. 75; of Iberia, 1872, p. 89; New Orleans to assume control, 1876, p. 35; certain lands exempt, 1877, p. 6; not a personal judgment and improvement necessary, 1877, E. S. p. 106; 1878, p. 28.

DUELLING.

See R. S. §§ 801, 802.

DUTY.

See IMPOST.

EJECTMENT.

See PETITORY AND POSSESSORY ACTIONS, III. OFFENSES AND QUASI OFFENSES, II. (b). POSSESSION, I. II. PRESCRIPTION, II. (b), 1), c.

ELECTION.

1. Of officers of corporations, see CORPORATIONS, III.
2. For election in contracts, see OBLIGATIONS, VIII. (d.)
3. For election of remedies and pleas, see PLEADING, II.
4. For election of domicile, see DOMICILE, II. COURTS, II. (g), 1).

ELECTION BY THE PEOPLE.

1. The incumbent of an office, who has been defeated by another in an election to the same office, and contests the right of his opponent, will be responsible to him for the fees of the office, pending the contest, should it be decided that such incumbent had no right or claim to hold such office. 15 A. 239, *Petit v. Rousseau*.

2. The act of the legislature entitled "an act relative to elections in the parish of Orleans," approved March 19, 1857, is free from all constitutional objections. 15 A. 426, *State v. Griffin*.

3. Where an election was contested upon the ground that after the commissioners had made their returns they proceeded to count the votes over again and found that there was a difference which would have changed the result; *Held*: That where it does not appear that the mistake was committed on the first counting, any more than on the second, full effect must be given to the official returns of the commissioners. 15 A. 464, *Ramsey v. Callaway*.

4. The act of the legislature, approved March 19, 1857, entitled "an act relative to elections in the parish of Orleans," which provides for the appointment of a superintendent and other officers, is not in violation of the constitution. 15 A. 354, *State v. New Orleans*.

5. This act pertains to the body of laws enacted for the internal government of the State, and forms no part of the police of the city of New Orleans. *Id.*

6. Where the petition discloses that the defendant received a greater number of votes, no cause of action is shown in a contest for an elective office. 21 A. 290, *Fish v. Collens*.

7. The seventh section of the "Eligibility Act" of 1868, No. 39, is unconstitutional. 21 A. 490, *State v. Towne*.

8. One who, after having been parish judge, held the office of clerk of a district court, under the authority of the Confederate States, is not disfranchised thereby. 21 A. 684, *Hudspeth v. Garrigues*.

9. Act No. 164, of 1868, has no application to elections held before its passage; under acts of 1855 and 1856, a party wishing to contest the election must give the opposite party notice within ten days after the closing of the election. 22 A. 66, *Davis v. Maxwell*.

10. Under act No. 100, of 1870, the supervisors of registration have the power to declare where polls should be opened, and the act declares the whole parish, one election precinct. The votes for ward officers may therefore be cast outside of the ward, for which the officers are to be selected. 23 A. 230, *Buckner v. Ruston*.

11. The petition to contest an election should be filed within ten days after the election, not ten days after the result is made known by the State officers. 23 A. 794, *Deslonde v. Lozano*. See No. 21. Appeals in election cases, acts 1855, 415, 416; acts 1856, 9; 1868, 220.

12. The law approved 20th November, 1872, relative to elections, did not repeal or destroy the law No. 100 of 1870. The office of the board of returning officers is not abolished, but preserved. The mode of filling the office alone is changed. 25 A. 11, *State ex rel. Attorney General v. Wharton et al.*

13. WYLY and KENNARD, JJ., *dissenting*: The law of 1872, entirely repealed the act of 1870. *Ib.*

14. The 54th section of act No. 100 of 1870, repeals section 1430 of the Revised Statutes, prescribing the mode of contesting elections; and the party commissioned under the provisions of said act is *prima facie* entitled to the office. 25 A. 127, *Hughes v. Pipkin*.

15. WYLY, J., *dissenting*: Both are co-existent, by holding that act No. 100 of 1870, refers to elections not pending in a contested election suit. *Ib.*

16. "The board of selectmen," of the city of Baton Rouge, can under the eighth section of the city charter, exercise their discretion so far as to determine the right of the officers elected under the charter, but their action is not conclusive and may be reviewed by the courts. 25 A. 311, *State ex rel. Shorten v. Board of Selectmen of Baton Rouge*.

17. The commissioner's return, without any evidence of relator's title to the office, is not sufficient to obtain a mandamus. *Ib.*

18. The law of 20th November, 1872, did not repeal the election law of 1870, which created the board of returning officers. 25 A. 2, *State v. Wharton*.

19. The act of 1872 applies only to elections held under it after its passage. *Ib.*

20. Section 1430 of the Revised Statutes is repealed by act 1870, No. 100. 25 A. 127, *Hughes v. Pipkin*.

21. The suit for a controversy of office must be brought within ten days after the election. 27 A. 305, *Madison v. Dyer*; *Ib.* 541, *State ex rel. Leonard v. Jackson*; N. R. *Belden v. Sherburne*; R. S. 1419; 22 A. 794, *Deslonde v. Lozano*. See No. 11.

22. The returns made by the returning board, and the commission issued thereunder, are conclusive evidence of the right to the office. 27 A. 541, *State ex rel. Leonard v. Jackson*. See OFFICE AND OFFICER, Nos. 22, 23, 24.

23. In a contest for office all relevant facts tending to show who was the real choice of the people, or *would* have been under an honest execution of the election law, is admissible. 29 A. 610, *Webre v. Wilton*.

24. No officer can substitute his own will for that of the people. Courts will undo the wrong and award the right. 29 A. 610, *Webre v. Wilton*.

25. The returns of election made by the returning board are, by the statute creating the board, "*prima facie* evidence until set aside after a contest according to law;" but there is no law providing for such contest; the acts of 1855 are not applicable, nor are the provisions of the Revised Statutes; therefore the courts can entertain no such contest. 28 A. 698, *State ex rel. Moncure v. Antoine Dubuclet*; 13 A. 90; 25 A. 264, 267.

26. WYLY and MORGAN, JJ., *dissenting*: "Until set aside in a contest according to law," clearly gives to the court the right to review the findings of the returning board. This right is to be exercised under the general rules of practice. *Ib.*

27. The mere position of a ballot box, without resulting injury, does not avoid an election. 27 A. 514, *Burton v. Hicks*; 12 A. 366.

28. The failure to comply with the directory clauses of an election law will not annul an election. 27 A. 514, *Burton v. Hicks*; 9 A. 577; 10 A. 732; 1873, p. 15; Cooley's Limitations, 621; 13 A. 301.

29. The disregard of a directory provision of law, such as the return within a certain time of the result of a poll, will not invalidate the election. 29 A. 610, *Webre v. Wilton*.

30. Votes fraudulently cast, and those of disqualified persons, must be rejected. *Ib.*

31. In *Minor v. Happersett*, 21 Wall. 178, the Supreme Court of the United States decided that the constitution of the United States has not conferred the right of suffrage upon any one, and that the United States have no voters of their own creation in the States. In *United States v. Reese et al. supra*, p. 214, it held that the fifteenth amendment has invested the citizens of the United States with a new constitutional right, which is, exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition or servitude; the right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted by the constitution of the United States, but the last has been. 92 U. S., *Otto's*, 543, *United States v. Cruikshank et al.*

32. The State may direct that the city shall pay one-half of the expenses of electing city officers. See NEW ORLEANS, II. (b), No. 1.

33. School houses in Orleans not to be used for elections. 1860, p. 29.

Acts 1870, Nos. 99, 100; 1872, No. 98, bound with acts of 1873, p. 15; 1873, p. 56; 1874, p. 227; repealed, 1875, pp. 1, 29; expenses for blanks, 1875, p. 56; notice of contest when given by clerk, recorder, sheriff, coroner, justice of the peace or other parish or district officer, 1877, p. 26; registrar of voters, 1877, E. S., p. 168; 1878, p. 248; assistant, 1876, p. 163; New Orleans divided into wards, 1878, p. 217; election law, 1877, No. 1; 1877, E. S., p. 89; amended, 1878, p. 150; justices how elected, 1877, E. S., p. 87; congressional districts 1874, p. 116.

EMANCIPATION.

See MINORS, IV. JUDGMENT, XI. (b), No. 13.

ENTRY.

See EVIDENCE, X. (c). EXECUTION, IV. JUDGMENT, IV. PLEADING, V. (b), 1). PUBLIC LANDS, III. (b), 3).

EQUITY.

1. A debt against which a technical defect may be pleaded at law, may be recovered in equity. 95 U. S. (*Otto's*) 644, *New Orleans v. Clark*.

2. See INJUNCTION, II. EVIDENCE, XVIII. JUDGMENT, V. (c). MARRIAGE, VIII. (a), No. 12. MORTGAGE, VI. (c), No. 3.

3. Where the law is silent, equity governs, See COURTS, I. No. 2.

ESTOPPEL.

1. The plaintiff, having alleged that A was an attaching creditor, and having made him a party to the proceedings, is estopped from denying that he is a creditor. 22 A. 252, *Dalton v. Viosca and Weber*.

2. A party who files a plea of *lis pendens* to the claim set up in reconvention, is estopped from averring, in an action to annul the judgment obtained against him in the suit which he set up as *lis pendens*, that he had not been properly cited. 22 A. 368, *Abbot v. Wilbur*; 21 A. 438; 24 A. 272, *Bush v. Dewing*.

3. The defendant having entered into compromise with the plaintiff to pay him the note after a certain lapse of time, is precluded from afterwards contesting the title of plaintiff. 22 A. 429, *Conrad v. Callery*.

4. The principal is not precluded by the assertion of the agent as to his authority, from denying such authority. 22 A. 445, *Smith v. Coon*.

5. One who acquiesces in a judgment by paying a part of it, renounces the means and exceptions that might have been opposed to its payment. 23 A. 27, *Gernon v. Dubois*; 524, *Willes v. Citizens' Bank*. See JUDGMENT, XI. (a), No. 18.

6. By allowing a judgment to be executed, the defendant is not estopped from suing for its nullity. 24 A. 332, *Widow St. Romes v. Carondelet Canal Company*.

7. A wife who, during marriage, has made several payments on a judgment against her and her husband, *in solido*, has, nevertheless the right, after dissolution of the marriage, when for the first time the judgment is sought to be enforced against her, to sue for its nullity, because the basis was a debt of the husband assumed by her. 28 A. 758, *Mrs. F. C. Bienvenu v. Leda and Mathilde Prieur*. See JUDGMENT, X. Nos. 1, 7, 8. MARRIAGE, VIII. (c), No. 1.

8. An application made by the executor named in the will, to have the will probated, is not a judicial admission which would estop the executor from claiming as his own, property disposed of in the will. 15 A. 676, *Carter v. McManus*.

9. The admission of the marriage, in the original answer, will not estop defendant from amending, by alleging the absolute nullity of the marriage. 15 A. 519, *Summerlin v. Livingston*.

10. In a suit for the settlement of the community, the surviving spouse may set up, for purposes of defense, the nullity of the marriage, arising from the fact that the deceased was, at the time of the marriage, legally married to another person; even though he was aware of her condition at the time of their marriage. A party cannot avail himself of his own turpitude as the basis of a demand, yet he is not estopped when he resorts to it for the purpose of defense. *Ib.* See PLEADING, V. (b), 1), No. 6.

11. Where a party has expressly recognized the title of another to property, and thus estopped himself from questioning the validity of such title, a party holding the same property under him as vendee, must be held to a recognition of that title, and must show that he has acquired the same, or fail in maintaining his right to the property. 15 A. 684, *Girault v. Zunts*.

12. Where a creditor has treated with the transferee of his debtor's property, as the real owner, he will be estopped from contesting the validity of the sale. 15 A. 531, *Ross v. Pritchard*.

13. The doctrine in the case of the *same plaintiffs v. McCall*, 13 A. 215, affirmed to the effect that, where in a forced sale of property, a change in the terms more favorable to the seized debtor is made, such a change will not invalidate the sale, it will be presumed to have been made at the instance of the debtor, and he is estopped from contesting it. 15 A. 370, *Nicholls v. Mercier*.

14. When the averment in a petition amounts to an acceptance of a succession, the plaintiff is estopped from contesting a valid title derived from the person to whom he succeeds; he is the warrantor of the title. 15 A. 140, *McQueen v. Sandel*.

15. Allegations in a previous suit, based on the same instrument, and which ended by a non-suit, cannot form matter of estoppel, leaving, as it does, the parties in the same relative position in which they were before its institution. 16 A. 190, *Smith v. Harrell*.

16. Where the pretended owner of a steamboat has repairs made and materials furnished on the credit of his ownership, he cannot escape responsibility by setting up that he was not the owner. 18 A. 559, *Hailey v. Franks*.

17. Where plaintiffs, after knowing that the bonds had been stolen and pledged, accepted the thief's note for the bonds, they thereby ratified the pledge and cannot recover the bonds from the pledgee. 18 A. 147, *Warneken & Co. v. Marchand*.

18. A tutor cannot allege, in defense of his note given to his ward, that he purchased the slave through an interposed person, which he had no right to do. 25 A. 529, *Neilson v. Neilson*.

19. Transferees of a suit, attorneys at law, by appearing as counsel for the transferer and signing the petition, alleging the transferer's ownership subse-

quent to the transfer, are estopped from setting up title in themselves by virtue of said transfer. 25 A. 558, *Pipes v. Norsworthy*.

20. Setting up title under his vendor, the purchaser is estopped from disputing the title of the vendor. *Id.* See PETITORY AND POSSESSORY ACTIONS, I. No. 4; II. (c), 3).

21. Plaintiff being acknowledged as the legitimate child, in the same act others were, cannot contest the legitimacy of the others, and affirm his own; that act is indivisible. 26 A. 26, *Succession Monette*.

22. MORGAN, J., *dissenting*: Plaintiff is not estopped, because his father might in this way make his grandfather his child. *Id.*

23. The officer, as such, having been punished by the Supreme Court for contempt, cannot consider his right to office adjudged. 26 A. 53, *Lynne v. City*.

24. Minors can never be estopped. 16 A. 98, *Zunts v. Courcelle*.

25. Defendant, who sent to plaintiff a draft, is not estopped from denying plaintiff's title to the interest of a partner who had previously died. 16 A. 248, *Skipwith v. Leo*.

26. Defendants who, in an action in boundary, had pleaded in defense to a suit by the vendors, that the quantity delivered was less than that sold, are not estopped afterwards from showing their true lines, which, when so drawn, will make the quantity of land therein less than what had been allowed to them by the court in the first action. 16 A. 314, *Porche v. Lang*. See BOUNDARY, No. 1.

27. Plaintiff having, by judgment, been recognized as mayor of Jefferson City, compromised a suit by injunction, brought by another claimant and recognized his capacity; he thereby waived all his rights to recover his salary from the corporation. 26 A. 342, *Kreider v. City*.

28. Legatees, who ratify the will, cannot afterwards be heard to contest one of the legacies. 26 A. 570, *Heirs of E. A. Johnson v. Bradish Johnson*; 29 A. 406, *Succession McCloskey*.

29. One who rents from his adversary, thereby acknowledges his want of title and recognizes that of his adversary. 26 A. 189, *Johnson v. Dunbar, adm'r.* See EXECUTION, V. (d), 10), No. 2.

30. When a subsequent settlement is made, and defendants acknowledge themselves indebted to plaintiff, they cannot plead usury—where no fraud is alleged. 26 A. 331, *Carruth v. Carter & Brother*.

31. Lessees, who contract with the agent, cannot, when sued, deny his authority. 26 A. 581, *Rochereau v. Lewis*.

32. A debtor who points out property, is estopped from objecting to the sheriff's action. 13 A. 461, *Berlin v. Gilly & Co.*

33. The settlement of a business transaction by note, for the balance due, will be conclusive, where no error is shown. 21 A. 231, *Douglass v. Manning*.

34. The declarations made in an act of purchase, signed by the husband, that the price was paid with paraphernal property, is binding as between the husband and the heirs of the wife. 21 A. 343, *Succession Wade*.

35. In a deed of sale, to a third person, by the husband and wife, the recital that the property is the paraphernal property of the wife, does not estop the heirs of the husband from showing that property belonged to the community. 28 A. 312, *Kerwin et als. v. Hibernia Insurance Company*. *Per contra*, see MARRIAGE, XI. (b), No. 3.

36. Plaintiff in attachment is estoppel from afterwards setting up that the property attached did not belong to defendant. 28 A. 60, *G. Brandon v. Allen & Co.*

37. A transfer of stock regularly made on the books of the company, and recognized by the directors, estops the company from calling on the transferrers for any assessment. 25 A. 436, *Ellison v. Schneider*.

38. The State having based its proceedings against the North Louisiana and Texas Railroad, on act 108, of 1868, affirmed its constitutionality, and is afterwards estopped from urging its unconstitutionality. 28 A. 121, *State ex rel. Morgan's Sons v. Board of Liquidation*. See 25 A. 65; see No. 44.

MORGAN, J. *dissenting*: The State never asserted the constitutionality of the act. *Id.*

39. Where, in a contract of lease, it was acknowledged that the lessee was a free woman of color, by the parties to the contract; *Held*: That the sureties are not estopped by such acknowledgment, from alleging and proving the fact that the lessee and principal obligor was a slave. 15 A. 38, *Levy v. Wire*.

40. A defendant who claims as his, certain property in a judicial proceeding, cannot afterwards enjoin its seizure on the allegation that it belongs to the State, and that he has custody thereof as tax collector. 27 A. N. R. *Howell v. Sheriff et als.*

41. Where the judgment was against J. N. R., but F. J. R., answered and appeared throughout the proceedings, moving for an appeal; on suggesting that the judgment has been rendered against him, he will be estopped from denying that he is the party condemned. 27 A. 490, *Formento v. Robert*.

42. Plaintiff, who recognizes defendant's title, in an authentic act, is estopped and cannot subject the land to his judgment against a third person. 28 A. 107, *Theriot v. Michel*.

43. The insurance company having pleaded the validity of the contract, and obtained judgment therein, cannot be heard to aver afterwards that the contract is *ultra vires*. 28 A. 139, *Delbondio et al. v. New Orleans Mutual Insurance Co.*

44. The State, having in a judicial proceeding, urged the validity of acts Nos. 118, of 1867 and 82 of 1870, is estopped from afterwards urging their unconstitutionality. 28 A. 460, *State v. Richard Taylor*. See No. 38. (*These acts have reference to the lease of the new canal to the defendant*).

45. A married woman is not bound by her declarations in an act of mortgage, that the property belongs to the community. 2 Woods, 151, *Reid v. Rochereau*.

46. All the matters set up having been passed upon in another suit, form the basis of an estoppel. 28 A. 625, *Jacobs v. Frère*.

47. A testamentary executor, not claiming to act for the creditors, cannot sue to set aside as simulated and fraudulent, a sale made by the testator. 23 A. 205, *Van, Wickle v. Calvin*.

48. All admissions made in pleadings, cannot be taken as an estoppel; the defendant who sets up that his title is not valid, when sued for the price, is not estopped from defending his title in an action for the land. 23 A. 647, *Morgan, adm'r v. Kennard et als.*

49. A party is estopped from contradicting, in a subsequent action, what he has judicially admitted to be true, in a previous action between the same parties. 23 A. 764, *Bender v. Belknap*.

50. The defendant is not estopped from disputing plaintiff's claim to the property, because he did not at the time of his bankruptcy surrender the property to his creditors. 23 A. 669, *Ware and Son v. Morris*.

51. The acquiescence in a sale under execution, which would prevent a party from claiming his immovable property, ought to be very clearly shown. 23 A. 138, *Poché v. Thériot, sheriff*.

52. The husband is estopped from denying that the property mortgaged by his wife was not her own separate property, if he has signed the act of mortgage. 23 A. 83, *Stewart v. Boyle*.

53. The purchaser at a succession sale, provoked by himself, and who has been in possession several years, cannot attack his own title. 7 A. 617; 4 L. 61; 15 A. 520; 24 A. 301, *Fellers v. Brown*.

54. Plaintiff, who was a party to all the proceedings, for the distribution of certain shares of stock between the stockholders, cannot be listened to, when urging technical irregularities in the proceedings, so as to enrich himself at the expense of others. 25 A. 228, *Back v. Louisiana Levee Company*; 30 A. —, *Southworth v. Same*.

55. Plaintiff who proceeds with the sale in block, notwithstanding third opponent's application for a separate appraisal of the building on which he claims a builder's lien, cannot be heard setting up that the privilege has been lost by the sale in block. 25 A. 337, *Baltimore v. Parlange*.

56. One who takes possession of his house after the completion of repairs therein, is not estopped on that account, from setting the defects of the work, when sued for the price. 25 A. 518, *Gordy v. Veazie*.

57. Plaintiff who has, in a previous suit, recognized defendants as forming a corporation, without any reference to its having been regularly incorporated, is not estopped from showing that the company has no legal existence as a corporation. In order to estop him there should at least be an admission that the company was entitled to exercise corporate rights and privileges. 16 A. 153, *Spencer Field & Co. v. Cooks*.

58. Where the real owner of the note declares to the drawer that the note belongs to a third person and defendant spends money to purchase claims against such pretended owner, plaintiff cannot be heard afterwards to deny the ownership of such third person so as to defeat the plea in compensation. 18 A. 294, *Laski v. Goldman*; 8 L. 545; 13 L. 132; 4 N. S. 91.

59. The tutrix who makes a donation to the minor cannot be heard to plead the nullity of the act, for want of proper acceptance. 18 A. 152, *Banabé v. Snaër*. See DONATIONS, V. (b), Nos. 2, 3.

60. One cannot do an act which he is at liberty to abstain from, and by a mere reservation, screen himself from the legal consequences of that act. *Protestatio actui contraria non protest*. 18 A. 59, *Succession de Egana*. See EXECUTION, V. (b), No. 9.

61. A party cannot shift his position at will to a contradictory one, in order to defeat the action of the law upon it. 18 A. 141, *Devall v. Succession Watterston*.

62. Where an administrator has placed a debt upon his tableau and made full proof of it, he cannot be permitted, in the absence of proof of error, to question the truth and competency of the evidence adduced by him in support of the correctness of the tableau, when the heirs seek to make him personally liable for his failure to collect the debt. 15 A. 186, *Serret v. Labauve*.

63. The judicial admission that one is the partner in *commendam* of plaintiff and defendant, estops him from at the same time claiming to be a partner by reason of the transfer of plaintiff's interest to him. 29 A. 280 *Latting v. Fassman, Bryant & Co.*

64. One who mortgaged his slaves can afterwards recover no damages for the foreclosure of the mortgage, by setting up that the slaves were his children, born free. 29 A. N. E., *Montané v. Saloy*.

65. The judge who renders a judgment, cannot afterwards be heard as an individual to allege the nullity of the judgment. 29 A. 291, *Osborn v. Legras*.

66. A person cannot avail himself of a lien, the discharge of which has been fraudulently prevented by his own acts. 92 U. S. (Otto's) 171, *Carey et al v. Brown*.

67. Heirs are not bound by receipts given by them to executors, without knowledge of the fraud which has been perpetrated by the latter. 4 H. 503, *Michoud v. Girod*.

68. A national bank which makes a contract not authorized by its charter, cannot repudiate the contract and retain its fruits. 2 Woods, 77, *Casey v. La Société du Crédit Mobilier*.

69. As to action of boundary. See BOUNDARY, No. 4.

70. As to claims not put down on schedule of insolvency. See COMPENSATION, II. No. 6.

71. As to claim against a depositary who has been sued. See DEPOSIT, III. No. 17.

72. The price being distributed to plaintiff, in a tableau of distribution he cannot afterwards contest the sale. See EXECUTION, V. (d), 10), No. 1.

73. An insurance company not bound on a policy in certain cases. See INSURANCE, III. (c), No. 8.

74. The principal, after ratification, cannot deny the agent's authority. See MANDATE, II. (b), No. 6.

75. Plaintiff, who gives credit to the agent individually, is bound by his choice. See MANDATE, IV. No. 2.

76. Declarations of the wife to the judge. See MARRIAGE, VIII. (c), No. 12.

77. Plaintiff, who introduced defendant to a commission merchant, and

obtained advances on the faith of his statement, is estopped from denying the partnership. See PARTNERSHIP, I. (c), No. 3.

78. Effect of false representation of partners to induce another to purchase a partner's interest. See PARTNERSHIP, IV. (a), No. 10.

79. One cannot question the title of the party from whom he holds. See PETITORY AND POSSESSORY ACTIONS, I. No. 4.

80. Defendant in execution cannot recover his property on a simple petitory action; he is bound in warranty. See PETITORY AND POSSESSORY ACTIONS, II. (a), No. 8.

81. Intervenor, who claim as factors, cannot afterwards claim as owners. See PLEADING, II. (a), No. 15.

82. Where a share holder or an obligee under contract with the corporation, is sued, neither is permitted to deny the existence of such corporation. 94 U. S. (Otto's) 680, *Casey v. Galli*.

83. A judicial partition which has been annulled for error and want of jurisdiction in the court, by a judgment which has become final, and the subsequent voluntary acts of the parties based on an error of fact, as to the principal motive, made to carry out the partition, cannot form the basis of an estoppel. 30 A. 405, *Chatenond v. Hebert*.

84. Whoever, by word or act, purposely persuades another that a certain state of things exists which induces him to act, so as to alter his previous position, is estopped from denying the existence of that state of things. 30 A. 50, *Montague v. Weil, Bro.*

85. After appearance in their corporate capacity, defendants are estopped from denying their corporate capacity. 30 A. 711, *Jones v. Trustees of the Congregation of Zion*.

86. The pledgee who sues in his individual name on the pledged promissory note, is not estopped from showing that he is the pledgee. 30 A. 714, *Blouin v. Liquidators of Hart & Hebert*.

EVIDENCE.

I. OF THE RULES OF EVIDENCE BY WHICH COURTS ARE GOVERNED IN THIS STATE.

II. OF MATTERS JUDICIALLY NOTICED WITHOUT PROOF.

III. OF PRESUMPTIVE EVIDENCE.

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| (a) <i>In general.</i> | (d) <i>Judicial proceedings; and discharge of duty by public officers.</i> |
| (b) <i>Fraud and simulation; and presumption of innocence.</i> | (e) <i>Presumption of payment.</i> |
| (c) <i>Presumption of ownership.</i> | |

IV. OF THE MODE AND TIME OF INTRODUCING EVIDENCE.

V. OF BILLS OF EXCEPTION; AND EVIDENCE ILLEGALLY OBTAINED OR RECEIVED WITHOUT OBJECTION.

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| (a) <i>In general.</i> | (c) <i>Necessity of the bill; and effect of evidence received without objection.</i> |
| (b) <i>Mode of objection; requisites and drawing of the bill; its signature and amendment.</i> | |

VI. OF DEMURRING TO EVIDENCE.

VII. OF THE RELEVANCY AND VARIANCE OF EVIDENCE.

VIII. OF THE BURDEN OF PROOF.

IX. OF THE BEST EVIDENCE; AND SECONDARY PROOF OF NON-JUDICIAL WRITINGS, LOST, OR IN POSSESSION OF THE OTHER PARTY.

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| (a) <i>In general, and of promise to pay the debt of a third person.</i> | (d) <i>Appointment of public officers.</i> |
| (b) <i>Notice to produce.</i> | (e) <i>Loss or destruction of primary evidence.</i> |
| (c) <i>Birth, marriage, death, and insolvency.</i> | |

X. OF HEARSAY EVIDENCE; DECLARATIONS OF PARTIES IN THEIR OWN FAVOR; AND DECLARATIONS AS PART OF THE RES GESTÆ.

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| <p>(a) <i>In general.</i>
 (b) <i>General repute, and pedigree.</i>
 (c) <i>Books, accounts, and entries.</i></p> | <p>(d) <i>Transfers of title; and acts and declarations in qualification, or disparagement, thereof.</i>
 (e) <i>Other declarations of parties in their own favor.</i></p> |
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XI. OF THE TESTIMONY OF WITNESSES IN OTHER SUITS OR PREVIOUS PROCEEDINGS.

XII. OF ADMISSIONS.

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| <p>(a) <i>In general.</i>
 (b) <i>Admissions in view of compromise or under threats.</i>
 (c) <i>Admissions by husband and wife; and debtors as against creditors.</i>
 (d) <i>Admissions of agent as against principal, and principal as against surety.</i>
 (e) <i>Admissions by partners.</i>
 (f) <i>Admissions implied from acquiescence and conduct, or upon which others have acted.</i>
 (g) <i>Admissions by account rendered.</i></p> | <p>(h) <i>Admissions by third persons and persons acting in autre droit; those of parties as against privies; and of recitals.</i>
 (i) <i>Unity of admissions; and their general effect when verbal.</i>
 (j) <i>Judicial admissions.</i>
 1) <i>In general.</i>
 2) <i>Their entirety; and sufficiency to relieve from other proof.</i>
 3) <i>Admissions by attorneys, of record.</i>
 4) <i>Admissions as to third persons; of joint parties; parties as against privies; and parties acting in autre droit.</i></p> |
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XIII. OF THE SUFFICIENCY OF EVIDENCE.

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| <p>(a) <i>In general.</i>
 (b) <i>Number of witnesses; and obligations over five hundred dollars in amount.</i></p> | <p>(c) <i>Stale demands and those repelled by presumption of innocence or discharge of duty; laches in producing evidence; or its suppression.</i></p> |
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XIV. OF THE ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT IMMOVABLES, AND PRESCRIPTION.

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| <p>(a) <i>To establish or affect contracts relating to immovables.</i>
 1) <i>In general.</i>
 2) <i>Private sales; agreements to sell; and damages for non-execution of contract.</i>
 3) <i>Public sales; agency and partnership.</i></p> | <p>(b) <i>To show payment of price, circumstances of possession, and boundaries.</i>
 (c) <i>To show other matters.</i>
 (d) <i>To affect prescription.</i></p> |
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XV. OF THE ADMISSIBILITY OF PAROL, TO AFFECT WRITTEN EVIDENCE.

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| <p>(a) <i>Rule of exclusion not applicable to third persons.</i>
 (b) <i>Rule of exclusion not applicable to contemporaneous writings.</i>
 (c) <i>To show incapacity of party.</i>
 (d) <i>To show simulation, to contradict or vary.</i>
 1) <i>In general.</i>
 2) <i>Simulation; consideration; and privies.</i></p> | <p>(e) <i>To explain; ascertain subject matter and its quality; and to show usage.</i>
 (f) <i>To show collateral facts and acts in execution of instrument.</i>
 (g) <i>To show a subsequent agreement or discharge.</i>
 (h) <i>To show fraud, error or usury.</i>
 (i) <i>Bill of lading and receipt.</i>
 (j) <i>Record and judicial writings.</i></p> |
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XVI. OF WITNESSES.

- (a) *Attendance.*
- (b) *Competency.*
 - 1) Laws determining competency.
 - 2) Interest, as affecting competency.
 - A. *In general.*
 - B. *Interest in the result.*
 - § 1 *In general.*
 - § 2 *Warrantors and heirs; insolvency and the revocatory action.*
 - C. *Interest in the question.*
 - D. *Equality of interest.*
 - E. *Opposition of interest.*
 - F. *Agents, servants, and others in employ of parties.*
 - G. *Parties to the action.*
 - 3) Infamy and color, as affecting competency.
 - 4) Marriage, concubinage, and relationship, as affecting competency.
 - 6) Attorneys at law, how far competent.
 - 7) Competency of witness to prove or impeach his own act.
- (c) *Examination and privileges.*
- (d) *Opinions and credibility.*
 - 1) *In general.*
 - 2) *Experts; and opinions of witnesses.*
 - 3) *Mode of impeaching or supporting credit of witnesses.*

XVII. OF THE REDUCTION OF TESTIMONY TO WRITING.

XVIII. OF INTERROGATORIES ON FACTS AND ARTICLES.

- (a) *Right to interrogate; order to answer; and service of interrogatories.*
- (b) *Relative to what they may be propounded.*
- (d) *Answers.*
 - 1) *In general.*
 - 2) *In open court or under commission; and when to be made.*
 - 3) *Relevancy and sufficiency.*
 - 6) *Neglect to answer.*
 - 7) *Effect as evidence.*

XIX. OF COMMISSIONS TO TAKE TESTIMONY.

- (a) *Application and order; issuing commission; and return day.*
- (b) *Affidavit; names and residences of witnesses.*
- (d) *Execution of commission; certificate and seal of commissioner.*
- (e) *Authentication; and proof of commissioner's capacity.*
- (f) *Rule to admit commission; objections to interrogatories, answers, or witnesses.*
- (g) *Other matters.*

XX. OF THE PROOF OF FOREIGN LAWS.

XXI. OF THE AUTHENTICATION AND PROOF OF RECORDS AND JUDICIAL WRITINGS.

- (a) *In general.*
- (b) *Records and judicial writings in this State.*
- (c) *Records and judicial writings from the other States.*
- (d) *Foreign States.*

XXII. OF THE ADMISSIBILITY AND EFFECT OF RECORDS AND JUDICIAL WRITINGS.

- (a) *In general.*
- (b) *Probate decrees; and appointment of curators, tutors, etc.*
- (c) *Sheriff's return; and execution sales.*
 - 1) *In general.*
 - 2) *Execution sales.*
- (d) *Judgments determining marital rights; and those of minors and mortgagees; and revocatory action.*
- (f) *To show rem ipsam, and collateral facts.*
- (g) *Res judicata.*
- (h) *Foreign judgments and judgments in rem.*

XXIII. OF OFFICIAL REGISTERS; PLANS AND SURVEYS.

- (a) *In general.*
- (b) *Assessment rolls.*
- (c) *Auction sales.*
- (d) *Baptism, marriage, birth and death.*
- (e) *Conveyances and mortgages.*
- (f) *Custom house documents.*
- (g) *Land office; plans and surveys.*

XXIV. OF AUTHENTIC ACTS.

(a) *In general.*(b) *Requisites; copies; and admissibility.*

XXV. OF PRIVATE ACTS OR ACTS SOUS SEING PRIVE,

(a) *Production or withdrawal.*(b) *Proof.*(c) *Date, effect, admissibility, and commencement of proof in writing.*✓ *In general.*3) *Comparison of handwriting.*

XXVI. OF THE ALTERATION OF WRITINGS.

XXVII. OF THE AUTHENTICATION AND PROOF OF NON-JUDICIAL WRITINGS FROM OTHER STATES.

XXVIII. OF RECOGNITIVE AND CONFIRMATIVE ACTS.

XXIX. OF UNITED STATES INTERNAL REVENUE STAMPS AS AFFECTING DOCUMENTARY EVIDENCE.

I. OF THE RULES OF EVIDENCE BY WHICH COURTS ARE GOVERNED IN THIS STATE.

1. Evidence called for, *ex-officio* by the judge, after the case is submitted and under advisement, is unauthorized, and will be disregarded on appeal. 15 A. 300, *Sowers v. Shiff*.

2. An order of court entered upon the minutes, is a part of the record; it need not be offered in evidence. 15 A. 451, *Pagett v. Curtis*. See XVIII. (d), 1), No. 3.

3. Although a witness does not recollect the whole conversation of a party, he may, nevertheless, be allowed to testify to what he does recollect; any objection to the testimony on this score, goes to the effect, and not to the admissibility of the evidence. 15 A. 483, *Garrett v. Crooks*.

4. The tendency of modern practice is to enlarge the admissibility of evidence, leaving the court to restrict its applicability. 17 A. 178, *Kaiser v. City of New Orleans*.

5. A party who introduces evidence not admissible under the pleadings, cannot object to the testimony offered by the opposite party to rebut it. 19 A. 516, *Mousseau v. Thebens & Reynolds*.

6. The rule of court prescribing that no private agreement or consent between the parties or their counsel, relative to the progress of any cause, shall be alleged or suggested by either of them against the other, unless the evidence thereof shall be in writing, subscribed by the party against whom it shall be alleged, or his counsel, does not apply to such proof in an action in damages for the issuance of an execution, contrary to such agreement. 19 A. 212, *Johnston v. Yale*.

7. Where the obligors, who have it in their power to avoid all doubts in a contract, fail so to do, the doubts will be construed against them. 20 A. 363, *Mithoff v. Byrne, Vance & Co.*

8. Ambiguity, in the language of a witness, will be interpreted so as to sustain the correctness of the action of the judge *a quo*. 21 A. 629, *Campbell, ad'r v. Thibodeaux*.

9. Declarations made by the testator, in his will, should not outweigh his express acknowledgment in an authentic act, that he had sold the property and received the price. 21 A. 368, *Succession Forsyth*.

10. Courts will not look with much respect upon the sincerity and good faith of litigants when they set up frivolous defenses. Such tactics operate against them in case of conflict of testimony. 23 A. 674, *Ludeling v. Buzman*.

11. The testimony of defendant who was examined as a witness by plaintiff, can be contradicted afterwards. 24 A. 210, *Thomas v. Kennedy & Sewell*.

12. When the testimony of two witnesses is contradictory, the one swearing affirmatively and giving a detail of circumstances, will preponderate. 26 A. 678, *Brigham v. Bussey*.

13. LUDELING, C. J., *dissenting*: Not where the other is an officer; the law presumes he has done his duty. *Ib.*

14. The unimpeached testimony of a disinterested witness must be weighed and cannot be disregarded by the court. 28 A. 682, *Perez & Bethancourt v. New Orleans Mutual Insurance Company*; *Same v. Merchants' Mutual Insurance Company*; 22 A. 308, *H. Lussee v. Hays, sheriff, et al.*

15. The note sued on, need not be offered in evidence, when the defendant pleads its novation and settlement. 27 A. 537, *Spears v. Spears*.

16. The answer is part of the pleadings which make up the case, and need not be offered in evidence. 27 A. 537, *Spears v. Spears*.

17. In probate matters, the law requires the evidence to be reduced to writing. 29 A. 16, *Rheil v. Martin*; C. P. 1042; 16 L. 200, 202, 203.

18. The appellate court will not notice documents that are copied in the transcript, if not indicated in the note of evidence, although they may be annexed to the answer. 9 R. 466, *McAuliffe v. Destrehan*.

19. More weight should be given to the testimony of three witnesses of good standing, than to that of one who contradicted himself while under oath. 29 A. 388, *Reid v. Louisiana Lottery Company*.

20. Documents filed with an answer, cannot be noticed in the appellate court, if they have not been given in evidence on the trial. 22 H. 141, *New Orleans v. Gaines*.

21. Short-hand reporters, 1876, p. 149.

II. OF MATTERS JUDICIALLY NOTICED WITHOUT PROOF.

1. The court will take judicial notice that a litigant is an alien enemy. 16 A. 353, *Succession Beckman*.

2. The judge will take judicial cognizance of the capacity of the levee tax collector, who is an officer appointed by law. 16 A. 440, *Templeton v. Morgan*.

3. The court will take judicial notice of the military orders issued by the commanding general, department of the gulf. 18 A. 497, *Lanfear v. Mestier*; 21 A. 33, *Citizens' Bank v. Dixey*.

4. The court will take judicial notice of all military orders issued by the commanding general, whilst New Orleans was held by the United States troops, and which affected the action of, and the proceedings in the courts of this State. 18 A. 656, *Taylor v. Graham*; 18 A. 497, *Lanfear v. Mestier*.

5. Judicial notice is taken by the courts of orders issued by competent military authority. 20 A. 141, *New Orleans Canal and Banking Co. v. Templeton*.

6. The court will notice judicially who are its attorneys. 21 A. 693, *Monition of Hall and opposition of Lawrence*. See ABSENTEE, II. No. 14.

7. The court will notice from the history of the times that a sheriff could not have demanded any other than Confederate money, for property sold by him. 23 A. 163, *Harvey v. Walden*. See No. 9.

8. Courts are not authorized to take judicial cognizance of the legislative transactions recorded in the journals, to ascertain whether the appointees of the governor were confirmed. 23 A. 377, *Ard v. Bankstone*.

9. The plaintiff, by requiring the sheriff to execute the judgment at the time, when he knew that a sale could only be effected for Confederate money, is presumed to have authorized the receipt of that unlawful currency; hence he cannot recover from the sheriff the amount bid. 23 A. 475, *Spalding & Rogers v. Walden*.

10. No such presumption arises when the plaintiff was a non-resident. *Ib.*

11. A private statute creating a private corporation is not such a law of which the court will take judicial cognizance; it must be offered in evidence. 28 A. 415, *Mandere v. Bonseigneur and New Orleans Savings Institution*.

12. The Spanish laws, which formerly prevailed in Louisiana, will be judicially noticed and expounded by the courts of the United States. They are questions of law, and not questions of fact. 11 H. 663, *United States v. Turner*.

13. The laws of Spain need not be offered in evidence; they were prevailing

in Louisiana after its transfer to the United States; but the laws of France must be proved. 17 A. 228, *Pecquet v. Pecquet*; 5 A. 63; 9 R. 151.

14. The court knows the signature and capacity of a tax collector. See EXECUTORY PROCESS, II. (a), No. 2.

III. OF PRESUMPTIVE EVIDENCE.

(a) *In general.*

1. The presumptions arising from the facts which tend to establish the status of marriage is not conclusive, but subject to be rebutted by testimony negating the fact of marriage. 15 A. 46, *Phillbrick v. Spangler*. See MARRIAGE, IV. No. 1.

2. The court will not presume a usurious contract. 20 A. 569, *Johnson v. Succession Robbins*.

3. When two commissions are before the court for the same office, the presumption is in favor of the last issued. 19 A. 211, *Dubuc v. Voss*.

4. The presumption is that an officer has been properly removed when the law provides for his removal in certain cases. 25 A. 74, *State ex rel Richardson v. Graham*.

5. The subscribing witnesses to a contract made out of Louisiana, are presumed to be non-residents of this State. See IX. (e), No. 17.

6. Presumption as to internal revenue stamps. See XXIX.

7. When attorney's fees are presumed to be abandoned. See EXECUTORY PROCESS, II. (b), 1), No. 2.

8. A judgment rendered in another State is presumed valid. See JUDGMENT, XIII. No. 5.

9. The husband is presumed to administer his wife's paraphernal property. See MARRIAGE, XI. (b), No. 10.

10. If there be no community, there can be no presumption that the property belongs thereto. *Ib.*; XII. No. 1.

11. Property is presumed to belong to the community, but that presumption may be rebutted. See MARRIAGE, XIII. (a), No. 10.; (b), 1), Nos. 1, 2; XIII. (e), 4), B.

12. The wife is presumed to have renounced, if she does not accept the community, after divorce. See MARRIAGE, XIII. (e), 3), Nos. 1, 2.

13. The notary who certifies an act as custodian of the notarial archives, will be presumed to be such. See NOTARY, No. 1.

14. For presumption of legitimacy, see PARENT AND CHILD, I.

15. For presumption as to death, see SUCCESSION, II., Nos. 6, 7.

16. It will not be presumed that the amount in dispute exceeds five hundred dollars, simply because two judgments, rendered by a district court, were enjoined; they may have been reduced by pleas of payment, compensation, etc. 30 A. 660, *Wade v. Loudon, sheriff*.

(b) *Fraud and simulation; and presumption of innocence.*

1. Fraud is never presumed, but must be proved with legal certainty. 18 A. 123, *Bridgeford & Co. v. Simonds*.

2. The precarious possession of property by the vendor after the sale, raises the presumption that the sale is simulated. 21 A. 463, *Guice v. Sanders*. See No. 6.

3. Good faith in contracts is always presumed, the onus of proof is on him who alleges bad faith. 24 A. 299, *Succession Navarro*.

4. Fraud and simulation, may be proved by any means in the power of the party alleging either. 23 A. 435, *Pendleton v. Eaton and Barstow*.

5. A sale *in globo*, when the vendor remains in possession, and carries on the business as usual, when no price is shown to have been paid, is presumed fraudulent and simulated. *Ib.*

6. Simulation is presumed, when the vendor remains in possession. 28 A. 357, *Richardson v. Cramer*.

7. For same presumptions, see OBLIGATIONS, VII. (b), 2), c. § 3.

8. Property sold, remaining in possession of the vendor, raises the presumption of simulation. See SALE, III. (b), 4), A. Nos. 2, 4.

(c) *Presumption of ownership.*

1. Where the vendor of property remains in possession until his death, it cannot be recovered from his succession under a title by transfer from the deceased, unless the claimant establishes good faith, and the reality of the sale. 15 A. 555, *Louisiana v. Baillio*.

2. Possession of a note is only *prima facie* evidence of its being due to plaintiff. This may be disproved by testimony. 18 A. 194, *Stewart v. McDonald*.

3. Every species of property found on a person's possession at the time of his death, is presumed to belong to him. 18 A. 337, *Succession Alexander*.

4. A possessor of property is not bound to prove the verity of the sale attacked for simulation; the burden of proof is on the party attacking. 21 A. 647, *Sellers v. Sellers*.

5. All constructions are presumed to have been made by, and to belong to the owner of the soil. 23 A. 139, *Poché v. Theriot*.

6. Unless the contrary be shown, the court will presume, that the persons signing an application for banquettes, are owners, and constitute the required one-fourth. 27 A. 57, *O'Hara v. Blood*.

7. The presumption of ownership flows from long usage. See NEW ORLEANS, I. (a), No. 1.

8. Plaintiff, in a petitory, action must rebut the presumption of ownership resulting from defendant's possession. See PETITORY AND POSSESSORY ACTIONS, I. No. 3; II. (a), No. 1; (c), 1), Nos. 1, 2.

(d) *Judicial proceedings; and discharge of duty by public officers.*

1. The law makes it the duty of the sheriff to pay all the taxes due on the property at the date of sale, and the presumption is, that he did so, and that they were included in the charges paid by the purchasing plaintiff. 17 A. 44, *Freidlander v. Bell*.

2. Where the parish judge issued a commission to take testimony in a case pending before the district court, under act 1868, No. 9, although it is not made to appear that he had before him the evidence required by the statute to grant the commission, the law presumes that he did his duty. 22 A. 84, *Louisiana State Bank v. Buhler*.

3. The certificate of a municipal surveyor may be contradicted by parol. 23 A. 30, *Rooney v. May*.

4. When defendant does not show the judgment of another State, properly certified, to be contrary to its laws, the court will apply the maxim "*omnia præsumentur rite esse acta*," and give full force to the decree. 24 A. 222, *Graydon v. Justus*.

5. On the trial of an injunction taken against a tax judgment, on the ground of want of advertisement as a citation, the proceedings of the tax suit were offered in evidence, but not the evidence upon which the judgment was rendered; *Held*: That the presumption is that the judge had sufficient legal evidence before him to render the judgment in the tax suit. 28 A. 851, *Stoner v. Flourney*.

6. In the absence of evidence to prove the petition and publication for the construction of a banquette, the court will presume that the city authorities complied with the law. See NEW ORLEANS, II. (e), 4), No. 1.

7. When the transcript of appeal contains no evidence, it will be presumed that the court acted upon proper evidence. 30 A. 629, *State v. Nicol & Bowman*.

(e) *Presumption of payment.*

1. The presumption of payment, arising from the possession of the notes, is of little or no weight, where the creditor is the mother, an aged and illiterate person, living with her sons, the debtors, depending upon them for the transaction of her business, and having her papers always within their reach, if not in their custody. 16 A. 295, *Leblanc v. Bertaut*.

2. The erasure of the mortgage securing the notes, adds nothing to strengthen the presumption. 16 A. 295, *Leblanc v. Bertaut*.

3. At the time of the pretended payment of large sums, if the defendants are proven to be in great want of funds, mortgaging heavily their property, the presumption is rebutted. *Ib.*

4. Where several years elapsed without any claim being made against the city, and a last installment was duly paid over, and nothing short of fraud and collusion between two officers of the city could account for the fact that the warrant, not indorsed by plaintiff, and found in the treasurer's office, never was in possession of plaintiff, the plea of payment will be maintained. 16 A. 374, *Cronan v. City*.

5. Receipts are *prima facie*, but not conclusive evidence of their purport. 20 A. 276, *Dunn v. Pipes*; 21 A. 175, *Draughton v. White*. See XV. (d), 1), No. 2. For evidence of payment, see PAYMENT, VI.

6. A note cancelled is not always proof of its payment. See EVIDENCE, XIII. (c), No. 1.

7. A mere discharge, whereby the wife acknowledges the receipt of a sum of money, will not rebut the presumption that the husband administers the wife's paraphernal effects. See MARRIAGE, XI. (b), No. 11.

8. The presumption is, that the tutor has done his duty. See MINORS, III. (f), 1), No. 1.

IV. OF THE MODE AND TIME OF INTRODUCING EVIDENCE.

1. A party cannot be controlled in the order of introducing his evidence. 26 A. 252, *Gusman v. Hearsey*.

V. OF BILLS OF EXCEPTION; AND EVIDENCE ILLEGALLY OBTAINED OR RECEIVED WITHOUT OBJECTION.

(a) *In general.*

1. Where, by agreement of counsel, all the evidence taken in writing on a previous trial, was to be received, subject only to the exceptions that might be made to its admissibility on appeal, the Supreme Court will not notice bills of exception which were taken on the previous trial. 15 A. 57, *Thompson v. Parent*.

2. Where witnesses have been offered and cross-examined without objection, and written evidence offered and received without a proper and intelligible exception reserved, the party against whom such oral and written evidence has been given, cannot be heard to object in the Supreme Court to its admissibility. 15 A. 694, *Heiss v. Corcoran*.

3. If illegal evidence be admitted, and the bill of exception taken thereto be not brought to the notice of the court, the evidence will be considered. 20 A. 306, *Draper v. Richards*.

4. See BILLS OF EXCEPTION.

(b) *Mode of objection; requisites and drawing of the bill; its signature and amendment.*

1. Where a memorandum of objection to the admission of a document offered in evidence, was found in the record; *Held*: That unless the grounds of objection are stated, such a memorandum cannot be noticed by the Supreme Court as an exception to evidence. 15 A. 694, *Heiss v. Corcoran*.

2. The evidence offered and ruled out, being annexed to the bill of exception, was considered by the Supreme Court. 16 A. 192, *Morrison v. White*.

3. Objections to the ruling of the judge, *a quo*, cannot be made on appeal, if not made in the court below, and excepted thereto. 16 A. 181, *Stewart v. Harper*.

4. A bill of exception which does not state the particular grounds of objection to the testimony, will not be considered. 16 A. 285, *McCloskey v. Central Bank*.

5. In testing the admissibility of the evidence, the court must confine itself

to the bills of exception, and cannot look into the evidence offered to see if it would not be admissible on other grounds. 16 A. 356, *Mestier v. Opelousas Railroad*.

6. If the evidence, improperly excluded, be in the record, it will be considered without remanding the case. 19 A. 270, *Beebe & Co. v. Kaiser & Bryan*; 14 A. 61; 13 A. 445; 12 A. 12, 50; 11 A. 404.

7. Where the rejected depositions are annexed to the bill of exception, they can be considered as evidence, if the bill be well taken. 20 A. 444, *Finley v. Bogan et al.*

8. The particular grounds of objection to the evidence, must be stated in the bill of exception. 20 A. 96, *Bogan v. Finley et als.*

9. A bill of exception must state the grounds of objection to the evidence which was rejected. 21 A. 635, *Richard v. Beauchamp*; 20 A. 138.

10. The evidence being annexed to the bill of exception, was considered by the court, the bill being well taken. 25 A. 630, *State ex rel. Livingston, etc. v. Graham*.

11. Short-hand reporters, 1876, p. 149.

(c) *Necessity of the bill; and effect of evidence received without objection.*

1. The admissibility of evidence given of facts not alleged in the petition, should be objected to when offered, and the point reserved; otherwise it will be considered as if it had been responsive to an allegation in an amended petition, filed with consent of the opposite party. 15 A. 304, *England v. Grison*.

2. Full effect is given by the Supreme Court to evidence received in the inferior court without objection. The party against whom evidence is offered, the introduction of which might be resisted, must object at the time it is presented, and if his objections are overruled, take a bill of exception. 15 A. 389, *New Orleans v. Congregation Dispersed of Judah*. See OFFENSES AND QUASI OFFENSES. II. (b), No. 1.

3. Full effect will be given to evidence received without objection, although the pleadings do not put the point at issue. 16 A. 273, *Barbet v. Roth*. See JUDGMENTS, V. (a), No. 4.

4. Evidence received without objection, by way of reconvention, will be considered as if the formal plea had been made. 17 A. 37, *Kean v. Brandon*; 4 A. 193; 5 A. 184; 9 A. 255.

5. A party who, without opposition, suffers evidence to be adduced contrary to or beyond the allegations contained in the pleadings, is bound by its effect, so that after the admission of the evidence it matters not if the judge should strike out that portion of the pleadings. 20 A. 241, *Hennen v. Gilman*; 18 L. 328.

6. Parol evidence received, without objection, to prove the charter of a corporation, will be considered. 18 A. 310, *Monahan v. Hall*.

7. Evidence admitted without objection will be weighed and considered. 20 A. 379, *Nusbaum & Bro. v. Marks & Co.*

8. Even if parol evidence has been received without objection to prove a promise to pay the debt of a third person, the evidence cannot be considered. 23 A. 747, *Merz v. Labuzan & Carter*; 24 A. 401, *Levy v. Dubois*. See IX. (a). BILLS AND NOTES, V. (e) No. 2.

9. The objection made to the appointment of experts, under act 1858, of March 10th, to value the damages occasioned by the city in draining into Bayou St. John, was waived by admitting the report of the experts without objection. 23 A. 208, *Gagnet v. City*.

10. The act of 1858, which declares that parol evidence shall not be received to prove any promise to pay the debt of a third person, must prohibit the court from giving any effect to such evidence, even if received without objection. 24 A. 401, *Levy & Dieter v. Dubois et al.*; 23 A. 747, *Merz v. Labuzan*; 26 A. 221, *Baker & Thompson v. Widow Pagaud*. See IX. (a).

11. Parol, when admitted without objection to show that the written acknowledgment had reference to the claim sued on, will be considered. 25 A. 513, *Banker v. Durand, Jr.*

12. A partition of real estate may be proved by parol, if the evidence be received without objection. 26 A. 160, *Johnson v. Labat*.

13. In a suit against the indorsers, where the note is received in evidence, without objection, it is not necessary to prove defendant's signature. 26 A. 536, *Lewis v. Fairbanks, etc.* See **BILLS AND NOTES, XII. (a)**.

14. Defendant who objects to the evidence on an untenable ground, will be bound by the proof, although he had valid objections which he could, but did not urge thereto. 30 A. 397, *Mitchell v. D'Armand*.

VI. OF DEMURRING TO EVIDENCE.

1. Demurring to evidence at common law, happens where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law. 'Tomlins' Law Dictionary *verbo* demurrer.

VII. OF THE RELEVANCY AND VARIANCE OF EVIDENCE.

1. In an action for damages, evidence is inadmissible to prove damages of a different character than those set forth in the pleadings. 15 A. 51, *Roberts v. Hyde*.

2. In a suit brought on a special contract, evidence may be received to prove the value of the work or labor performed under the contract, but the plaintiff is not entitled to a judgment for more than the stipulated price, as his claim is based on the contract and not on a *quantum meruit*. 15 A. 69, *Lacroix v. Tournillion*.

3. An uncertainty in the description of the property sold constitutes no objection to the admissibility of the act of sale in evidence. 15 A. 235, *Carpenter v. Featherston*.

4. A variance in the bill of sale as to the names of the vendors, is a variance in the substance itself and will exclude it as evidence. 15 A. 305, *Shaw v. Noble*.

5. In actions upon contracts and deeds, if any part of the contract proved, or deed described, should materially vary from the contract, or deed, as stated in the pleadings, this will be fatal. *Ib.*

6. Where it was sought to make parties liable for the price and debts of a boat, as owners, under a title derived from the plaintiffs at a certain period; *Held*: That evidence under a different title could not be received. *Ib.*

7. Evidence is inadmissible to establish payment or compensation of a debt, unless specially set up as a defence to the action. 15 A. 670, *Ruhlman v. Smith*.

8. In a suit upon a due bill, where there was a variance between the initials of the man with which the bill was signed, and the allegation of the petition as to the name of the person by whom the bill was drawn; *Held*: That a judgment of non-suit should be rendered, unless the plaintiff amend his pleadings, or at least adduce proof of the fact that they were the same person. 15 A. 693, *Hereford v. Lake*. See **BILLS AND NOTES, XII. (d)**.

9. The schedule of the husband's insolvency, although filed after the wife's judgment has been obtained, is admissible in evidence, to show the husband's embarrassed circumstances, and is not to be considered as *res inter alios acta*. 16 A. 369, *Roubien v. Bell and Haggerty*.

10. When defendant denies that he employed plaintiff by the year, and if he *did*, pleads that he had good cause to discharge him, because he was altogether incompetent, evidence should be received to prove the incompetency. 16 A. 189, *Webre v. Gaillard*. See **PLEADING, II. (a)**.

11. Where the answer designated the defendant, as the New Orleans and Bayou Sara Mail Company, instead of leaving out the word mail, the charter may be received in evidence. The variance is unimportant where there is no doubt of the identity of the company. 18 A. 218, *Bridgeford v. Hall et als.*

12. Plaintiff who claims the nullity of the donation, may prove that the legatee is the illegitimate child of the testator. 18 A. 591, *Bennett v. Cane*.

13. Where a *written* contract is alleged, no evidence of a *verbal* one is admissible. 19 A. 531, *Duplantier v. Michoud*.

14. Plaintiff in injunction, must prove the allegation of his petition. 19 A. 276, *Boutté v. Maillard*.

15. In a revocatory action, the allegation and proof of insolvency of the debtor is most essential, and unless alleged, no evidence thereof can be received. 19 A. 290, *Abat v. Penny*.

16. Proof that the draft was based on Confederate money, is inadmissible when that issue is not raised. 21 A. 342, *Caldwell v. Neil*.

17. In a distribution of funds, no evidence is admissible, to contest the reality of the judgment, it having been rendered and recorded before the existence of third opponent's claim. 22 A. 416, *Hay v. Scott*; 10 A. 564; 6 A. 89; 2 A. 174.

18. Plaintiff cannot complain, if he has provoked enquiry in regard to the real interest and consideration of the mortgage, of its being pushed to the extent of finding the real truth. 22 A. 286, *D'Meza v. Générés*. See XV. (j), No. 7.

19. Evidence impugning the motives of the attorneys, who bring the suit, is irrelevant to the matters at issue. 21 A. 455, *Rogers v. Morrison*.

20. Evidence tending to establish bribery and corruption against the members of the general assembly, is inadmissible. 22 A. 545, *State ex rel. Belden v. Fagan*.

21. Plaintiff cannot prove what he has not alleged. 22 A. 479, *Dubuys v. Farmer*.

22. The specifying of some of the ways by which plaintiff has been imposed upon, does not preclude him, under the general allegation of fraud, from giving evidence of other acts of deception. 21 A. 573, *Miller v. Bedell*.

23. Where the law provides what shall be the duration of a lease in the absence of any express agreement, no evidence of usage or custom in this regard, can be received. C. C. 2655; 22 A. 378, *Jackson et al. v. Beling*.

24. It is competent for plaintiff to prove notice of dishonor by parol, although he alleged the fact as appearing by the certificate of notice of protest. 22 A. 479, *Dubuys v. Farmer*.

25. Evidence which tends to establish *res inter alios acta* is totally irrelevant, and should not be admitted. 23 A. 244, *Berry v. Marshall*.

26. Having sued for the value of the work as a whole, plaintiff should be allowed to prove the separate value of each item which made up the whole, and the remedy of the adverse party, if taken by surprise, is an application for a continuance. 25 A. 518, *Gordy v. Veazie*.

27. When sued upon a *quantum meruit*, the defendant may offer in evidence a bill rendered to him by the plaintiff on the completion of the work, for a less amount than the one claimed. 25 A. 519, *Gordy v. Veazie*. See PLEADING, V. (a), 3), D. No. 2.

28. One suing for damages, as owner, cannot prove that he was a charterer. 26 A. 306, *Drew v. Attakapas Mail Transportation Co.*

29. The petition having declared upon an account furnished during 1870, and 1871, an item "account rendered dated April, 1870," not purporting to be for supplies for said years, and being too vague, does not support evidence to prove said item. 26 A. 168, *Moore v. Gordon*.

30. Where the act declared upon is designated as authentic, it is admissible under the pleadings, even if only one witness signed the same. 27 A. 107, *Morfit v. Fuentes*.

31. Where the allegations in an action of damages are, that plaintiff was walking on the neutral ground of a street, he may prove that he was on the railroad track. This is not the substance of the issue to be proved. 27 A. 53, *Johnson v. Canal and Claiborne R. R. Co.*

32. No testimony is admissible to prove another settlement than as alleged in the pleadings, which declare upon certain documents in writing. 28 A. 181, *Gaudé v. Gaudé*.

33. The attorney may prove that he was employed by the agent, although this fact be not alleged. 28 A. 459, *Barrow and Pope v. Brown, ad'r*.

34. In a revocatory action, insolvency unless alleged cannot be proved. See OBLIGATIONS, VII. (b), 2), c. § 2.

35. In default of allegations that an act of the legislature was not legally passed, the journals of the two houses to prove such fact, is inadmissible in evidence. 30 A. 350, *Choppin & Beard v. Louisiana Levee Co.*

VIII. OF THE BURDEN OF PROOF.

1. A party who pleads prescription is bound to prove the facts necessary to sustain the plea. 15 A. 332, *Succession of Montamat*; 16 A. 353, *Succession Beckman*.

2. Plaintiff must prove that the draft is valid as to the wife, where it is drawn by the husband and wife. 15 A. 485, *Adams v. Curry*.

3. A partner who complains of error in the settlement of a partnership account, approved by the signatures of the partners, should make it appear by proof. 15 A. 493, *Bry v. Cook*.

4. The burden of proof is on the party who has to support his case, by proof of a fact of which he is most cognizant. 15 A. 509, *Rugely v. Gill*.

5. When one of the parties to a suit has more means of knowledge concerning a matter to be proved, than the other, the *onus probandi* is on him. 15 A. 663, *Bowman v. McElroy*.

6. Where the vendor remains in possession under a clause in the contract of sale, the vendee, in order to recover the property, must refute the presumption of simulation, by establishing the reality of the transaction. 15 A. 582, *Sullice v. Gradenigo*. See OBLIGATIONS, VII. (b), 2), c., § 3, Nos. 1, 5.

7. Where the return to the citation is that it was served at domicile, this is *prima facie* evidence of domicile and the *onus* is on defendant to show the contrary. 20 A. 246, *Alter v. Waddel*; 9 R. 243; 15 A. 533; 1. A. 79; 17 A. 61.

8. Defendant, who pleads payment, must prove the same. 18 A. 228, *Irwin v. Gernon*; 243, *St. Armand v. Alexander*; 23 A. 84, *Gernon v. McCan*.

9. Plaintiff, having shown his title to the horse claimed, it devolves on defendant to show a legal divestiture of plaintiff's title. 19 A. 12, *Sullivan v. Goldman*. See PRESCRIPTION, II. (c).

10. The burden of proof is on intervenor to make out his title. 20 A. 468, *State v. Louisiana State Bank*.

11. Where the note appears on its face to be prescribed, it devolves on plaintiff to defeat the plea. 20 A. 565, *Schlenker v. Taliaferro*; 21 A. 293, *Offut v. Chapman*.

12. Where the authority of the agent is denied, the party alleging, must prove the agency. 21 A. 592, *McCarthy v. Strauss et al.*

13. The burden of proof falls on a defendant averring a settlement in full. 22 A. 106, *Coleman & Kirk v. Mollère & Cire*. See PARTNERSHIP, II. (a), No. 7.

14. The party alleging want of skill or diligence, must prove the same. 23 A. 584, *Kirk v. Folsom*.

15. Plaintiff must prove, affirmatively, the interruption of prescription. 26 A. 245, *Alter v. McDugal*.

16. The *onus* is on the defendant to establish his special defense. 24 A. 288, *Bayley & Co. v. J. C. Jeneven*.

17. It is incumbent on the adjudicatee to show that the title offered is not good. 24 A. 431, *Succession Williams*.

18. The burden is on the defendant to prove the custom set up against plaintiffs. 19 A. 481, *Domingo v. Merchants' Mutual Insurance Company*.

19. On a plea of want of consideration, a married woman who borrowed, under the authorization of the judge, must prove the plea. 26 A. 402, *Feltus v. Blanchin & Giraud*. See MARRIAGE, VIII. (b), Nos. 1, 6, 10.

20. The burden of proof is on the insurance company to prove the violation of the contract of insurance by plaintiff. 29 A. 764, *Bréard v. Mechanics' and Traders' Insurance Company*.

21. Plaintiff in injunction, who alleges that no notice of seizure had been served on him by a competent officer, must prove the same. 28 A. 842, *Baird v. Brown*; 9 M. 48; 13 L. 493; 2 A. 503; 13 A. 215; 3 A. 146; 3 N. S. 576; 6 A. 175.

22. As to consideration of promissory notes, see BILL AND NOTES, IV. (b); MARRIAGE, VIII. (d).

23. The burden is on the insurance company to prove that the insured killed himself. See INSURANCE, II. No. 6.

24. The owner must prove the cause of the ship's loss. See INSURANCE, III. (d), 2), Nos. 1, 2.

25. Plaintiff, in an action of nullity, must prove the want of citation. See JUDGMENT, XI. (a), Nos. 15, 16.

26. For burden of proof in suits for separation of property, see MARRIAGE, XIV. (c).

27. The authorization of the judge, given to a married woman to borrow money, shifts the burden of proof on the wife. See MORTGAGE, III. (b), No. 2.

28. He who alleges simulation, must prove it. See OBLIGATION, VII. (b), 2), c. § 3, No. 3.

29. Plaintiff, in a petitory action, must prove his title. See PETITORY AND POSSESSORY ACTIONS, I. No. 3; II. (a), No. 1; (c), 1), Nos. 1, 2, 3.

30. On an exception that the plaintiff partnership was not properly described, the burden of proof is on plaintiff. See PLEADING, I. (c), 7), No. 1.

31. Burden of proof as to ownership of a boat. See SHIPPING, II. No. 1.

32. The tax collector who proceeds summarily, on being enjoined, must prove that the formalities of law have been fulfilled in the assessment and other proceedings. 30 A. 627, *Clinton and Port Hudson Railroad Company v. Tax Collector*.

33. He who alleges that a law has not been promulgated, must prove it. 30 A. 647, *State ex rel. Rills v. D. N. Barrow*.

34. The minor who acknowledges to have received the item charged against him, but avers that the amount was derived from another source than set forth by the tutor, assumes the burden of proof. 30 A. 735, *Brown v. Bessou*.

IX. OF THE BEST EVIDENCE; AND SECONDARY PROOF OF NON-JUDICIAL WRITINGS, LOST, OR IN POSSESSION OF THE OTHER PARTY.

(a) *In general, and of promise to pay the debt of a third person.*

1. It is not necessary that the contract of affreightment should be in writing, and parol evidence of any special agreement is therefore admissible. 15 A. 103, *Roberts v. Riley*.

2. Where a party offered in evidence, as proof of marriage solemnized in the State of Indiana, a certified copy, duly authenticated, of the record of the marriage license, and certificate of marriage of the minister who celebrated the same, from the county circuit court of the United States, and at the same time offered the Revised Statutes of Indiana, relative to "marriage," and to the "clerks of the circuit court;" *Held*: That such testimony is admissible to establish the marriage. 15 A. 313, *Succession Taylor*.

3. Parol evidence is admissible to prove that the contracting parties were in good faith, and that the marriage was consummated. 15 A. 313, *Succession Taylor*.

4. In suing for the property illegally donated, the heirs are not required to produce a counter letter, but are allowed to prove the violation of the law, by every species of evidence, oral as well as written. 15 A. 599, *Lazare v. Jacques*.

5. Extra-judicial declarations are the weakest species of evidence known to the law. 16 A. 255, *Penn v. Crawford*; 168, *Chapman v. Woodward*; 20 A. 15, *Weaver v. Anfoux*. See XII. (a), No. 1.

6. Parol testimony of extra judicial admissions by a deceased person is the weakest kind of evidence, but if supported by other facts, it may establish a claim. 18 A. 617, *Cabler v. Succession Abels*.

7. The loose declarations of a party since dead, made in conversations, is the weakest kind of evidence, and is entitled to little or no weight. 24 A. 604, *Bland v. Loyd*.

8. Parol is admissible to show under what circumstances and for what pur-

poses payments were made on the notes, and it does not establish a debt against a dead person. 27 A. 134, *Pemberton et al v. Magnan*.

9. Heirship may be proved by parol. 18 A. 591, *Bennett v. Cane*.

10. Oral evidence is admissible to prove relationship. 26 A. 127, *Boe v. Filleul*.

11. Parol is admissible to prove a commercial partnership. 17 A. 9, *Villa v. Jonte*.

12. A planting partnership may be proved by parol. 25 A. 593, *Battle v. Jenkins*.

13. Where the letters in possession of the adverse party could not be obtained, their contents may be proved by the next best evidence. 19 A. 93, *Merritt v. Wright*.

14. Possession and enjoyment of servitudes of way and drain, are matters of fact, which can be established only by parol. 20 A. 339, *Machecha v. Avegno*.

15. Parol is admissible to show the husband's indebtedness to his wife; whether she had a valid title to the property by him taken is no concern of the creditors. 22 A. 487, *Johnson & Hamilton v. Jordan & Foster*.

16. Parol, as well as written evidence, is admissible to prove the authority of the president of the corporation to confess judgment, where the process of court is to be served on him by the charter, and the books of the company are silent as to this regard. 26 A. 665, *Kilgore v. Willis*.

17. Where the credit was given to the contractor, the promise of the owner to pay for the materials cannot be proved by parol. 26 A. 373, *O'Hern v. Gouldy*; 23 A. 747; 24 A. 309.

18. A promise to pay the note of another must be proved by written evidence. 28 A. 551, *Richard England v. J. S. Neal and J. C. Sinnott*.

19. Parol is inadmissible to prove a contract of suretyship. 23 A. 692, *Graves v. Scott & Baer*.

20. Parol as well as written evidence may be received to prove a claim to personal property. 27 A. 43, *Succession Elliot*.

21. Parol is not admissible to prove extra work, where the building contract provides that no extra shall be allowed unless ordered in writing. 27 A. 116, *Page v. Nicholson & Co*.

22. Parol is admissible to show that the mortgage notes were given to the factor to secure certain advances to be made by him. 27 A., N. R., *Miliken v. Drouet*.

23. Parol is not admissible to show that a city council had given time to the tax collector to settle, and that his sureties were thereby released. 28 A. 274, *Mayor of Natchitoches v. Redmond*; 26 A. 243.

24. Parol evidence is admissible to show the resolutions of a corporation, when the same have not been entered on the minutes. 26 A. 738, *Donnelly v. St. John's Episcopal Church*.

25. The act of 1858, which declares that parol evidence shall not be received to prove any promise to pay the debt of a third person, will have no application to a case in which it is proved that the promise was made prior to the passage of that act; that the testimony was received without objection, and related to a bill of exchange upon which it was sought to hold the defendant responsible. 15 A. 415, *Taylor v. Smith*.

26. Parol is admissible to show that the credit was given to defendant, and that he was not considered as security. 28 A. N. R., *Payne, Huntington & Co. v. Turner*; O. B. 45, fo. 63. See BILLS AND NOTES, V. (e), No. 2.

27. Parol is admissible to prove a promise on the part of a second indorser, to share equally any loss which might be suffered by the first indorser. 5 H. 278, *Phillips v. Preston*.

28. Parol, to prove a promise to pay by a third person, even if received, will not be considered. See EVIDENCE, V. (c), Nos. 8, 9, 10, 11.

(b) Notice to produce.

1. The court cannot order litigants to produce their books and papers on any other day than that fixed for the trial of the case. 18 A. 203, *Murison & Co. v. Butler*; C. P. 140, 473.

2. When a party to a cause lives out of a parish where the court is held, he cannot be compelled on a *subpœna duces tecum* to bring all his commercial books into court. 18 A. 296, *Murison & Co. v. Butler*.

3. The penalty for not producing books and papers in possession of the adverse party, in obedience to a *subpœna duces tecum*, is not imprisonment for contempt, but taking for confessed the facts stated in the affidavit for the *subpœna*. 25 A. 284, *Columbia Fire Co. No. 5 v. Purcell et als.*

(c) *Birth, marriage, death and insolvency.*

1. See *infra*, XXIII (d). **INSOLVENCY.**

2. Marriage, how proved, and sufficiency of proof. See **MARRIAGE, I. (a)**, Nos. 3, 4.

3. Presumption of marriage, see *supra*, IV. (a), No. 1.

(d) *Appointment of public officers.*

See **CONSTITUTION, II. (d)**. **OFFICE AND OFFICER.**

(e) *Loss or destruction of primary evidence.*

1. Parol evidence is admissible to prove the contents of an instrument of partition, after the opposite party has been served with notice to produce the missing document, if in his possession, and after the loss of it has been advertised in a newspaper, and an affidavit made by the party offering to introduce it, that he has not been able to find the document after diligent search. 15 A. 140, *McQueen v. Sandel*.

2. In a suit to recover damages on account of a seizure made without any warrant in law; *Held*: That the plaintiff having in vain endeavored to obtain the original writs of seizure, was authorized to prove, by secondary evidence, its issuing and the action of the constable under it. 15 A. 391, *Saloy v. Leonard*.

3. It is only necessary, by article 2259, that the loss of an instrument be advertised within a reasonable time, and this may be done in a proper case as well after as before suit is brought. 15 A. 463, *Weaver v. Cox*.

4. Where the destruction of an instrument is shown by direct testimony, the oath of the party is not required by article 2258, of the C. C. 15 A. 463, *Weaver v. Cox*.

5. Where an administrator's bond has been lost, and its existence and genuineness fully established, and it is shown that the administrator gave the bond; *Held*: That it is not necessary, in such a case, to advertise its loss, as required by article 2259, of the C. C. 15 A. 529, *Cox v. Bradley*.

6. The rule which admits proof of the contents of a private deed, either lost or destroyed, does not dispense with proof of its execution. 16 A. 318, *Cooper v. White*.

7. When there is positive evidence that an instrument in writing was destroyed, parol testimony will be admitted to prove its contents. 17 A. 10, *Billea v. White*.

8. The contents of a written instrument cannot be proved by parol, without first showing the existence and loss of the written document. 19 A. 445, *Marks & Co. v. Winter*.

9. Proof of the contents of a lost document, showing the transfer of the claim to plaintiff, cannot be made without affidavit and advertisement of the loss. The testimony of the attorney that he made diligent search without success, is insufficient. 29 A. 277, *Ticknor v. Calhoun*; 9 R. 381; 3 A. 228; C. C. 2279, 2280.

10. The affidavit of a party showing the loss of the books, received without objection, will be sufficient to authorize the introduction of secondary evidence to prove their contents. 21 A. 454, *Yale, Jr. v. Oliver & Drake*.

11. The loss of the appeal bond sued upon, should be proven before giving secondary evidence thereof. 16 A. 444, *Perkins v. Bard & Wilson*.

12. When the original appeal bond is lost, secondary evidence, either written or oral, may be resorted to to establish the alleged signature of the surety to the bond. 25 A. 2, *Cincinnati Insurance Company v. Harrison*.

13. No advertisement of a lost deed is necessary before proving its contents. 26 A. 367, *Gordon v. Fahrenberg & Penn.*

14. Where the title to real estate has been destroyed by fire, parol is admissible to prove the contents of the documents. 28 A., N. R., *Lewis v. Calhoun.*

15. A deed of trust is no title in Louisiana. 28 A. 326, *Marsh and Husband v. Levin.*

16. Where a party in possession of certain lands, applies, through an attorney, to his vendor, for the original Spanish grant (proved to have been once in the possession of the vendor), and the latter hands the attorney a bundle of papers, saying they were all the titles he had to the lands in question, but which bundle, on examination, did not contain the original grant; *Held*: That as there was no other place to which the law pointed where search could be made, and as there were no grounds for supposing that the instrument was designedly withheld, the proof of the loss of the original grant was sufficient to let in secondary evidence of its contents. 7 P. 99, *Union v. Tillotson.*

17. Where a contract, having subscribing witnesses, is proved to have been made out of the State of Louisiana, it is presumed that the witnesses reside at the place where the contract was made, and are not subject to the process of the court; secondary evidence is, therefore, allowable to prove the execution of the contract. 13 P. 378, *Wilcox v. Hunt.*

18. Clerks to copy all original documents filed, 1878, p. 42.

X. OF HEARSAY EVIDENCE; DECLARATIONS OF PARTIES IN THEIR OWN FAVOR; AND DECLARATIONS AS PART OF THE RES GESTÆ.

(a) *In general.*

1. The evidence of witnesses is admissible as to what they heard from, or were told by others, of orders having been issued or given by the insurgent military authorities, then in possession of the city, for the destruction of property prior to, or about the time of the loss of the property insured. 19 A. 388, *Marcy v. Merchants Mutual Insurance Company.*

2. Evidence of the conversations and admissions of the parties implicated in a fraud or simulation, may be offered in behalf of creditors: 20 A. 464, *Bushnell v. City National Bank of New Orleans*; 15 A. 177, 616; 16 A. 88; 7 A. 138; 6 A. 675, 710; 5 A. 1; 18 A. 648; 2 N. S. 13; 13 A. 207; 14 A. 188. See (e), No. 5; XII. (h), No. 1.

3. The testimony of a witness who examined certain cotton, but is unable to identify it, except upon the statement of other parties, should not be received in evidence. 21 A. 726, *Poutz v. Jones.*

4. The reasons for the exclusion of hearsay, are the want of sanction of an oath, and any opportunity to cross-examine. But when the testimony to be proven was given under oath, in a judicial proceeding between the same parties, the testimony of one of the witnesses may be proven by those who were present. 23 A. 348, *State v. Cook.*

5. The letters of one of the conspirators are admissible against the others, as part of the *res gestæ*. 29 A. 388, *James Reid v. Louisiana State Lottery Company.*

(b) *General repute and pedigree.*

1. In cases of pedigree, hearsay evidence is admissible from necessity; but the declaration must have been made *ante litem motam*, by members who may be supposed to have known the relationship which existed in its different branches. 13 P. 209, *Stein v. Bowman.*

2. Heirship and relationship may be proven by parol. See IX. (a), Nos. 9, 10.

(c) *Books, accounts, and entries.*

1. Entries on the books of an insolvent, when they are shown by witnesses to have been made in good faith and at the time they purport to have been made, and most of them for matters within the knowledge of the witnesses,

are admissible and sufficient to correct an error made by the syndic in his tableau of distribution. 15 A. 87, *Hernandez v. His Creditors*.

2. Where plaintiff sought to hold defendant liable for money lent, and defendant's books were offered in evidence, in which all the entries were made by plaintiff, as his book keeper, during the defendant's absence from the country; *Held*: That unless defendant objected to the entries on his return, and had his book corrected by counter entries, he will be presumed to have acquiesced in those made, and they will bind him. 15 A. 398, *Didier v. Augé*.

3. Copies and sworn extracts from mercantile books, although received without objection, do not make proof of the items of a merchant's account. 15 A. 458, *Byrne v. Grayson*.

4. A towboat's private book of rules and regulations, cannot be received in evidence even when connected with oral testimony. 17 A. 6, *Creen et al. v. Croce et al.*

5. Plaintiff's books, nor the testimony of a clerk whose knowledge is derived from the books, are legal evidence for plaintiff. 19 A. 326, *Conery v. Hayes*; 15 A. 457; 2 N. S. 509; 4 N. S. 383; 12 R. 407; 12 A. 770; 28 A. 592.

6. *Ex parte* statements of partnership accounts should not be received in evidence; but the books kept by plaintiff should be admitted. 25 A. 279, *Job v. Heuer*.

(d) *Transfers of title; and acts and declarations in qualification, or disparagement thereof.*

1. The declarations of the vendor made after the sale, though out of the presence of the vendee, acknowledging that the sale was simulated, are admissible against the vendee to prove fraud in the vendor; but such evidence alone is insufficient to establish fraud in the vendee. 15 A. 616, *Carrollton Bank v. Cleveland*. See (a), No. 2.

2. When the evidence fails to establish a transfer of the claim by the original creditor to the plaintiff the case will be remanded. 17 A. 111, *Connell v. Brown*.

3. The acts and declarations of a vendor shortly before and after a sale, out of the presence of the vendee, going to show the simulation of the sale, are admissible against the vendee to prove fraud in the vendor, but do not affect the vendee. 18 A. 648, *Hoose & Victor v. Robbins*.

4. A transfer by the vendor, to the holder of the note given for the purchase price, of his right to sue for the dissolution of the sale, is not admissible in evidence, being *res inter alios acta* and the unsworn declarations of a witness, without benefit of cross-examination on the part of the defendant. 24 A. 502, *Swan v. Gayle*. See SALE, VI. (c).

5. The written declarations of the ostensible owner are admissible in evidence to show that the real ownership of the immovable is in another. 26 A. 533, *Duncan v. Duncan*.

6. The subrogation of the vendor to plaintiff, of his right to sue for a rescission of the sale for non-payment of the price, is not admissible in evidence. See SALE, VI. (c), No. 12.

(e) *Other declarations of parties in their own favor.*

1. Conversations or admissions of the parties implicated in the fraud or simulation, may be offered by creditors; the objection to such evidence going to the effect or weight of it, when the declarations are not made in the presence of the other party. 15 A. 177, *Davis v. Stern*. See EVIDENCE, (a), No. 2; *infra*, No. 5.

2. Extra-judicial declarations made out of the presence of parties in interest, in an inebriated state and boastfully, if admissible at all against the succession of the party, are entitled to no weight whatever, unless strongly fortified by corroborating evidence. 16 A. 168, *Chapman v. Woodward*. See IX. (a), Nos. 5, 6, 7.

3. *Ex parte* certificates of masters and clerks of steamboats, which received

effects from a railroad, showing that nothing had been abstracted from the packages whilst on board, are not admissible in evidence, to show that the contents must have been taken on the railroad. 16 A. 315, *N. O., O. & G. W. R. R. Co. v. Williams*.

4. Defendants cannot offer their own letters in evidence, unless called for by plaintiffs. 19 A. 92, *Merritt v. Wright*.

5. The letters and acts of a conspirator should not be admitted as against the other conspirators, if written or done after the conspiracy is at an end. 29 A. 388, *Reid v. Louisiana Lottery Company*. See (a), No. 2.

XI. OF THE TESTIMONY OF WITNESSES IN OTHER SUITS, OR PREVIOUS PROCEEDINGS.

1. The answers to interrogatories on facts and articles, which either party had the right to offer on the first trial, may be used in the same manner on the second or any subsequent trial of the same cause. 16 A. 32, *Bachemin v. Scheiznaydre*.

2. With respect to depositions, complete mutuality or identity of all the parties, is not required. It is generally sufficient, if the matters in issue were the same in both cases, and the party against whom the deposition is offered, had full power to cross-examine the witness. 16 A. 88, *Cannon v. White*; Greenleaf, 589; 7 R. 438.

3. The admissions of a party to the suit, may be given in evidence, so can their sworn declarations made in other suits. 7 A. 106, *Hood v. Chambliss*; 14 A. 727, *Alford v. Hughes & Randolph*; 1 A. 391; 7 R. 440; 24 A. 604, *Bland v. Loyd*.

4. Testimony of witnesses taken contradictorily at the first trial, may be offered on the second. 26 A. 313, *Francis v. Levine*.

5. The testimony of witnesses taken in another proceeding, not between the same parties, should be received in evidence under the written agreement of the parties, as entered in the minutes of the court. 29 A. 213, *Cooper v. Capel*.

6. The testimony of a witness taken in writing on the first trial, is admissible in evidence, if the witness be absent at the new trial. 29 A. 149, *Hefner v. Hesse & Vergez*.

XII. OF ADMISSIONS.

(a) *In general.*

1. The conversations of the insolvent, as to his liability, is not legal evidence as to the absent and contending creditors. 18 A. 239, *Collins v. His Creditors*. See IX. (a), Nos. 5, 6, 7.

2. Plaintiff admits the title by purchasing land from defendant; a suit instituted before the purchase, must therefore fall. 18 A. 578, *Shreveport v. LeRosen*.

3. A conversation between one of the parties to the contract and a third person, out of the presence of the other party, is inadmissible in a suit to enforce the contract. 21 A. 620, *Bethel v. Hawkins*.

4. Defendant, who alleges fraud and misrepresentation of plaintiff when effecting the insurance, as to the ownership of the property, may prove by the admissions of plaintiff, that he did not claim the amount of the insurance, and that the premises were not his, although his title had been received in evidence. 25 A. 355, *MacCarthy v. Louisiana Mutual Insurance Company*. See XI. No. 3.

5. A counter letter when admissible. See SUCCESSION, VIII. (c), 1), No. 16.

(b) *Admissions in view of compromise or under threats.*

1. An offer to compromise cannot be received in evidence. 19 A. 362, *Pike & Co. v. Doyle*.

(c) *Admissions by husband and wife; and debtors, as against creditors.*

1. Declarations of the husband, when acting as agent of his wife, are admissible against her. 26 A. 210, *Boedicker v. East*.

2. The admissions of the wife in the act of mortgage, that the debt enured to her separate benefit, does not make proof of the fact. 29 A. 123, *Conrad v. Leblanc, sheriff*; 7 N. S. 341; 8 N. S. 692.

(d) *Admissions of agent as against principal, and principal as against surety.*

1. Letters and parol are admissible to show that plaintiff recognized the rights of defendant to the real estate by acting as defendant's agent, collecting and remitting the money collected from time to time, for the rent. 26 A. 533, *Duncan v. Duncan*.

2. The statements of an agent, when the agency is shown, are not hearsay. 28 A. 459, *Barrow & Pope v. F. A. Brown, ad'r*.

(e) *Admissions by partners.*

1. After dissolution of the partnership, the admissions of one partner is not evidence against the others. 19 A. 326, *Conery v. Hayes*.

(f) *Admissions implied from acquiescence and conduct, or upon which others have acted.*

See ESTOPPEL, No. 58, *et seq.*

(g) *Admissions by account rendered.*

1. An account having been stated between the parties, and signed by them, parol evidence, to show other items of indebtedness, cannot be received. 26 A. 585, *Pickens v. Friend*.

2. Plaintiff cannot offer his own books in evidence. 28 A. 592, *Lyons v. Teal*. See X. (c), No. 5.

(h) *Admissions by third persons and persons acting in autre droit; those of parties as against privies; and of recitals.*

1. In cases of fraud and simulation, conversations and admissions of the parties, even when not made in the presence of each other, their acts and actions are admissible, leaving to the court and jury to determine, from all the surrounding circumstances, the weight and effect of such evidence. 16 A. 88, *Cannon v. White*; 2 N. S. 13; 15 A. 177; 13 A. 207; 14 A. 188. See X. (a), No. 2; OBLIGATIONS, VII. (b), 2), c. § 2, No. 2.

2. The conversations of a contracting party with the broker, out of the presence of the other party, are admissible. 26 A. 6, *Horrell v. Louisiana National Bank*.

3. Plaintiff is not bound by statements made by third persons out of his presence. 27 A. 256, *Drake v. Hays et als*.

(i) *Unity of admissions; and their general effect when verbal.*

1. The objection to the admission, when the witness does not testify to the whole, goes to the effect and not the admissibility. See I., No. 3.

(j) *Judicial admissions.*

1) In general.

1. Judicial admissions cannot be contradicted. 29 A., N. R., *Judson, Fowler & Stillman v. H. B. Stevens*.

2. They are not matters of estoppel in cases of non-suit. See ESTOPPEL, No. 15.

3. A judgment being obtained on a contract, it cannot afterwards be alleged to be *ultra vires*. See ESTOPPEL, No. 43.

4. All admissions are not matters of estoppel. See ESTOPPEL, No. 48.

5. The admissions cannot be contradicted. See ESTOPPEL, No. 49.
6. As to partnership in *commendam*. See ESTOPPEL, No. 63. See 2).

2) Their entirety; and sufficiency to relieve from other proof.

1. In a petitory action, it is incumbent on the defendant to exhibit the title under which he claims ownership; and an allegation made by the plaintiff, in a previous suit for the same cause of action, that the defendant claimed the ownership under a tax sale, which the plaintiff charged to be an absolute nullity, will not be construed into an admission by the plaintiff that he had been divested of his title. 15 A. 543, *Reynolds v. Stille*.

2. Defendant's judicial confession is conclusive, as to the amount admitted to be due. 17 A. 289, *Betat v. Mougin*.

3. An admission in the petition, forms a presumption *juris et de jure* against plaintiff, in a subsequent proceeding. 18 A. 141, *Devall v. Succession Watterston*. See 1).

3) Admissions by attorneys of record

1 The judicial admission of the transfer, by attorneys at law, who are the transferrers, estops them. See ESTOPPEL, No. 19.

4) Admissions as to third persons; of joint parties; parties as against privies; and parties acting in *autre droit*.

1. The admissions of a party to the suit may be given in evidence, so can their sworn declarations made in other suits. See XI. No. 3.

XIII. OF THE SUFFICIENCY OF EVIDENCE.

(a) *In general.*

1. A payment of more than five hundred dollars may be proved by one witness. 18 A. 210, *Widow St. Romes v. City of New Orleans*; 14 L. 346; 18 A. 120, *Mitchell v. Simonds*; 15 A. 522, *Jones v. Fleming*. See PAYMENT, VI.

2. The testimony establishing the value of the stock of goods lost by fire, being vague and unsatisfactory, judgment of *non-suit* should be rendered. 17 A. 139, *Flynn v. Merchants' Mutual Insurance Company*.

3. The failure of plaintiff to prove the facts essential to recover, is not cured by the evidence of the defendant, leaving the fact doubtful. 17 A. 294, *Briggs v. Simonds*.

4. Plaintiff must make out his proof clearly and explicitly. 18 A. 597, *Sutton, tutor v. Mock, adm'r*; 116, *Kearney, Blois & Co. v. Hauche*; 15 A. 268, *Mummy v. Haggerty*; 457, *Byrne v. Grayson*.

5. Plaintiff should make his case certain; to make it probable is not enough. 22 A. 378, *Jackson & Anderson v. Billings*; 19 A. 121, *Carver & Co. v. Harris*; 15 A. 268; 18 A. 29, 116; 29 A. N. R., *Ocean Dry Dock v. Stein et als*. See OFFENSES AND QUASI OFFENSES, II. (a).

6. Proof of the amount of lost profits, sued for as damages, must be clear, absolute and certain. 18 A. 646, *Gibelin v. Hamilton & Scott*.

7. Defendant cannot be condemned to pay the value of a mule belonging to plaintiff in default of evidence showing its value. 19 A. 171, *Dangerfield v. Faure*.

8. A judgment, so far as it accords a legal mortgage on the property of a third person, must be based upon sufficient evidence, otherwise it should be avoided. 23 A. 58, *Boudreau v. Boudreau*.

9. Where the evidence fails to show that the contract was based on Confederate currency, the contract will be enforced. 20 A. 1, *Weaver v. Anfoux*.

10. An act, whereby it was recognized that a third person was the owner of certain portions of land, bought by others, does not, of itself, vest title, nor does it dispense with the primordial title, unless the latter be therein set forth. 22 A. 522, *Kittridge v. Cane et al.*

11. The testimony of a married woman, unsupported by other evidence, will be of less weight than the authentic renunciation by her made before a com-

missioner of this State, residing in another State, passed ten years previous. 25 A. 595, *Prikett v. Law*.

12. Where a child claims property in the possession of his natural father, on the ground that it was acquired by the joint labor of his father and *deceased mother*, courts of justice are bound to discountenance pretensions based upon such an immoral connection, by demanding strict and conclusive proof before affording relief. 15 A. 306, *Rochelle v. Hezeau*.

13. No weight must be attached to testimony intrinsically improbable, and suggestive of collusion and conspiracy. 29 A. 764, *Breard v. Mechanics' and Traders' Insurance Company*.

14. For non-suit and judgment in cases of doubt, see JUDGMENT, VIII.

15. Plaintiff, in a petitory action, must make his case legally certain. See PETITORY AND POSSESSORY ACTIONS, II. (c), 3), No. 2.

16. An unsigned judgment, dissolving an injunction sued out by the attorney general against a legislative appropriation, is not sufficient proof of relator's claim against the State. 30 A. 421, *State ex rel. Hartwell v. Jumel, auditor*.

(b) *Number of witnesses; and obligations over five hundred dollars in amount.*

1. The evidence of one witness, who simply declares that the account sued on, which is over five hundred dollars, is correct, without giving his reasons for this assertion, is not sufficient to authorize the confirmation of a default. 15 A. 219, *Kentgen v. Jordan*.

2. A payment of more than five hundred dollars may be proved by one witness. See (a), No. 1.

3. The testimony of one witness, unsupported by corroborating circumstances, is insufficient to prove a contract exceeding five hundred dollars. 19 A. 433, *Brady v. McWilliams*.

4. Article 2257, of the C. C., requiring corroborating circumstances in addition to the testimony of one witness, where the contract is for a sum exceeding five hundred dollars, relates in express terms to the proof of contracts which are not reduced to writing. 15 A. 639, *Collins v. McElroy*.

5. When the amount in dispute exceeds five hundred dollars, and the defense rests upon the testimony of a single witness, contradicted by other evidence, the case rests with plaintiff. 16 A. 191, *Alexander v. School Directors*.

6. At least one witness, and corroborating circumstances, should be shown to prove a verbal power of attorney to make a contract over five hundred dollars. 17 A. 142, *Gardes v. Schroeder and Schrieber*.

7. The testimony of one witness, corroborated by the books of the opposite party, is sufficient to establish a claim of more than five hundred dollars. 20 A. 119, *Goldsmith, Haber & Co. v. Freedlander & Gerson*.

8. A judgment by default is a sufficient corroborative circumstance, with the testimony of one witness, to establish a claim amounting to more than five hundred dollars. 24 A. 137, *Webster & Co. v. Burke*.

9. All contracts relative to movables may be proved by parol, and when above five hundred dollars there must be one witness and corroborating circumstances. 17 A. 312, *Moore v. City of New Orleans*.

10. It is doubtful whether one witness is sufficient to prove a claim of more than five hundred dollars, but composed of different items below that amount. 23 A. 786, *Betzer v. Coleman et al.*

11. One witness is sufficient to prove an account over five hundred dollars, composed of several distinct items, each below five hundred dollars. 19 A. 71, *Stribling v. Stewart*; 28 A. 144, *Rossignol v. Drauzin Triche*.

12. The acknowledgment of an account above five hundred dollars, proved by one witness only, is not sufficient. 19 A. 326, *Conery v. Hayes*; C. C. (2257).

13. One witness is sufficient to prove a promise to pay a note of more than five hundred dollars. 20 A. 417, *Helm v. Ducayet*; 3 N. S. 268; 7 A. 659.

14. The rule that a claim of more than five hundred dollars must be proved by more than one witness, does not apply to the proof of ownership, where one witness may be sufficient. 20 A. 411, *Field v. Harrison*.

15. A letter written by plaintiff's attorney to defendant, a telegram, not

formally offered in evidence, ordering the merchandise sold, a general denial, and the absence of defendant from the trial, are sufficient corroborating circumstances to the testimony of one witness to prove an account of more than five hundred dollars. 30 A. 392, *Goepper & Son v. Lusse*.

(c) *Stale demands and those repelled by presumption of innocence or discharge of duty; laches in producing evidence; or its suppression.*

1. Notes given by one in indigent circumstances for the purchase of property and offered cancelled, to prove payment of the price, are not sufficient by themselves to prove payment. 16 A. 208, *Brown v. Saddler*.

2. A judgment of separation set up by plaintiff in injunction, as her muni-ment of title, can produce no legal effect, when alleged in the answer, to be fraudulent, unless its truth and genuineness are established by other legal evidence. This is not an open question. 19 A. 96, *Bogan v. Finley*; 4 L. 422; 12 L. 304; 11 L. 536; 4 A. 135; 10 A. 87.

3. Where the draft given for the goods purchased, is made part of the petition, but not offered in evidence, and no sale or delivery of goods is proven, plaintiff will be non-suited. 19 A. 261, *Bridgeford v. Colton and Baldwin*.

4. Credits on the back of a promissory note, to be evidence against the maker must be shown to have been placed there, with his knowledge and consent. 21 A. 335, *Boulin v. Rainey*.

5. The act of sale executed by the agent, and the procuration, are sufficient to confirm a default. See MANDATE, V. (b), 3), No. 7.

XIV. OF THE ADMISSIBILITY OF PAROL EVIDENCE TO AFFECT IMMOVABLES.

(a) *To establish or affect contracts relating to immovables.*

1) In general.

1. In a petitory action brought by the administrator, for the husband's estate, against the widow, for slaves which she has in her possession, and claims as her paraphernal property, parol evidence is admissible to prove that she possessed the slaves prior to her marriage, as owner. 15 A. 227, *Bordelon v. Dumartrail*.

2. Parol evidence, although inadmissible to establish title to land, is yet admissible to prove fraud, practiced in the transfer of land. 15 A. 483 *Garrett v. Crooks*.

3. Parol cannot be received to prove the usufruct of an immovable. 23 A. 242, *Lynch v. Lynch*.

4. The price stated in the act of sale, cannot be contradicted. 23 A. 589, *Girod v. Vines*.

5. Parol cannot be received to prove a partition of the movable property mentioned in each lot, made of the succession property. C. C., 1293; 26 A. 252, *Gusman v. Hearsey*.

6. Title to real estate cannot be established by parol. 26 A. 445, *George v. Campbell*.

7. Parol is not admissible to prove that plaintiff never owned the real property in dispute, but that defendant did. 26 A. 731, *French v. Back*.

8. Title to real estate, cannot be established by parol. 27 A. 198, *Halsey v. Sandidge and Payne*.

9. Where a slave was really bought by one party, but the title was made in the act of sale to another party who was interposed for certain purposes; *Held*: The relation of vendor and vendee, as contemplated by article (2255) of the Civil Code, does not exist between the real purchaser in the case and the interposed party, and that such a case would not come within the provisions of article (2255) Civil Code, directing that transfers of immovable be in writing. 15 A. 539, *Barbin v. Gaspard*. See (a), 3), No. 2; XV. (h), No. 2.

10. Parol is inadmissible to prove the sale of a slave. *Ib*.

11. Where a party brought suit to recover slaves claimed to have been purchased by the defendant at sheriff's sale, from the same vendor under whom plaintiff claimed title, and plaintiff offered to prove the verbal statement of

the defendant, showing that he (the defendant) had purchased these slaves for the contingent benefit of the seized debtor's wife and children, or of the debtor himself; *Held*: That, as the introduction of such testimony would be an attempt to establish title to slaves by parol, and would also be foreign to the issue in the cause, it is, therefore, inadmissible. 15 A. 566, *Smith v. Lambeth*.

12. A servitude of way may be shown by parol. 29 A. 39, *Burke v. Wall*.

13. A partition of real estate may be proved by parol received without objection. See V. (c), No. 12.

14. Property purchased during community, by the wife, may be shown by parol to be her separate property. See MARRIAGE, XIII. (b), 2), No. 12.

2) Private sales; agreements to sell; and damages for non-execution of contract.

1. Parol evidence is not admissible to explain receipts, where the receipt itself is the only legal evidence of a contract for the sale of real estate, and where the effect of the parol proof would be to substitute a parol agreement, for the sale of an immovable, in the place of the receipt. 15 A. 126, *Young v. Cook*.

2. Parol is admissible in an action in damages, to show that defendant, contrary to his agreement, sold the land, and could not comply with his promise. 26 A. 296, *Burbank v. Pierce*.

3. Parol is admissible to prove that the principal was present, and directed his son to sign a promise to sell real estate. 29 A. 567, *Meyer v. King*.

4. Parol is not admissible to prove a promise to sell, and damages resulting from its non-execution. See SALE, I. (f), (*promise to sell or buy*).

5. The title of real estate, and a power to sell, may as validly be made under private signature, as by authentic act. 30 A. 332, *Smith v. Kinney*.

3) Public sales; agency and partnership.

1. Parol is inadmissible to prove the agent's authority to make a sale of immovable. C. C. 2275; 23 A. 196, *Keary v. Ducote*.

2. Parol is inadmissible to prove that the property was purchased by defendant in his name, for the plaintiff, who paid the cash. 28 A. 678, *Carl Kunnegeiser v. Louis Juncker et als*. See XIV. (a), 1), No. 9. See XV. (h), No. 2.

3. Parol cannot be received to prove an agency to sell land. 21 A. 548, *Mumford v. McKinney*.

4. Parol is admissible to prove a commercial partnership. See PARTNERSHIP, III. (b), 1), No. 1.

(b) To show payment of price, circumstances of possession and boundaries.

1. Parol is admissible to show that by accident or negligence, the deed of sale has not been made the actual depositary of the intention of the parties, such as a wrong boundary. 26 A. 547, *Fleming & Baldwin v. Scott & Watson*.

2. Parol is admissible to prove the fact of the actual division and the possession. 26 A. 547, *Fleming & Baldwin v. Scott & Watson*.

3. Parol is not admissible in an action to annul a sale of real estate, to prove that more cash was paid than is recited in the act of sale. 27 A. 492, *Formento v. Robert*.

4. Defendant having offered evidence to prove that the fence was on his land, and owned by himself alone; plaintiff who averred that it was a fence in common, may offer the testimony of a surveyor, to prove that the fence was on his land. 29 A. N. R., *Catherine Jones v. Joseph Henry*.

5. The price stated in the act of sale, cannot be contradicted. See (a) 1), No. 4.

6. See BOUNDARY.

(c) To show other matters.

1. Parol is admissible to show that one-half of the insurance effected on the

buildings, should be paid to the lessee who put up a part of the improvements, in case of loss by fire. 18 A. 90, *McDonald v. Stewart*; 1 R. 358; 7 R. 520.

2. Parol is admissible to prove a ratification of the sale. 21 A. 548, *Mumford v. McKinney*; 470, *Cronnover v. Randle*.

3. When the act of sale is silent in regard to alleged servitudes, they can only be shown by proof of the use or existence thereof, for a period sufficient to establish title, and this use may be proven by parol, as also all agreements in relation to such use, unless they were reduced to writing. 25 A. 56, *Machea v. Avegno*.

4. Plaintiff may prove by parol where the wood was cut, whether on plaintiff's or defendant's lands. 25 A. 530, *Grevemberg v. Borel*.

5. Evidence is admissible to explain what improvements were intended by the parties to be sold, in a contract of sale, reciting: "the plantation with the improvements thereon." 26 A. 257, *Bayley executor v. Denney*.

6. Parol is admissible to show who paid for the building of a house. 26 A. 614, *Pool v. Fontelieu*.

7. Parol is not admissible to prove a promise to pay eight per cent. interest. See LOAN, III. (a), Nos. 1, 3, 4, 5.

8. Parol is admissible to prove the transfer by an heir of his share of certain funds in bank. 30 A. 424, *Succession Bougère*.

(d) To affect prescription.

1. Parol is inadmissible to prove a payment made on the note by the deceased, so as to show an interruption of prescription. 23 A. 531, *Pavy v. Escoubas adm'r.*, C. C. 2278; 21 A. 350, *Succession Hildebrandt*; 23 A. 549, *Broussard v. Breaud*; 24 A. 496, *Boswell v. Succession Roby*; 25 A. 481, *Guillory v. Déjean*; 492, *Millard v. Smith adm'r.*; 23 A. 690, *Grove v. Scott*.

2. Parol is admissible under the act of 1858, to prove an interruption of prescription; the act requires written evidence to prove a renunciation of prescription. 23 A. 109, *Ross v. Johnston*; 22 A. 198, *Birch v. Bates*.

3. Parol is not admissible to show that the credits indorsed on the notes, were made at the dates when they purport to have been made. 21 A. 350; 23 A. 456, *Succession Kugler*.

4. Part payment of a note, after prescription has accrued, cannot be proved by parol. 21 A. 350, *Succession Hildebrandt*.

5. Parol evidence is inadmissible to prove an interruption of prescription against a succession. 26 A. 514, *Fawcett v. Peterson*.

6. Under act 1858, Secs. 2 and 3, approved March 18, no parol evidence can be received to prove a promise to pay a written obligation when prescription has already run. 21 A. 293; 22 A. 199, *Birch v. Bates*.

7. Parol to prove an acknowledgment of a living bound, *in solido*, with a dead debtor, is admissible and will interrupt prescription as to the deceased. 26 A. 608, *Petetin v. Boagni*; C. C. 2278, 3552.

8. Parol is not admissible to prove the acknowledgment of a deceased person of an account, nor the payments alleged to have been made thereon. 27 A. 639, *Goodman v. Rayburn*; 1858, 158; C. C. 2278; 26 A. 514; 25 A. 492; 24 A. 496; 21 A. 350; 23 A. 531, 549.

9. Parol is admissible to prove an interruption before prescription had been acquired on the note, although prescription had already run, at the time the evidence is offered. 26 A. 608, *Petetin v. Boagni*; 30 A. 496, *Boult v. Sarpy*.

10. Parol is not admissible to prove that the credits endorsed on the back of the note, but signed by no one, were payments made by the deceased or the administrator of his succession. 28 A., N. R., *Brierley v. Administrator Jabez Tanner*.

11. Parol is admissible to prove that prescription has been interrupted, if the promise be made before prescription has been acquired. 28 A. 449, *John E. Crone v. Citizens' Bank*; 21 A. 179, *Bernstein v. Ricks*.

12. Parol is admissible to prove the interruption of prescription caused by an act of the administrator. 28 A. 663, *McDaniel v. Lalanne*.

13. Parol is not admissible to prove an interruption after prescription has

already run, of a loan of money, in payment of which defendant gave his check, which was not paid on presentation. 29 A. 830, *Duncan v. Duncan*.

14. Parol is admissible to prove to what debt the written acknowledgment of the deceased referred. See XV. (e), No. 5.

XV. OF THE ADMISSIBILITY OF PAROL, TO AFFECT WRITTEN EVIDENCE.

(a) *Rule of exclusion not applicable to third persons.*

1. The true consideration of a contract may always be questioned by one who was not a party to it, and who has an interest in showing that the consideration expressed was not the true one; and if such third party offers one who was a party to the act, to make such proof, the objection that this witness was a party, goes to his credibility and not to the competency of his evidence. 15 A. 579, *Smith v. Conrad*.

2. The rule that no parol evidence is admissible to contradict, vary, etc., a written document, applies only to the parties to the act. 18 A. 287, *Westholz v. Retaud*. 19 L. 387.

3. The admissibility of parol evidence against or beyond the contents of an act, only extends to the parties. 19 A. 52, *Blake v. Hall*; 11 M. 630; 2 L. 157; 3 A. 464; 4 L. 29.

4. Third persons may explain an authentic act and prove what was said by the parties before, since or at the time the act was passed. 20 A. 444, *Finley v. Bogan et al.*; 14 L. 108; 7 R. 53; 2 A. 94, 480; 4 A. 500.

5. Evidence is admissible to prove the reality of the act and mortgage, when attacked by one not a party to it. 22 A. 286, *D'Meza v. Générés*.

(b) *Rule of exclusion not applicable to contemporaneous writings.*

1. The return of the administrator on the back of the order to sell, being contemporaneous with the order, and the act of an officer of court, is admissible in evidence without proof of the signature. 21 A. 505, *Woods v. Lee*.

2. A party can not vary or destroy his voluntary written agreements by other than written evidence, which includes answers to interrogatories on facts and articles. 12 A. 739; 5 A. 315; 22 A. 382, 322; 11 A. 113; 23 A. 445, *Tourne v. Mathieu*; 17 A. 2.

3. Inasmuch as the deceased could have shown the simulation of a sale made by him, by a counter letter or interrogatories on facts and articles, his heirs have the same right. 27 A. 267, *Tesson v. Gusman*; 10 A. 704. See (d), 2), No. 3.

4. Several documents forming one and the same contract, are admissible in evidence to prove and explain the transaction. 29 A. 567, *Meyer v. King*.

(c) *To show incapacity of party.*

1. Incapacitated persons, when seeking to be relieved from the effects of engagements contracted by them *in fraudem legis*, are entitled to show the real nature of the transaction. It is not a good answer to say that persons so incapacitated should take a counter letter; in default thereof, they may use parol evidence to invalidate the contract. 16 A. 11, *Leblanc v. Bouchereau*; 5 A. 580.

(d) *To show simulation; to contradict or vary.*

1) *In general.*

1. A certificate releasing a mortgage is only *prima facie* evidence of the facts therein mentioned, and may be contradicted. 20 A. 425, *St. Romes v. Widow Blanc*; 5 M. 625; 11 M. 526; 8 R. 130.

2. A receipt given for money may be explained by parol. 21 A. 175, *Draughton v. White*. See III. (e), No. 5; XV. (i), Nos. 1, 2. MANDATE, V. (b), 4), No. 5.

3. Parol evidence to explain an ambiguous sentence in an acknowledgment of a debt, or to establish something else than what is written, is not admissible. 25 A. 492; *Millard v. Smith, adm'r*; C. C. 2276.

4. The certificate of a municipal surveyor may be contradicted by parol. See EVIDENCE, III. (d), No. 3.

5. The price stated in the act of sale cannot be contradicted. See EVIDENCE, XIV. (a), 1), No. 4.

6. Officers may testify to certain facts. See XVI. (b), 7), No. 1.

2) Simulation; consideration; and privies.

1. Parol is admissible to prove want of consideration of a mortgage note given for Confederate money. 20 A. 167, *Parker v. Broas*. See (e), No. 1.

2. It is competent to prove by parol the consideration of the note. 22 A. 426, *Gillard v. Huval*.

3. As between parties and their heirs, other than forced heirs, the only admissible evidence of the simulation of a written contract is a counter letter. 29 A. 512, *Hebert v. Légit*; 4 L. 167; 3 A. 154; 4 A. 487; 9 L. 566; 3 R. 457. See XV. (h), Nos. 3, 4.

4. The heirs can, like the ancestor, only show the simulation of an act by a counter letter. See XV. (b), No. 3. OBLIGATIONS, VII. (b), 2), B., § 3.

5. For consideration of bills and notes, see BILLS AND NOTES, IV. (a); (b); XII. (c).

(e) To explain; ascertain subject matter and its qualities; and to show usage.

1. Defendant cannot prove by parol that the note sued upon was to be paid in Confederate notes. 18 A. 533, *Williams, ad'r. v. Boozeman*. See CONFEDERATE MONEY; see (d), 2), No. 1.

2. In a suit to enforce the delivery of cotton sold, where the defense is, that the purchase money was Confederate notes, evidence is admissible to prove such fact, although the contract calls for dollars and cents. 20 A. 238, *Haynes v. Rogillio*.

3. Parol is not admissible to explain an ambiguity apparent on the face of a written instrument. 20 A. 363, *Mithoff v. Byrne, Vance & Co.*

4. It is competent for the notary to explain an erasure and interlineation in the mortgage note. 20 A. 409, *Bernstein v. Ricks*.

5. Parol may be admitted to prove to what debt the written evidence of acknowledgment of the deceased referred to. 23 A. 217, *Harrison, ad'x. v. Dayries et als.*; 456, *Succession Kugler*.

6. Where the subject matter of the written instrument is not under consideration, and the suit is not one to enforce any right growing out of the written instrument, and the evidence offered is not in aid of the act, parol is admissible. 23 A. 481, *Stackhouse v. Zunts*.

7. Parol is not admissible to show the true intent of the parties in the stipulation, that the purchaser should withhold payment of the notes until the title was perfected. 24 A. 173, *Wade v. Percy*.

8. Parol evidence, to show the intention of the testator, is not admissible. 93 U. S. (Otto's), 589, *Mackie et als. v. Story*.

9. Parol is not admissible to change the terms of a written contract. 18 A. 577, *Shreveport v. David LeRosen*.

10. Evidence is admissible to show what improvements were intended to be sold in the deed. See XIV. (c), No. 5.

11. Parol is not admissible to explain a written contract. See EVIDENCE, XV. (d), 1), No. 3.

(f) To show collateral facts and acts in execution of instrument.

1. In an action for the diminution of the price, evidence is admissible to show that the surplus of the lot sold was inserted in the act by an error of the notary. 20 A. 415, *Wurzbarger v. Meric*. See SALE, III. (b), 2), c.

2. Parol, to show that the money was delivered to the husband, does not contradict the notarial act of donation in favor of the wife, and is admissible. 26 A. 594, *Perret v. Sanarens*.

3. Parol evidence is admissible to show how the note sued upon and identified with a written contract of anterior date, was given. 27 A. 149, *Davidson & Hill vs. Bodley*.

4. Parol is admissible to prove that the forms required by C. C. art. 1578, have not been observed in the nuncupative will by public act. 28 A. 452, *Mary Ann King v. Vairin et als.*

5. Conversations between the contracting parties previous to the contract are presumed to be embodied in the written contract. 5 H. 278, *Phillips v. Preston.*

6. To affect the acceptance of a bill, see BILLS AND NOTES, V. (e).

7. Parol is not admissible to show that one of the contracting parties to a written instrument was acting as agent. See SURETYSHIP, I. (c), No. 3.

(g) *To show a subsequent agreement or discharge.*

1. Where the parties to a written contract, by mutual consent enter into a new agreement, as regards some part of it, proof of the latter agreement may be made by parol. 17 A. 32, *Leeds v. Fassman*; 4 L. 30; 5 A. 597.

2. The indorsement is not a corroborating circumstance going to prove the subsequent promise to pay. 18 A. 257, *Trabue & Co. v. Short & Co.*; 7 R. 451.

3. The acknowledgment of the note, before prescription accrues, may be shown by parol. 21 A. 179, *Bernstein v. Ricks.* See XIV. (d), No. 11.

4. Parol is admissible to show that after entering into the written contract certain changes and stipulations were agreed upon. 27 A. 626, *Buckmaster v. Jacobs.*

5. Parol is admissible to prove that what appears to be an indorsement on a note is the signature of the holder to acknowledge payment. 29 A. 551, *Cole v. Smith*; 4 N. S. 222; 2 L. 481; 7 R. 61; 10 R. 92; 13 A. 25.

(h) *To show fraud, error, or usury.*

1. In cases of fraud and simulation, parol evidence may be introduced by third persons to contradict or vary the contents of written instruments. 15 A. 177, *Davis v. Stern.*

2. Testimonial proof is not admissible for the purpose of proving that a third person was interposed to receive or to be invested with title to real estate or slaves for the use of and instead of the intended vendee. 15 A. 539, *Barbin v. Gaspard.* See XIV. (a), 1), No. 9.

3. Parol testimony, to show fraud or simulation in a sale of immovable property or slaves of an ancestor to the prejudice of the legitime of the forced heirs, may in a certain class of cases be introduced; but such evidence never can be introduced by the heirs without the consent of the adverse party, to show title in the ancestor to such property, for the purpose of increasing the amount of the assets of his estate. 15 A. 539, *Barbin v. Gaspard.* See XV. (d), 2), Nos. 3, 4.

4. Children, being forced heirs, claim not merely as the representatives of their ancestor, but from the law, and may allege and prove by parol, fraud, or simulation, vitiating the acts of their ancestors. 15 A. 700, *Hoggatt v. Gibbs.*

5. The declarations of parties to a public act, cannot be contradicted by those who made the declarations, unless upon allegations of fraud, duress or error. 16 A. 307, *McRae v. His Creditors.*

6. Article 2276, (2256), C. C., prohibiting parol against or beyond the written acts, etc., applies to acts intrinsically valid, and not to such as are attacked, to be declared null on account of fraud. 20 A. 211, *Cox & Co. v. Estate King*; 2 A. 909; 4 L. 351.

7. The nullity of a transfer of immovables by reason of fraud and collusion, may be proven by parol. 24 A. 209, *Thomas v. Kennedy and Sewell.*

8. Parol evidence is admissible, whenever the obligation is one contracted in *fraudem legis*: it is immaterial what form may have been given to the reprobated contract. 15 A. 599, *Caroline Lazare, wife, etc., v. Céline Jacques.*

9. Parol evidence cannot be admitted to prove a promise to pay eight per cent. interest. 25 A. 600, *Gerspard and Herring v. Mullin.*

10. See for this subject, OBLIGATIONS, VII. (b), 2), c. § 1.

(i) *Bill of lading and receipt.*

1. A receipt is only *prima facie* evidence of payment. 19 A. 459, *Platt v. Maples*; 20 A. 276, *Dunn v. Pipes*; 21 A. 175.

2. A receipt for money, may be contradicted or explained, by parol testimony, and where the payment of a legacy has been made to a minor, in Confederate money, the executor should pay over again. 21 A. 532, *Porter v. Brown & Chaler*. See XV. (d), 1), No. 2.

3. Where the evidence is contradictory, and that given on one side entitled to as much weight as the other, the receipt will stand. 21 A. 581, *Borden v. Hope*.

4. So much of a bill of lading, as is a receipt, may be explained, while that part of it, which is a contract, cannot be explained by parol testimony. 29 A. 446, *Hunt & Macauley v. Mississippi Central Railroad Company*.

5. Where the receipt evidences a contract, no evidence is admissible to contradict it. See XIV. (a), 2), No. 1. See SHIPPING, X. (b), 1); 2); 3).

(j) *Records and judicial writings.*

1. Evidence to show that terms of sale, other than those recommended by the majority of the meeting of creditors of a succession, would be more advantageous, is not admissible. 19 A. 82, *Guion v. Creditors Succession of Guion*.

2. Parol is inadmissible to prove service of citation. 21 A. 682, *Gliddon v. Goos*.

3. The sheriff's return is the only proof admissible. 21 A. 27, *Leblanc v. Perroux*; 1 R. 30.

4. A judgment recorded to operate as a judicial mortgage, as against third persons, must speak for itself, and extraneous evidence is inadmissible to give the act any other meaning. 23 A. 133, *Graves v. Hunter*. See REGISTRY, II. (a), 1), No. 6; 2), No. 12; (c), No. 11.

5. Parol is admissible, to prove that the judgment sought to be enjoined was rendered without citation. 23 A. 557, *Simpson v. Hope*.

6. Parol is inadmissible, without allegation of fraud, to show that plaintiff, who gave bond to release property sequestered, received less than was mentioned in the bond. 23 A. 562, *Henderson v. Walmsley*.

7. Plaintiff, having been allowed to explain, by parol, the circumstances attending the seizure, it was competent for the defendant to produce rebutting evidence, in relation to the facts connected with the seizure, which did not tend to contradict, vary, or alter the written return of the sheriff. 25 A. 498, *Mouton v. Broussard*. See VII. No. 18.

8. Parol is not admissible to show that the intervention was dismissed, because service thereof had not been made. 27 A. 284, *Fluker v. Herbert*; 12 A. 349.

9. No parol proof can be offered to contradict the journals of the general assembly. 23 A. 745, *Lottery v. Richoux*.

10. The officer who makes a return on the writ of *feri facias*, cannot be compelled to amend or modify it, nor can its truth be questioned in the proceedings against the sureties on the appeal bond. 93 U. S. (Otto's), 341, *Smith et als. v. Gaines*.

11. The provisions of the act of 1875, prescribing the mode of reviving the burned records of the parish of Rapides, do not furnish the exclusive means of evidence to prove the contents of the destroyed documents. 29 A. 277, *Ticknor v. Calhoun*. See act No. 13, of 1877.

12. Parol evidence is admissible to prove that the sheriff returned a forthcoming bond into court. The certificate of the clerk to the contrary is nothing more than a written statement by an individual. 28 A. 589, *State ex rel. Schexnaydre v. Gordy*.

13. The certificate of the recorder of mortgages may be contradicted. See MORTGAGE, VII., No. 12.

14. Burnt records of Livingston, 1877, No. 13; of other parishes, see the name of such parish.

XVI. OF WITNESSES.

(a) *Attendance.*

1. Continuance for absence of witnesses. See CONTINUANCE, III. (b); (c), No. 1.
2. Physicians not to attend in certain cases. 1877, E. S., p. 177.

(b) *Competency.*1) *Laws determining competency.*

1. The exclusion of the citizen from giving evidence is somewhat opposed to natural right, and ought not to be extended beyond the letter of the law. 16 A. 99, *Pelham v. Steamboat Messenger*.
2. Section 8, of act No. 47, of 1873, which disqualifies delinquent tax payers as witnesses, is unconstitutional, the object of the law not being contained in its title. 26 A. 142, *Adams v. Webster*.
3. A legatee, not a witness to the will, is competent to prove any fact in relation to the will. 28 A., N. R., *Succession Robb*.

2) *Interest, as affecting competency.*A. *In general.*

1. The decision in the case of *Evans v. Gray*, 1 N. S. 712, re-affirmed to the effect that, when interest in a witness is established by evidence *aliunde*, it cannot be disproved by his own testimony. 15 A. 126, *Young v. Cook*.
2. The commission allowed an executor, does not constitute such an interest as disqualifies him from testifying in behalf of the estate which he represents. 15 A. 566, *Smith v. Lambeth*.
3. The maker of the note can testify in a suit by one indorser against another, to prove the contract of suretyship. 16 A. 205, *Hacker v. Lanarès & Co.*
4. Although some of the plaintiffs have transferred all their rights in the suit to the others, the former cannot testify, because they are still bound for costs. 16 A. 386, *Roselius v. Barelli*.
5. A witness who is a mere nominal party to a suit, and disclaims any personal interest therein, is competent. 17 A. 6, *Green et al. v. Crose et al.*
6. Plaintiff cannot testify. 18 A. 664, *Block v. St'r Trent*; 14 A. 324.
7. The mere fact that one is a party to the record, does not disqualify him as a witness. 19 A. 270 *Beebe & Co. v. Kaiser & Bryans*.

B. *Interest in the result.*§ 1 *In general.*

1. The testimony of a witness, testifying to defeat a claim against him, is not admissible in evidence. 16 A. 22, *Bullit v. Stewart*. But see acts, 1868, 269; R. S., 1870, § 3961.
2. A co-defendant cannot be made a witness against plaintiff. 17 A. 11, *Bell v. Black*.

§ 2 *Warrantors and heirs; insolvency and the revocatory action.*

1. A vendor, who is not bound in warranty, is a competent witness to testify in a case where the title of property sold by him is involved. 15 A. 560, *Hyman v. Bailey*.
2. A natural son is not a competent witness in controversies which relate to the succession of his deceased natural father. 15 A. 590, *Lazare v. Jacques*.
3. Descendants are expressly prohibited from being witnesses in civil cases for or against their ascendants. 18 A. 54, *Succession Weigel*; 12 A. 410.

C. *Interest in the question.*

1. A tutor is a competent witness to prove the correctness of his tutorship account. 21 A. 187, *Tutorship Scott*.

D. *Equality of interest.*

1. Where the witness is interested as heir, to see the property recovered, and at the same time is bound to the same extent, if so recovered, his interest is neutralized, and he is competent. 16 A. 399, *Rhodes v. Meyers*; C. C. (2260).

2. In a contest between two creditors for priority, the debtor's interest does not disqualify him as a witness. 19 A. 21, *Ealer v. McAllister*.

E. *Opposition of interest.*

1. One who is bound as joint and several obligor with both plaintiff and defendant upon the face of the note which is sued on, cannot be heard as a witness to fix the sole and exclusive liability upon one of the parties, although released by the other party who offers his testimony. 15 A. 240, *Huff v. Freeman*.

2. Where a defendant is sued as a partner of a commercial firm on an obligation not signed by him, or with his name, the members of the firm are competent witnesses for him to prove that he was a partner. 15 A. 541, *James v. Brooke*.

F. *Agents, servants and others in employ of parties.*

1. The State engineer, who entered into contract under the law, is a competent witness to testify as to the faithful performance of the work. 21 A. 132, *Grady, adm'r, v. Desobry Sr.*

2. A broker is a competent witness as to the conversations held with him out of the presence of the other party. 26 A. 6, *Horrell v. Louisiana National Bank*.

G. *Parties to the action.*

1. A co-defendant cannot be made a witness against the plaintiff. 17 A. 11, *Bell v. Black*.

H. *Examination on voir dire; and mode of proving interest and restoring competency.*

1. Where a suit is brought on a due bill signed by an agent, and the answer specially denies the agency, the agent, on being released from personal responsibility by the plaintiff, may be heard as a witness to prove the fact that the money borrowed, for which the due bill was given, was applied to the payment of the debts of his principal. 15 A. 143, *Garland v. Scott*.

2. The release of one of the principal debtors, by the surety, from all liability to himself as surety, renders such debtor a competent witness for the surety. 15 A. 522, *Jones v. Fleming*.

3. Although a witness testifies that he has no interest in the suit, yet if it appear by his examination on the *voir dire*, that he has an interest, he cannot be heard. 15 A. 528, *Cops v. Eddin*.

4. It is competent for the party offering a witness, to examine him on his *voir dire*, as to the nature or his interest in the suit, when he answers affirmatively to the single question, are you interested in this suit? 18 A. 54, *Succession Weigel*.

5. Where the lessee's partner has been released from all liability, the partner is a competent witness. 19 A. 114, *Crane v. Harris*.

6. A resolution of the directors of a bank, authorizing the president to release an agent from all liability, on account of transactions with the bank, together with the release, are admissible testimony, where his competency as a witness is attacked by reason of interest. 20 A. 468, *State v. Louisiana State Bank*.

3) *Infamy and color, as affecting competency.*

1. Effect of a pardon as to capacity to testify, see CRIMINAL LAW, XII. (d), No. 4.

4) *Marriage, concubinage and relationship, as affecting competency.*

1. The recognized exception, as to the competency of the wife to testify against her husband, where she has sustained a personal injury, does not

extend to cases of bigamy. In these, the lawful wife's testimony is not liable to this objection. 15 A. 403, *State v. McDavid*.

2. In a suit against the wife, interrogatories cannot be propounded to the husband. 18 A. 319, *Cull v. Herwig*.

3. In a suit against the husband and wife *in solido*, on allegations that the husband acted as his wife's agent, and bound her as such, the husband cannot be a witness, nor can he be interrogated on facts and articles. 20 A. 421, *Carter v. Taylor*; C. C. (2260), § 3; 11 A. 628; 18 A. 319; 2 A. 722, 807, 876.

4. Interrogatories cannot be propounded to the husband to prove that he signed the note as the agent of his wife. 21 A. 681, *Robichaux v. Bouillett*.

5. Article 2260, C. C., is peremptory; the husband cannot be a witness, either for or against his wife, etc. It makes no difference at what time the relation of husband and wife commenced. 21 A. 651, *Leon v. Bouillet*.

6. The declaration of the husband against his wife, can no more be admitted against his wife than his testimony. 21 A. 422, *Simmonds v. Norwood*.

7. The husband is not a competent witness against his wife's heirs, as to what transpired during her life time. 21 A. 343, *Succession Wade*.

8. After the death of the husband, the wife is a good witness in behalf of his succession. 28 A. 669, *Michael Reilly v. Succession of Christopher Reilly*.

9. A concubine is a good witness, but her credibility is affected. 28 A. 279, *State v. Brown*.

10. When the contest is between the wife and a creditor who is attacking her judgment of separation in nullity, she being joined with her husband as defendant, the wife should be permitted to testify. 23 A. 164, *Keller v. Vernon*.

11. The husband and wife cannot testify either for or against each other. C. C. 2281; 23 A. 556, *McDonald v. Thompson*.

12. The husband of defendant is a competent witness for intervenor, who claims the property seized. 27 A. 315, *Schmidt & Zeigler v. Willitson*.

6) Attorneys at law, how far competent.

1. Where interrogatories were addressed to an attorney, to ascertain who was his client, when that relationship commenced and ended, and what money had been received, and what paid over, and to whom paid; *Held*: That none of these matters are privileged communications within the meaning of article 2262, of the Civil Code. 15 A. 330, *Shaughnessy v. Fogg*.

2. An attorney ought not to testify as to matters confided to him by his client. 15 A. 553, *Holmes v. Barbin*.

7) Competency of witness to prove or impeach his own act.

1. In actions which involve the question of simulation, great latitude is permitted in the introduction of proof, and officers may be called upon to state any thing which does not directly contradict their return, although the same may be connected with other and extraneous proof, which shall have the effect of showing that the officer was mistaken in such return. 15 A. 310, *Leverich v. Adams*.

2. Jurors are incompetent as witnesses to impeach their own verdict. 15 A. 591, *Duhon v. Landry*. See No. 9.

3. A public officer who has given a solemn certificate in his official character, and under his seal, cannot, as a witness, prove it false. 14 L. 382; 5 R. 200; 7 R. 854; 23 A. 218, *Garthwaite, Lewis & Stuart v. Seip & Casson*.

4. The marriage contract, which declares that the property of the future wife consists of certain property and a sum of money, denoted *propter nuptias*, cannot be contradicted by the husband's testimony to show that the wife brought nothing in marriage. 25 A. 201, *Edwards v. Edwards*.

5. The declarations in an authentic act and in judicial proceedings, cannot be contradicted by the signer's testimony, even if he be not estopped. 26 A. 706, *Elbert and husband v. Wallace & Co.*; 27 A. 701, *Howell v. Sheriff*.

6. A witness cannot be heard to contradict his own testimony. 27 A. 701, *Howell v. Sheriff et als.*

7. The jurors cannot be allowed to prove that the word defendant, in the verdict, was meant for plaintiff. 28 A. N. R., *Lewis v. Calhoun.* 11 L. 141; 12 A. 3.

8. The testimony of a married woman, unsupported by other evidence, will be of less weight than her authentic renunciation made before a commissioner of this State ten years previous. 25 A. 595, *Prickett v. Law.*

9. A juror is not competent to impeach his own verdict, but the officer of the court who is instrumental in bribing the jury, may be heard. 29 A. 134, *Hawkins v. N. O. Printing and Publishing Company.* (N. B. *The court does not so decide "authoritatively."*) See No. 2. CRIMINAL LAW, XII. (f), 2), Nos. 1, 7.

10. A witness to the act may testify against its truth; his credibility only is affected. See XV. (a), No. 1.

(c) Examination and privileges.

1. A witness alone can raise the objection that his testimony will incriminate him. 26 A. 6, *Horrell v. Louisiana National Bank.*

2. Interrogatories need not be answered, if their effect would render the respondent liable to a penalty. See XVIII. (d), 1).

3. Or might contradict his affidavit for an injunction. See XVIII. (d), 1), No. 4.

(d) Opinions and credibility.

1) In general.

1. A witness who swears false in one particular, cannot be believed in his other statements. 26 A. 591, *Cross v. Parent.*

2) Experts; and opinions of witnesses.

1. The supposition and belief of a witness are not admissible in evidence, but the witness may state the fact from which such inference may be drawn by the court. 15 A. 410, *McConnell v. New Orleans.*

2. The conjectures of medical men as to the probable duration of a disease have not, *per se*, the weight of proof of the fact of duration. 15 A. 620, *Paty v. Martin.*

3. The opinion of a witness cannot be received in evidence. 21 A. 726, *Poutz v. Jones.*

4. The opinion or conclusion of a witness is not evidence. 27 A. 316, *Schmidt & Ziegler v. Willitson.*

3) Mode of impeaching or supporting credit of witnesses.

1. A party introducing a witness is not permitted to impugn his character for veracity, but may introduce evidence to rebut a statement made by the witness of a particular fact. 26 A. 211, *Brodericker v. East.*

2. A witness may be discredited by other means than by a direct attack upon his character for veracity. The surrounding circumstances may disprove his credibility with more force than the statement of other witnesses, that he is not credible. 29 A. N. R., *Succession Drumm.*

3. Testimony given by a witness, on a former trial, cannot be offered to impeach his evidence, unless a proper foundation be laid by directing his attention to the former statements and giving him a fair opportunity to explain them, if he can. 30 A. 170, *Succession Pinard v. Holten.*

XVII. OF THE REDUCTION OF TESTIMONY TO WRITING.

1. The court cannot draw a conclusion from the note of evidence, which contradicts the record. 19 A. 33, *McCracken v. Simms.*

2. A witness, whose testimony has not been read to him, has the right to correct the same afterwards. 20 A. 27, *Dunn v. Pipes.*

3. "If the record contains no note of evidence, but it appears that the letters were received in evidence, in the absence of proof to the contrary, we will presume the judge did his duty and required proof of the signatures before receiving them in evidence." 22 A. 73, *Parham & Blount v. Succession Ogle*.

4. "We find no note of evidence, we presume, therefore, that the judgment was properly rendered, and upon evidence properly before the court." 23 A. 393, *Graham v. Rice*. See APPEAL, IX. (a), No. 12.

XVIII. OF INTERROGATORIES ON FACTS AND ARTICLES.

(a) *Right to interrogate; order to answer; and service of interrogatories.*

1. Interrogatories on facts and articles cannot be taken for confessed, and used as evidence on the trial, without an order of court directing them to be answered within a given delay, and notice of such order given to the party interrogated. 15 A. 612, *Lapene v. Riche*.

2. Personal service of the interrogatories on facts and articles, is not necessary, but may be made in conformity to article 189, C. P. 21 A. 681, *Blanchin & Giraud v. Pickett et als.*; 2 A. 11.

3. Interrogatories may be propounded to enforce a verbal partition. 26 A. 251, *Gusman v. Hearsey*,

4. A party cannot destroy his written agreements, except by written evidence, which includes interrogatories on facts and articles. See XV. (b), No. 2; XVIII. (b), No. 1.

5. When an act is to be done by a party personally, which cannot be done by the attorney, such as answering to interrogatories, on facts and articles, the order must be served personally, before he can be deemed in default. 28 A. N. R., *Marquez & Co. v. Bernard*.

6. In a suit against the wife, interrogatories cannot be propounded to the husband. See EVIDENCE, XVI. (b), 4), Nos. 2, 4.

7. Defendant cannot object to the answers being offered in evidence. See PETITORY AND POSSESSORY ACTIONS, II. No. 2; *infra*, (d), 1), No. 3.

(b) *Relative to what may be propounded.*

1. The law requires the proof of sale of immovable property to be in writing; but when actual delivery has been made, a verbal sale or other disposition of immovable property may be proved by interrogatories propounded to either vendor or vendee, the reply to which would be a confession of title. C. C., article 2255. No other kind of proof is permitted by this article. 17 A. 2, *Haughery v. Lee*. See XV. (b), No. 2.

2. The capacity of the officer who received the answers to the interrogatories having been proven by parol, without objection, the answers are admissible. 18 A. 129, *Letten v. Durbridge*.

3. A litigant cannot be compelled to answer an interrogatory, enquiring whether he had taken the oath of allegiance to the United States. 21 A. 194. *Pratt v. Draughton*.

(d) *Answers.*

1) In general.

1. Plaintiff, a branch pilot, sued the owner of a vessel to recover a fine imposed by law, for having had the vessel piloted across the bar, by one not appointed a branch pilot, and propounded interrogatories to the master to prove his allegations; *Held*: That the master cannot be compelled to answer if he would expose himself to the penal liability. 16 A. 360, *Shepherd v. Payson*.

2. The whole record need not be offered in connection with the answers to the interrogatories. 18 A. 203, *Murison & Co. v. Butler*.

3. The answers to interrogatories form part of the pleadings, and either party may use them without formally offering them in evidence. 19 A. 490, *Burkett, agent, v. Hopson*; 5 N. S. 179; 9 R. 19. See I, No. 2; XVIII. (a), No. 7.

4. A motion to strike out interrogatories on facts and articles, propounded to plaintiff, on the ground that they tended to make him confess himself guilty of a crime in seeking to make him contradict his affidavit for an injunction, cannot be taken as a confession that the sale is simulated, and the answers to the interrogatories affirming the validity of the sale, cannot be disregarded. 27 A. 253, *Theriot v. Lyons, sheriff*. See PLEADING, V. (b), 1), No. 2.

5. The law does not require answers to interrogatories to be made in any particular set of phrases. 17 A. 2, *Haughery v. Lee*.

6. Where answers to interrogatories on facts and articles, all taken together, present a complete answer to all the interrogatories, the court will not order one of the interrogatories to be taken as confessed, for the reason that they appear evasive. 18 A. 547, *Bond v. Bishop*.

7. See answers to garnishment process. ATTACHMENT, X.

8. No suit in damages can be instituted, to recover what has been lost in another suit, because defendant answered falsely to the interrogatories. See OFFENSES AND QUASI OFFENSES, I. No. 4.

2) In open court and under commission; and when to be made.

1. Where interrogatories on facts and articles are not required to be answered in open court, nor to be sworn to before the clerk, the answers sworn to before a justice of the peace, and filed in court before the trial of the cause, cannot be objected to on the ground of their not being filed until after the day fixed in the order of court for their being answered. 15 A. 240, *Huff v. Freeman*.

2. An order of court to answer interrogatories on facts and articles, is not necessary where defendants are not required to answer in open court. 21 A. 681, *Blanchin & Giraud v. Pickett*; 11 A. 173; 14 L. 260; 10 L. 546; 7 L. 522.

3. The commission issued to examine the plaintiff having been returned unexecuted, the interrogatories cannot be taken for confessed. 26 A. 332, *Mrs. LeBlanc v. Succession Massieu*.

4. The order to answer the interrogatories on facts and articles, not fixing a day upon which they should be answered, cannot be taken for confessed in default of answers. 26 A. 333, *Leblanc v. Succession Massieu*.

3) Relevancy and sufficiency.

1. A party interrogated on facts and articles, may state any facts intimately connected with the subject of interrogatories, and necessary to an explanation of part of his answer. 15 A. 184, *Tegarden v. Powell*.

2. When a defendant is interrogated by the plaintiff for the purpose of proving the liability or indebtedness set forth in the petition, and the defendant, in answering, states facts which tend to establish his liability, he may also in the same connection state other facts which show that such liability has been discharged. 15 A. 618, *Braxton v. Bloom*.

3. When a party to a suit, in answering an interrogatory on facts and articles, states some other facts besides those concerning which enquiry has been made, if such facts be matters of defense and closely linked to the facts on which the party was interrogated, the answer is admissible. 15 A. 644, *Woodruff v. Dodd*.

4. When the district judge struck out such an answer, and, a bill of exception being taken, the Supreme Court admitted it in evidence; *Held*: That the case should be remanded in order to give the opposite party an opportunity to contradict it. *Id.*

5. A party to a suit, interrogated on facts and articles, may state, in addition to such matters as are intended to be elicited by the interrogatories, any other matters by way of defense, provided they are closely allied to those facts sought to be drawn from the party by the interrogatories. 15 A. 656, *Quirk v. Haskins*.

6. Defendant, sued as part owner of a boat, on a draft drawn by the master, and paid by plaintiff, as indorser, propounded interrogatories to plaintiff, to enquire

whether it was not to his knowledge, that the boat belonged to another. To which plaintiff did not answer categorically, and the answer being regularly taken for confessed, the suit was legally dismissed. 16 A. 300, *Walker v. Wingfield*.

7. The law does not require answers to interrogatories to be made in any peculiar set of phrases. 17 A. 2 *Haughery v. Lee*.

8. The answers to interrogatories propounded to one defendant, cannot be used as against the other defendants. 18 A. 239, *Collins v. His Creditors*.

9. Plaintiff, who propounds interrogatories, cannot have matters closely linked to the question at issue stricken out, so as to be able to move for judgment on the remaining part of said answers. 26 A. 251, *Gusman v. Hearsey*.

10. In answering interrogatories on facts and articles, facts closely linked to the question may be mentioned; all others must be stricken out. 29 A. 540, *McLear & Kendall v. Hunsicker*; 3 M. 410; 6 R. 2; 9 R. 127; 11 R. 518; 2 A. 910; 6 A. 205; 13 A. 201.

11. When a motion is made to strike out a part of the answers to interrogatories on facts and articles, the judge must pass on the motion before the trial; he cannot refer the motion to the merits. 29 A. 540, *McLear & Kendall v. Hunsicker*.

12. Sufficiency of evidence to prove the deposit in Confederate notes. See DEPOSIT, III. No. 18.

6) Neglect to answer.

1. The failure of an administrator to answer the interrogatories on facts and articles, binds the estate. 21 A. 681, *Blanchin and Giraud v. Peckett*; 6 M. 730.

2. Where interrogatories on facts and articles are served on defendant with the petition, to be answered within legal delays, and previous to any default, they are taken for confessed and judgment is rendered against the defendant, the case will be remanded. 27 A. 671, *Henshaw & Sons v. Flannery & Co.*

7) Effect as evidence.

1. The answer of the vendor of an interposed party in an act of sale to interrogatories on facts and articles propounded to him, can only be regarded in the light of testimonial proof in respect to such interposed party. 15 A. 539, *Barbin v. Gaspard*. See No. 7.

2. The answers to interrogatories on facts and articles, which either party had the right to offer on the first trial, may be used in the same manner on the second or any subsequent trial of the same cause. 16 A. 32, *Bachemin v. Scheixnaydre*.

3. The court is bound to give full effect to answers to interrogatories received in evidence, without objection. 18 A. 318, *Cull v. Herwig*.

4. Answers to interrogatories propounded to prove a transfer of real estate cannot be contradicted by parol. 26 A. 252, *Gusman v. Hearsey*.

5. The testimony of the defendant is not sufficient to contradict the answers of plaintiff to interrogatories on facts and articles propounded by defendant and corroborated by the promissory note in evidence. 26 A. 594, *Boagni v. Foucky*.

6. The answers of plaintiff to interrogatories on facts and articles, must prevail over the unsupported testimony of defendant. 26 A. 693, *Christian v. Vickers*.

7. In a case where the sale is made to an interposed party, who, when interrogated, denies the sale, such denial is conclusive on the other, and testimonial proof cannot be admitted to contradict it. 15 A. 539, *Barbin v. Gaspard*. See Nos. 1, 10.

8. The answers to interrogatories form a part of the record offered in evidence. 18 A. 716, *Walker v. Villavaso*; 3 A. 649.

9. Answers to interrogatories form part of the record, and need not be offered in evidence. This applies only to the answers which are legal and not objected to. 29 A. 540, *McLear & Kendall v. Succession Hunsicker*. See XXII. (a), No. 1.

10. Answers to interrogatories must be contradicted by two witnesses, or one witness corroborated by strong circumstantial evidence. 19 A. 470, *Hynson v. Texada*.

XIX. OF COMMISSIONS TO TAKE TESTIMONY.

(a) *Application and order; issuing commission; and return day.*

1. An affidavit that the district judge is absent from the parish, is sufficient to authorize the parish judge to sign an order to take the deposition of a witness. 26 A. 616, *Cain v. Loeb*.

2. A deputy clerk may issue a commission to take testimony. 16 A. 399, *Rhodes v. Meyers*.

3. The presumption is that the parish judge had the necessary evidence to issue a commission in a case before the district court. See EVIDENCE, III. (d), No. 2.

(b) *Affidavit; names and residence of witnesses.*

1. The deposition of a witness residing out of the State, taken under commission, which was issued without the necessary affidavit, should not be received in evidence. 15 A. 222, *Folse v. Kittridge*.

2. The testimony, under commission, of a witness employed in the United States navy, will not be rejected, because he was within the jurisdiction of the court at the time of the trial. 20 A. 455, *Golding v. Steamer America*.

3. One who, on crossing the interrogatories, objects to the taking of testimony of witnesses, not named in the interrogatories, is entitled to renew his objections when the testimony is offered, and the evidence should be rejected if the objections be valid. 26 A. 113, *Caballero v. Maduel, ex.*

4. Where the certificate of the commissioner shows the real name of the witness, an error of name in the caption is not fatal. 26 A. 616, *Cain v. Loeb*.

(d) *Execution of commission; certificate and seal of commissioner.*

1. It is sufficient, in the execution of a commission, if the caption shows that the witnesses were duly sworn, where, when, and by what authority the commission was executed; and it is not necessary that it should appear by whom the deposition was written. 15 A. 683, *Blair v. Collins*. See (f), No. 2.

2. The want of the commissioner's signature to the return, is a fatal defect of form. 16 A. 96, *Price v. Emerson*.

3. Depositions taken by a notary public, under a commission addressed to any judge, justice of the peace, or Louisiana commissioner in another state, are not admissible in evidence. 21 A. 411, *Pendery & Naylor v. Crescent Mutual Insurance Company*.

(e) *Authentication; and proof of commissioner's capacity.*

1. The proof of official qualification of the commissioner, specially designated by name in the commission, is unnecessary. 16 A. 101, *Morrison v. White*.

2. Nor is the seal of office required in such a case. *Ib.*

3. The parties agreed in the margin, of a commission addressed to any judge, justice of the peace, or Louisiana commissioner, upon the name of the commissioner, and this is sufficient. *Ib.*

4. Testimony in another State, taken before a justice of the peace, cannot be received in evidence, if not attested by the governor, under the great seal of the State. 22 A. 29, *Wadwell v. Stern*.

5. When the commissioner appointed by court returned the commission, signed commissioner of the State of Louisiana, and his seal is not affixed, the commission should be read in evidence. 27 A. 632, *Davis v. Madden*.

(f) *Rule to admit commission; objections to interrogatories, answers, or witnesses.*

1. When a commission had been obtained to procure the evidence of a witness, and on a rule taken on the opposite party to show cause why the depositions should not be read on the trial of the case, the objection was made that they were not signed by the deponent, and this objection was sustained by the court; *Held*: That in the absence of any neglect attributable to the party taking out the commission, he was entitled to a new commission, and to a continuance of the cause in the mean time. 15 A. 419, *Tarleton v. Bringier*.

2. Where an objection was made to the introduction in evidence of certain depositions, upon the ground that they were not reduced to writing by the justice of the peace, before whom they were taken, and that the proces-verbal of the magistrate did not state by whom they were reduced to writing; *Held*: That the presumption of law is, that the magistrate did his duty, and that the answers were written either by himself or by a person not interested in the event of the suit, and that the burden of proof was on the party objecting to rebut this presumption. 15 A. 534, *Imboden v. Richardson*. See (d), No. 1.

3. The object of taking a rule to show cause why testimony taken by commission should not be read on the trial, is to enable the party, in case of irregularity, or informality, not attributable to himself, to remedy the defect before trial. 15 A. 419, *Tarleton v. Bringier*.

4. The objections to the testimony taken by commission are in time, if made in answer to a rule to use the same. 23 A. 189, *McDonald v. Wells*.

5. The testimony taken under commission will be received, although two of the witnesses named were not examined. 24 A. 589, *Bremstein & Bender v. Crescent Mutual Insurance Company*.

(g) *Other matters.*

1. The return of a commission taken by plaintiffs, but received after the death of one of the partners of the commercial firm, plaintiffs, is admissible in evidence. 19 A. 86, *Roth and Deblieux v. Moore*.

2. Plaintiff, who resides out of the State, and to whom interrogatories were propounded by commission, under act February 10, 1843, cannot offer as a substitute to the commission not returned, his answers not under commission. 20 A. 153, *Kirkland v. Harris*.

XX. OF THE PROOF OF FOREIGN LAWS.

1. A copy of an act of the legislature of another State cannot be properly authenticated without having affixed to it the seal of the State. 15 A. 295, *Commonwealth Insurance Co. v. Labuzan*.

2. Where a statute of another State is not offered in evidence, the court will presume that it is similar to ours. 19 A. 373, *Nalle v. Ventress*. See DONATIONS, VI. (a), 1), No. 1. SUCCESSION, VII. (a), 2), B. No. 6; VIII. (e), 6), No. 2.

XXI. OF THE AUTHENTICATION AND PROOF OF RECORDS AND JUDICIAL WRITINGS.

(a) *In general.*

1. The correspondence between a district attorney, representing the United States, and the attorney general, is confidential in its nature, and cannot be cited by third persons. 1 Woods, 234, *United States v. Six Lots of Ground*.

(b) *Records and judicial writings in this State.*

1. In Louisiana a contract under seal is of no greater dignity than one without seal. 13 P. 378, *Wilcox v. Hunt*.

2. For proof of signature to a judgment, see APPEAL, I. (b), 1), No. 7.

3. Original records may be offered in evidence. 1870, E. S., p. 98.

(c) *Records and judicial writings from the other States.*

1. Where it is alleged in the petition that the claim sued on has been reduced to a judgment in a foreign country, the plaintiff cannot establish this fact by parol evidence; the original cause of action being merged in the judgment, the suit must be considered as brought upon it. 15 A. 35, *Jones v. Jamison*.

2. A copy of a deed of trust and the assignment thereof, kept in a public office of any State, is admissible in evidence in the courts of this State, on being properly attested by the keeper of such records. 21 A. 594, *Graham & Anderson v. Thompson Williams*.

3. A certificate of proceedings before the court of ordinary in the State of South Carolina, where the judge acts as clerk of his own court, is good evidence before our courts, under the act of congress, when such certificate has the seal of the court, is certified by the clerk, and the same person, in his capacity of judge, declares the attestation to be in due form. 15 A. 451, *Pagett v. Curtis*. See (d), No. 2.

(d) *Foreign States.*

1. The action being based on a judgment rendered in a foreign country, parol is inadmissible to prove the cause of action. 15 A. 35, *Jones v. Jamison*.

2. An instrument from another State, not authenticated according to the act of congress, is not admissible in evidence. 27 A. 542, *Heard v. Patton*; 11 R. 417.

XXII. OF THE ADMISSIBILITY AND EFFECT OF RECORDS AND JUDICIAL WRITINGS.

(a) *In general.*

1. The introduction of another suit in evidence does not, in general, make the testimony on which the judgment was rendered, evidence in the new suit. 16 A. 356, *Mestier v. Opelousas Railroad*; 3 A. 174; 5 A. 6; 13 L. 270. See XVIII. (d), 7), Nos. 8, 9.

2. Where one party relies on, and offers a portion of a record in evidence, the other may offer the whole. 18 A. 528, *State v. Gordon*.

3. The record of a suit against a co-proprietor, is not admissible against the other co-owner, who was no party to said suit. 21 A. 423, *Marcelin v. His Creditors*.

4. Extracts from inventories or from proces verbal of sales when duly certified, are admissible in evidence. It is not necessary that all the mortuary proceedings of a succession should be introduced to prove a fact or a date which may be shown by a particular document; such a practice is abusive and will not be sanctioned. 22 A. 358, *Henderson v. Maxwell*.

5. The judgment being rendered and registered simply against two parties, the record cannot be admitted in evidence as to third persons, to prove that it is a judgment *in solido*. 23 A. 133, *Graves v. Hunter*.

6. Parol is admissible to prove what candidate was the real choice of the people. 29 A. 610, *Webre v. Wilson*. See ELECTIONS BY THE PEOPLE.

7. The certificate of the auditor to prove the amount due by a tax collector, is admissible. See TAXES, III. (c), 4), No. 1.

8. Extracts of judgments, unaccompanied by the pleadings, are not admissible in evidence. 30 A. 29, *Gest and Atkinson v. N. O. St. Louis and Chicago R. R. Co.*; 19 L. 526; 3 A. 594.

(b) *Probate decrees; and appointment of curators, tutors, etc.*

1. The records, documents and all papers relating to the account, the opposition and the mortuary proceedings having been destroyed by fire, before judgment, a new account being ordered to be filed, it was incumbent on the parties to offer secondary evidence sufficient to enable the court to pass judgment thereon; for want of such evidence, the case should be remanded. 19 A. 287, *Succession Peniston*.

2. Defendant may show that the judgment homologating her account, is no judgment at all. See SUCCESSION, VIII. (f), 3), No. 6.

(c) *Sheriff's return; and execution sales.*

1) In general.

1. The sheriff's return in relation to sales made by him, under execution, is only *prima facie* evidence of the facts stated in it between the parties, and is subject like other presumptive evidence, to be rebutted by contrary proof. 16 A. 323, *Grant & Co. v. Harris*.

2. Where a return in a record, purporting to be a sheriff's return, to a *feri facias*, alleges that under a proceeding to foreclose a mortgage, the sheriff seized the mortgaged premises, but does not purport to be signed by the sheriff, the return is traversable, and if the law requires an actual seizure, it may be shown that none was made. 21 Wall. 123, *Watson v. Bondurant*.

2) Execution sales.

1. A party claiming title to property under a sheriff's sale, is permitted to introduce in evidence the record of the suit in which the *fi. fa.* issued, and in which the sheriff's sale to such party took place; and the fact that the sheriff's sale was not followed by registry is not sufficient reason to exclude the record. 15 A. 566, *Smith v. Lambeth*.

2. When the *fi. fa.* and sheriff's return cannot be found, the title will be sufficiently made out by showing the petition, judgment, notices of judgment, seizure, and notice to appoint an appraiser, together with the sheriff's deed. 21 A. 383, *Coulson v. Wells*.

3. The presumption is that the sheriff paid the taxes at the time of sale. See III. (d), No. 1.

(d) *Judgments determining marital rights, and those of minors and mortgagees, and revocatory action.*

1. Where a judgment has been rendered declaring the sale made by a debtor of his property, to be simulated, the record and judgment will be received as full and conclusive proof of simulation. 15 A. 663, *Bowman v. McElroy*.

(f) *To show rem ipsam and collateral facts.*

1. In a contest between creditors, a judgment not attacked for fraud and collusion is *prima facie* evidence of the claim and privilege. 19 A. 143, *Gleason & McManus v. Sheriff*; 5 A. 401; 4 A. 135; 17 L. 205; 15 L. 59; 14 L. 459.

2. The whole record is admissible to prove that the judgment therein obtained is an absolute nullity. 20 A. 204, *Succession Patrick*.

3. A judgment not attacked by fraud and collusion is *prima facie* evidence against third parties. 20 A. 266, *Gleason & McManus v. Sheriff et al.*; 5 A. 401; 4 A. 135; 17 L. 205; 15 L. 59.

4. A judgment in a case to which the defendants were not parties or privies, is *res inter alios acta*, and not admissible in evidence. 14 A. 354, *Louis Mestier v. N. O. O. & G. W. R. R. Co.*

5. Parol is admissible to prove the place where a will was made. 28 A. 57, *Succession Robb*.

6. But not to show that the formalities were complied with in a nuncupative will by public act. See DONATIONS, VI. (a), 4), No. 6.

(g) *Res judicata.*

1. Where a partner intends to avail himself of a decree on an adjudication, upon the subject matter of a controversy, and not merely to prove, collaterally, that the decree was made, he must show the proceedings upon which the decree was founded; the whole record which concerns the matter in question, ought to be produced. 15 A. 276, *Clark v. Hébert*.

2. A judgment settling the status and legitimacy, is admissible in evidence

against one no party thereto, and is *res judicata* against the world. 26 A. 112, *Caballero v. Maduel, ex.*

3. For plea of *res judicata*, see PLEADING, VI. (c), 2); JUDGMENT, XV.

(h) *Foreign judgments and judgments in rem.*

1. See XXI. (c), No. 1; (d).

2. How executed. See EXECUTION, I. No. 3.

XXIII. OF OFFICAL REGISTERS; PLANS AND SURVEYS.

(a) *In general.*

1. Although the certificate of the inspector is made by the ordinance of the police jury, evidence of the debt, for work adjudicated by the police jury, their acceptance of the work is not conclusive evidence that it was done in conformity to law and to the terms of adjudication. 15 A. 181, *Grass v. Haynes*.

2. The certificate of a municipal officer, that the work is done according to contract, may be contradicted by parol. 23 A. 30, *Rooney v. May*.

3. The city's acceptance of paving, is *prima facie* evidence that the work has been done according to contract. See NEW ORLEANS, II. (g), 3), No. 3.

(b) *Assessment rolls.*

See TAXES, III.

(c) *Auction sales.*

See *ante*, XXII. (a), No. 4.

(d) *Baptism, marriage, birth and death.*

1. The certificate of marriage is evidence of the particular fact which the law requires to be recorded in it, and of no other. 20 A. 97, *Succession Hubee*.

(e) *Conveyances and mortgages.*

1. The recorder's certificate is only *prima facie* evidence of the facts stated in it, and if untrue, may be contradicted by proof. 15 A. 564, *Taylor v. Pearce*.

2. In a hypothecary action to enforce a judicial mortgage, the certificate of the recorder that the judgment has been recorded in his office, has the same effect as evidence when drawn up in a duly certified copy of the judgment as it would have on a separate and distinct paper. *Ib.*

(f) *Custom house documents.*

1. Papers registered in the custom house, when under the control of the Confederate States, have no legal entity, and are not evidence; but if received without objection they will be considered. 18 A. 337, *Succession Alexander*; 4 L. 64; 3 A. 34.

(g) *Land office; plans and surveys.*

1. In order to make the *proces verbal* of the surveyor appointed as an expert, authentic, and therefore admissible in evidence without his testimony, it should have been made according to C. C. 833, and signed by two witnesses called for the purpose. 23 A. 350, *Latiolais v. Mouton*. TALLIAFERO, J., *dissenting*.

2. An *ex parte* diagram may be used, so that the testimony of the witness may be explained by them. 26 A. 209, *Boedicker v. East*.

3. A document purporting to be a certificate of a Spanish survey in Louisiana, and which has been recognized by the Spanish authorities, is *prima facie* genuine; but it may, nevertheless, be shown to be ante-dated and forged. 3 H. 773, *United States v. King*.

4. For city surveyor, see NEW ORLEANS, II. (g), 3).

5. Plans and surveys cannot be allowed as costs under an execution. See SHERIFF, III. No. 9.

XXIV. OF AUTHENTIC ACTS.

(a) *In general.*

1. The second section of the act of 1865, authorizes commissioners appointed in other States by the governor of the State of Louisiana, to take the acknowledgment and the proof of any deed, mortgage, etc.; and the eighth section gives to all acts thus acknowledged the force and effect of authentic acts executed in this State. The commissioners are thus vested by express provision of law with all the powers of our justices of the peace and notaries. When an act of sale, mortgage, assignment, etc., is passed before a commissioner, therefore, it requires two witnesses in order to make it authentic, otherwise it is an act under private signature. 15 A. 392, *Langley v. Burrows*.

2. The return of a tax collector is authentic evidence in certain cases. See EXECUTORY PROCESS, II. (a), No. 2.

3. Negotiable mortgage notes make full proof of themselves. See MORTGAGE, III. (a), No. 7.

(b) *Requisites; copies; and admissibility.*

1. Where an instrument was attested by two witnesses, and afterwards acknowledged by the parties before the parish judge, when no witnesses were present; *Held*: That it was not an authentic act, and the copy was inadmissible in evidence, until an effort had been made in vain to obtain the original. 15 A. 235, *Carpenter v. Featherston*.

2. An American consul at a foreign port is without authority to make an authenticated copy of a draft drawn here by the owner of a ship upon the consignees of such ship, at such foreign port. 15 A. 641, *Williams v. Crescent Insurance Company*.

3. The objection that the act was not recorded, goes to the effect rather than the admissibility of the evidence. 23 A. 435, *Pendleton v. Eaton & Barstow*.

4. The authentic act is complete without the copy of the plan referred to therein. 29 A. 28, *Garrish v. Hyman*.

XXV. OF PRIVATE ACTS, OR ACTS SOUS SEING PRIVE.

(a) *Production or withdrawal.*

1. The copy of an assignment under private signature, the original of which is under the control of the party in whose favor it is made, is not admissible in evidence. 15 A. 108, *Gaines v. Page*.

(b) *Proof.*1) *In general.*

1. A copy of an assignment under private act, which is in existence and under control of the party in whose favor it is made, is not admissible in evidence. 15 A. 108, *Gaines v. Page*.

2. When the subscribing witness to an act under private signature, resides out of the State, proof of the genuineness of the signature of the party to the act, and of the absent subscribing witness, should be received preparatory to the introduction of the act in evidence. 15 A. 235, *Carpenter v. Featherston*.

3. The signatures of a document under private signature must be proved before admitting it in evidence. 22 A. 458, *Miller v. Wisner, sheriff*.

4. The testimony of a witness who states positively that the letters offered in evidence are in the hand writing of defendant, and signed by him, is sufficient to authorize the reception thereof in evidence. 26 A. 616, *Cain v. Loeb*.

3) *Comparison of handwriting.*

1. All evidence of handwriting is uncertain except where the witness saw the document written. 18 A. 448, *Fox v. McDonough's Succession*.

(c) *Date, effect, and admissibility, and commencement of proof in writing.*

1. An objection to an act under private signature offered in evidence, that it has no date except that of the day when it is offered, goes only to the effect. 15 A. 235, *Carpenter v. Featherston*.

2. Where a paper was offered in evidence purporting to contain a dispatch received at a telegraph office, and no proof was made that it was in the hand-writing of any person employed in the telegraph office at the time the dispatch purported to have been received, and no other proof of its authenticity was given; *Held*: That it was inadmissible in evidence. 15 A. 668, *Richie v. Bass*.

3. Where plaintiff in injunction claims the property seized, and the answer sets up the title as fraudulent and simulated, the date of the act *sous seing privé* offered as muniment of title, must be shown by evidence *dehors* the instrument. 19 A. 139, *Corcoran v. Sheriff*.

4. An act under private signature has no date, except that at which it is offered in evidence. 20 A. 464, *Bushnell v. City National Bank of New Orleans*.

5. A bill of lading being an instrument under private signature, should not be received in evidence without proof of the signature. 21 A. 410, *Pendery & Naylor v. Crescent Mutual Insurance Company*.

6. A certified copy of an act under private signature, recorded on the oath of one of the subscribing witnesses, is insufficient to prove title to real estate; the original must be produced and the signature proved. 26 A. 249, *Tesson v. Gusman*; 5 N. S. 175.

7. The signature being admitted, the check should have been received in evidence, although the body is charged to have been forged. 28 A. 521, *Jean Mandère v. Fs. Bonsignore*.

8. A private act once registered in the recorder's office becomes authentic, giving notice to creditors and third persons. 25 A. 112, *Pierce, Jr. v. Clark and Sheriff*.

XXVI. OF THE ALTERATION OF WRITINGS.

See XXV. (c), No. 7; APPEAL, III. (b), No. 20.

XXVII. OF THE AUTHENTICATION AND PROOF OF NON-JUDICIAL WRITINGS, FROM OTHER STATES.

1. The authentication to a commission taken in other States, and issued to "any notary," should be made in accordance with section 598, R. S., 1870. 23 A. 190, *McDonald v. Wells, curator*.

2. Protest of foreign bills by foreign notaries are received without proof of their signature and official capacities, to establish the facts of presentment, demand and non-payment. 15 L. 555; 23 A. 473, *Schorr v. Woodlief*.

3. But not to prove service of notice of protest. *Ib.*

XXVIII. OF RECOGNITIVE AND CONFIRMATIVE ACTS.

See RATIFICATION.

XXIX. OF UNITED STATES INTERNAL REVENUE STAMPS, AS AFFECTING DOCUMENTARY EVIDENCE.

1. It will not be presumed that the document was received in evidence without a stamp. 19 A. 438, *Brown v. Caves*; 18 A. 537, *Roberts v. Murray*.

2. The contract having been received in evidence without objection, the Supreme Court will presume that the original was properly stamped. 18 A. 472, *Roberts v. Murray*.

3. As to the want of internal revenue stamp, the court will presume that the judge acted according to law. 19 A. 267, *Perroux v. Lacoste*.

4. A note is not void for want of a revenue stamp, but simply inadmissible in evidence. 18 A. 514, *McLearn v. Skelton*.

5. In the case of *McLearn v. Skelton*, 18 A. 514, the original note was by

consent of both parties, brought before the Supreme Court to prove a want of stamp, a fact not stated in the opinion. 19 A. 268, *Perroux v. Lacoste*.

6. Where objection was not made to the admission of the notes in evidence, and there is nothing in legal form to indicate that the notes were introduced in evidence without stamps, the presumption will be that the district court did not authorize a fraud on the government. 19 A. 162, *Towne v. Bossier*; 18 A. 573.

7. Where defendant did not object to the admission of the note for want of stamps, and the clerk, in the margin of the note, certified that "no stamp, as required by law, is annexed or attached to this note," the presumption is that the judge did not authorize a wrong to be perpetrated on the government, and that the entry by the clerk is not evidence which the court can notice. 19 A. 180, *Stark v. Bossier*.

8. If objection is not made to the reception of the note, in evidence, because not stamped, the court will not presume that the note was unstamped. 20 A. 236, *Mortee v. Edwards*; 19 A. 180.

9. The judge did not err in allowing an internal revenue stamp to be affixed to the document offered in evidence. 21 A. 119, *Fleming v. Shields*.

10. A note or document with United States internal revenue stamps thereon may be received in evidence, although the stamps are not cancelled. 22 A. 131, *D'Armond v. Dubose*; 24 A. 618, *Brown v. Bennett*.

11. The act of congress, dated 30th June, 1864, which declares that no deed, instrument, document, writing or paper, required by law to be stamped, *which has been heretofore signed or issued*, without being duly stamped, or with a deficient stamp, nor any copy thereof, shall be recorded or admitted or used in evidence in any court, until a legal stamp or stamps, denoting the amount of duty shall have been affixed thereto, * * * and that said stamps may be affixed in presence of the court, applies to acts passed before the 30th June, 1864. 24 A. 403, *Succession Bernard*.

12. The provisions of act of 1865, section 1, declare that each instrument or paper, bill, draft, order or note, shall be deemed invalid and of no effect until the stamp is affixed by a collector of the revenue, and the fine of fifty dollars paid. *Ib.*

13. Section 163 of 1864, U. S. Statutes at large, p. 295, has been repealed by act 1866, sec. 9, 14 U. S. Statutes at large pp. 143, 144, and no instrument requiring a stamp shall be used as evidence in any court, unless duly stamped. 23 A. 250, *Carrie v. Billiu*.

14. If not stamped by the parties at the time of entering into the contract, the stamp should be affixed by the collector of the district upon payment or remission of the penalty by the collector. *Ib.*

15. A party having laid the foundation for the introduction of secondary evidence by showing the loss of the original documents sued upon, is not required to prove that the original had affixed to them, the required U. S. Internal revenue stamps, before the evidence can be received. 22 A. 70, *Van Winckle v. Poydras*.

16. If the copy of the mortgage act, offered in evidence has the recorder's certificate, showing that it was duly recorded, in the absence of proof that no stamp was affixed to the original, the court will presume that the recorder did his duty, and will overrule the objection of want of stamp. 24 A. 463, *Grand & Co. v. Cox et al.*

17. If neither the notary before whom the act of mortgage is executed, nor the parties have any stamps, but procure the same as soon as possible after the passage of the act, and they are annexed to the act and cancelled, this is sufficient. 25 A. 470, *Pavy & Co. v. Bertinet*.

18. See U. S. Statutes at large, 1874, p. 250, (documents, etc., may be stamped before 1st January, 1875, by any person in interest).

EXCEPTIONS.

See PLEADING, VI. BILLS OF EXCEPTIONS. EVIDENCE, XV. (d), 2). SURETYSHIP, III. (a), 4).

EXCHANGE.

1. An exchange of cotton for land is valid, no matter if both were valued by the standard of Confederate money. 22 A. 534, *Spyker v. Hart*.
2. An exchange of a lot for another is not complete, when, see SALE, I. (d), No. 8.

EXECUTION.

I. IN GENERAL.

II. OF THE RIGHT TO ISSUE OR STAY EXECUTION.

III. OF THE WRIT OF DISTINGAS.

IV. OF THE WRIT OF POSSESSION.

V. OF THE WRIT OF FIERI FACIAS.

(a) *Seizure.*

- 1) In general.
- 2) Debtor's right to point out property, and what must be first seized.
- 3) What may be seized; and mode of seizure.
 - A. In general.
 - B. Stock and partnership property.
 - C. What incorporeal rights may be seized, and who may be garnisheed; mode of seizure, and what it covers.
 - § 1 In general.
 - § 2 Evidences of debt; and claims in the hands of officers of court.
 - § 3 Salaries of office; and obligations due to, or by, the government.
 - D. Rights and obligations of garnishees; and mode of proceeding against them.
 - § 1 In general.
 - § 2 Interrogatories and answers.
 - E. Debtor's property disposed of fraudulently or bona fide.
- 4) Amount and divisibility of seizure.
- 5) Notice to debtor.
- 6) Effects of seizure; and sheriffs' rights over property seized.
 - A. In general.
 - B. Privilege acquired by seizure.
- 7) Forthcoming bonds.

(b) *Appraisalment.*(c) *Advertisement and notices, place and day, of sale.*(d) *Sale and adjudication.*

- 1) In general.
- 2) Terms and mode of sale.
- 3) Amount of bid and notice of incumbrances.
- 4) Who may purchase.
- 5) Fraudulent bidders and those who refuse to comply with their bid.
- 6) Twelve months bond.
 - A. In general.
 - B. Requisites of the bond; proceedings on non-payment; and surety's obligation.
- 7) Sheriff's act of sale and description of the thing seized and sold.
- 8) Payment of price; and warranty.
 - A. In general.
 - B. Warranty.
- 9) Validity of sale as affected by the judgment.
- 10) Ratification of sale.
- 11) To whom sheriff must pay proceeds.
- 12) Effect of adjudication; and what passes to the purchaser.
- 13) Avoidance of execution sales; general rules relative to their nullity; and purchaser's equity to reimbursement.

(e) *Satisfaction of execution.*(f) *Return and expiration of writ.*

VI. OF THE WRIT OF CAPIAS AD SATISFACIENDUM.

I. IN GENERAL.

1. Judgments of courts, as well as deeds and acts of parties, may be carried into effect by enquiries outside of the decree, deed or act, when there is a mere latent ambiguity. 15 A. 159, *Lea v. Terry*.
2. The difficulty of executing a judgment, because of uncertainty in the decree, is no concern of the clerk; his duty is to issue the writ in the manner pointed out by law. 15 A. 573, *State v. Bondy*.
3. The necessity of instituting a separate action to enforce a judgment, exists in two cases: first, when the judgment is a foreign judgment; second, when it is a domestic judgment, but the judgment debtor has died and his estate is under administration. 16 A. 352, *Succession Beckman*.
4. The Supreme Court having adjourned before the expiration of the delay

for a rehearing, and the record having been destroyed, the court, after expiration of the legal delay, will direct the lower court how to execute the judgment. 18 A. 605, *Garland v. Roy*.

5. No execution can issue on judgments of the Supreme Court, but such judgments shall be sent back to the inferior court, where they are filed, recorded and executed as judgments of said courts. 23 A. 392, *Wells v. Merz*; C. P. 915.

6. Notice of seizure served on a *curator ad hoc* in proceedings *in rem* does not constitute a valid seizure when the owner is present. 27 A. 122, *Cronan v. Cochran*.

7. Act No. 69, of 1869, which directs the judge to order in the same judgment which condemns a parish, the levy of a tax sufficient to pay the same, is constitutional. 28 A. 199, *Police Jury of Plaquemines v. Packard, et als*. Repealed by act 1877, E. S., p. 87.

8. The city of Jefferson having obtained judgment before a court having jurisdiction, is not responsible for the damages occasioned by its execution, even if the court erred in its purview of the ordinance. 22 A. 600, *Lilienthal v. Campbell, etc.*

9. The judicial mortgagee of an heir, on the distribution to be made by tableau between the heirs, may claim, by opposition thereto, that his debt be paid out of his judgment debtor's share accruing from the real estate sold to effect the partition, although his judgment is on appeal. 21 A. 253, *Succession Tureaud*. But see PARTITION, III. (a), No. 10. PLEADING, VIII. (d).

10. A mandamus will not be granted to compel the judge to issue execution when a rule taken for that purpose was dismissed and no appeal was taken from the judgment. See MANDAMUS, I. (a), 3), No. 1.

10. Judgments of the Supreme Court, how executed. See CLERKS OF COURT, No. 14.

11. Laws relating to execution of judgments, are remedial. See CONSTITUTION, II. (c), 3), c. No. 3.

12. See also SHERIFF, II. (b), 1).

13. For execution against administrators, see SUCCESSION, VIII. (f), 2), B. No. 2; (e), 8), No. 5.

14. The mayor and administrators of the city of New Orleans, may appropriate from the contingent fund provided for by the budget, a sum sufficient to pay a judgment as soon as it has become final; but if such appropriation be not made, they must provide in the budget for all matured debts, and the adoption of the budget is the appropriation of the amount for the purposes therein stated. If the collection of the taxes be not sufficient to pay the amount appropriated, such judgments as are not paid, must figure in the next annual budget, until paid. A mandamus is a proper proceeding to enforce such appropriation. 30 A. 129, *State ex rel. Carondelet Canal Navigation Co. v. Mayor and Administrators*.

II. OF THE RIGHT TO ISSUE OR STAY EXECUTION.

1. Plaintiff has the right to issue an *alias* writ of *fi. facias* for the balance due on his judgment. If the writ is issued for more than due, the remedy is by injunction. 16 A. 217, *Harper v. Terry*; R. S., Sec. 314.

2. Execution of a judgment against a warrantor, will be suspended until the warrantee has paid the amount thereof to the plaintiff. 17 A. 183, *New Orleans v. Ferrière*.

3. A rule to quash a *fi. fa.*, does not suspend the execution, nor does a suspensive appeal from the judgment on such rule. 20 A. 558, *Levi v. Converse, Harding & Co.*; 19 A. 210; 9 A. 302; 30 A. —, *State ex rel. C. C. Haley v. Judge Fourth District Court*.

4. A judgment creditor who accepted from the city of New Orleans, a warrant on the treasury, and transferred it to a third party, cannot proceed against the city before returning the warrant. 24 A. 405, *City v. Smith & Maxwell*.

5. No *fi. fa.* can be issued against the city of New Orleans. Act No. 5, of 1870, E. S. 23 A. 708, *City v. Ruleff*.

6. In the execution of a judgment *in solido*, the plaintiff may seize one or all the co-debtors. 24 A. 287, *Michel v. Benner et al.*

III. OF THE WRIT OF DISTRINGAS.

1. A distringas against the plaintiff is not the proper mode of executing a judgment ordering certain work to be performed, as no other person is ordered by the judgment to do the work, it must be done by the sheriff, as executing officer of the court. 15 A. 223, *Avery v. Police Jury*.

IV. OF THE WRIT OF POSSESSION.

1. In executing a writ of possession, the sheriff is bound to consult the petition and the reasons for judgment, if necessary, to explain what is uncertain in the decree; and he will be responsible in damages to the plaintiff, if he neglect or refuse to execute the judgment, if practicable with those explanations. 15 A. 573, *State v. Bondy*.

2. Where the proper mode of executing a judgment is by a writ of possession, there is no necessity for mentioning in the decree, that such a writ shall issue. *Ib.*

V. OF THE WRIT OF FIERI FACIAS.

(a) Seizure.

1) In general.

1. The creditor has no right to seize a claim belonging to the wife, by a valid *dation en paiement* made by the husband, but by error put in suit under the name of the husband. 24 A. 138, *Mrs. Leblanc v. Dayries*. See No. 18.

2. If a writ of *feri facias* issued prematurely and the injunction taken for this reason was made perpetual, the plaintiff may in due time issue an *alias* writ. 24 A. 298, *Byrne, Vance & Co. v. Mithoff*.

3. One not in any way a party to the record and having no act of subrogation to the judgment, on file, cannot control the execution. 24 A. 549, *Willis v. Nicholson*.

4. A judgment after its transfer may be executed in the transferrer's name. 13 A. 324; 26 A. 45, *Walker v. Villavaso*.

5. A forced sale may be made of the building erected by defendant on plaintiff's lot. 26 A. 261, *Augustin v. Dours*. See V. (a), 4), No. 14.

6. Execution cannot be issued against F. J. R., where the judgment is against J. N. R. The error must first be corrected. 27 A. 445, *Formento v. Robert*.

7. No execution can issue against a succession. 27 A. 556, *Levy & Sugar v. Cowan & Mayo*.

8. The defendant being an absentee, two judgments were obtained before a justice of the peace against him, one as though he were a resident, and another through the appointment of a curator *ad hoc*; a *fi. fa.* was issued in the first case, and not returned until the sale of the property, nearly three months after the issuance of the *fi. fa.*; Held: That the sale is a nullity. 27 A. 678, *McNeil v. Kramer et als*.

9. The judgment creditor who appeals from a judgment rendered on an injunction against his execution, may abandon his appeal and acquiesce in the judgment by conforming his writ thereto, without waiting for the decision of the Supreme Court. 29 A. 51, *Savoie, ad'r, v. Thibodeaux*.

10. Difference between a writ of *feri facias* and an imposition of taxes by courts. See COURTS, I. No. 15.

11. For exemption from seizure, see HOMESTEAD, II.

12. A writ of *fi. fa.* can only be stayed by an injunction. See INJUNCTION, II, (a), No. 3.

13. The creditors of the community may proceed against the husband alone after its dissolution. See MARRIAGE, XIII. (a), No. 4; (e), 4), c.

14. A judgment in favor of a minor homologating a tutor's account, may be executed by the issuance of a *fi. fa.* See MINORS, III. (f), 4), No. 1.

15. No *fi. fa.* can issue on a judgment homologating the proceedings of a family meeting adjudicating property to the surviving father or mother. See MINORS, (g), 5), No. 2.

16. A second indorser who pays a judgment against himself and first indorser may issue execution without further formality. See PAYMENT, II, (b), 2), No. 5.

17. Where the defendant in execution has no title to the land seized, the want of registry of the title of plaintiff in injunction cannot be urged by the seizing creditor. See PLEADING, V. (b), 1), No. 1.

18. A subsequent mortgage creditor cannot seize the property given in payment by the husband to his wife. See SALE, IX. No. 4.

19. Lands situate in another State cannot be seized here. 30 A. 136, *Banker v. Harrington & Co.*

20. A writ writ of *fi. fa.* issued under a tax judgment, remains in force until finally satisfied; no alias or pluries writs shall be issued. 30 A. 295, *Marin v. Sheriff and City.*

21. *Fi. fa.* not to issue against New Orleans. 1870, E. S. p. 10.

2) Debtors' right to point out property; and what must be first seized.

1. The defendant who fails or refuses to point out property when called upon by the sheriff, loses the right so to do. C. P. 646, 649; 23 A. 350, *Déville v. Hays.*

2. The right to point out property, or to object to the seizure of one species of property instead of another, is personal to the debtor, and a creditor cannot avail himself thereof. 26 A. 169, *Hoy & Co. v. Eaton & Barstow.*

3. The sheriff must commence by seizing the movables, but if the defendant fails to point them out he cannot complain. 29 A. 149, *Hefner v. Hesse & Vergez.*

4. When the judgment debtor points out property, it must not be encumbered with recorded liens and privileges; if the liens have no real existence the debtor should cause their cancellation, else the seizing creditor may disregard the property thus pointed out and seize other. 29 A. 500, *Todd v. Gordy, sheriff.*

5. When the debtor has pointed out property, he cannot object. See ESTOPPEL, No. 32.

3) What may be seized; and mode of seizure.

A. In general.

1. Dotal property, after the dissolution of the marriage, ceases to be out of commerce, and may be seized for a pre-existing debt. 16 A. 366, *Bouvillain v. Bourg*; 8 R. 457. See MARRIAGE, IX. No. 6.

2. If the property seized does not belong to the defendant, this does not concern him. 28 A. 848, *Howard v. Walsh*. See B. No. 4.

3. To effect a valid seizure of a negotiable note, the sheriff must take actual possession thereof. 18 A. 56, *Miller v. Streeder*; 5 A. 539; 5 L. 487; 7 R. 500; 2 A. 493, 910; 4 A. 369; 6 A. 182; 4 Cush. 456.

4. Where the amount bet on a horse race has been seized previous to the racing, taking into consideration the means and condition of the debtor, the seizure may be maintained. 19 A. 192, *St. Ceran v. Sherman.*

5. Where the movables were seized before delivery by the debtor, to the vendee, the seizure will be maintained. 21 A. 198, *D'Armand v. Sheriff.* See SALE, III. (b), 4), B.

6. The delivery of rum, which was put in the vendee's rectifier, and then made into neutral spirits, although not paid for, constitutes such delivery, that it may be seized by the vendee's creditors. 24 A. 428, *Terrill v. Hays.* See SALE, III. (b), 4), B.

7. Goods given in payment of the award of arbitrators, and delivered, cannot be seized by the creditors of the person giving them in payment. 28 A. N. R., *James H. Handy v. Banker & Venables.*

8. An order by the owner on the holder of jewelry or its proceeds, without

delivery, does not transfer the ownership to the bearer of the order. The property is liable to be seized as that of the said owner. 21 A. 322, *Aguader v. Guish*.

9. The bonds of the commercial water works and of the N. O., J. and G. N. R. R. Co., are liable to be seized by the judgment creditors of the city; they do not have the character of public property. 23 A. 61, *City v. Home Mutual Insurance Company*.

10. Money deposited by the administrator of a succession, cannot be seized for his individual debts. 26 A. 171, *Halpin v. Barringer*.

11. Where the property has been sold during the lifetime of the owner, an execution against his heirs cannot divest the ownership of the vendee. 27 A. 108, *Morfit v. Fuentes*.

12. If a corporation acquire property, even in a manner prohibited by law or its charter, the property does not still belong to the vendor who has received his price, and it cannot be seized by his creditors. 27 A. 450, *Edwards v. Fairbanks et als*.

13. Where it is shown that a party depends entirely upon his trade, as a printer and editor for means of support, his printing press and materials necessary for the exercise of his trade, are exempt from seizure under article 644, C. P. 15 A. 524, *Prather v. Bobs*.

14. The tools and instruments, exempted from seizure by law, must be necessary, and not merely convenient, for the exercise of the trade by which the debtor gains a living. 15 A. 524, *Prather v. Bobs*.

15. The tools and implements exempted by law from seizure, are the tools necessary for the manual labor of defendant's trade. The machinery of a foundry is not included in such exemption. 28 A. 695, *Boston Belting Co. v. Ivens*.

16. The taxes and public revenues of a municipal corporation cannot be seized. 2 Woods, 100, *Peterkin v. New Orleans*.

17. A judgment creditor cannot seize a judgment against himself. 27 A. 695, *Lemane v. Lemane*.

18. Plaintiff, who has recognized defendant's title, cannot seize by virtue of a judgment against a third person. See ESTOPPEL, No. 42.

19. Plaintiff may sell his own property under an execution against defendant. See (d), 13), No. 1.

20. For exemption from seizure, see HOMESTEAD, II.

21. The tools of his trade, surrendered by the insolvent, cannot be recovered. See INSOLVENCY, VI. No. 1.

22. The property of the wife standing without her knowledge, in the name of the husband, is not liable for his debts. See MARRIAGE, XI. (b), No. 8.

23. No *fiери facias* can be issued against the City of New Orleans. Act No. 5, E. S., 1870. See NEW ORLEANS, II. (c), No. 6.

24. No other property can be seized for taxes than that assessed. Acts 1876, p. 11.

25. Property dedicated to public use cannot be seized. See THINGS, I. (a), 1), No. 4; but see BUILDER AND BUILDINGS, No. 34.

26. The acts of 1872 and 1874, amending article 644, C. P., relative to exemption from seizure, do not apply to the landlord's claim. 30 A. 159, *Stewart v. Lacoume*.

27. Six hundred dollars of furniture, etc., exempt, act 1872, p. 93; amended 1874, p. 53; amended 1876, p. 123.

B Stock and partnership property.

1. When the creditor takes actual possession, by virtue of a *dation en paiement*, and retains one of the members of the debtor firm as a manufacturer, the property will not be liable to seizure by the firm's creditors. 17 A. 254, *Mittenberger & Co. v. Parker, sheriff*.

2. Partnership property cannot be seized for the individual debt of one of the partners. The interest of the partner can be seized. 21 A. 518, *Marston & Co. v. Dewberry*.

3. In execution of a judgment against a firm, money realized by another firm cannot be seized, but the interest of the partner who belonged to both firms may be seized. 21 A. 706, *Degelos, Durrive & Co. v. Woolfolk*.

4. The curator appointed to defend the absconding debtor, cannot set up that partnership property has been attached; the other partners or creditors can alone set this up. 26 A. 644, *Williams v. Williams*. See A. No. 2.

5. The seizing creditor has the right to seize and sell the right of the judgment debtor in a partnership, but this does not dissolve the partnership, and the seizing creditor cannot move for the appointment of a receiver, who can only be appointed after dissolution of the partnership. 27 A. 444, *Choppin v. Wilson et al.*

6. Specific property of the partnership, cannot be seized under execution against one of the partners. His entire interest must be seized. 27 A. 556, *Levy & Sugar v. Cowan & Mayo*.

7. The stock having been declared forfeited, the stockholder cannot be called upon by a creditor of a corporation, to pay the balance due on the stock. 18 A. 619, *Macauley v. Robinson*.

8. What the members of a corporation may be made to pay to the creditors. See CORPORATIONS, VI. (d), Nos. 1, 2, 3.

9. See PARTNERSHIP, III. (a); IV. (e), 4), No. 3; V. No. 3.

10. In an ordinary partnership on a judgment *in solido* against the partners, notice of seizure must be given to both. See EXECUTION, (a), 5), No. 7.

11. Community property invested in a partnership, becomes liable for the debts of the partnership. See MARRIAGE, XIII. (e), 4), A. No. 1.

12. The managing partner of an ordinary partnership, cannot divest his partner's share by selling partnership property. The partnership creditors may seize in the hands of the vendee, the share of the partner thus illegally sold. 30 A. 373, *Bass v. Messick*.

c. What incorporeal rights may be seized, and who may be garnisheed; mode of seizure, and what it covers.

§ 1 In general.

1. A debt not negotiable may be garnisheed, although it has been transferred by the defendant, if notice of such transfer has not been given to the garnishees. 17 A. 258, *Relf & Co. v. Boro*; C. C. (2612), (2613); 2 L. 422; 14 L. 10; 13 A. 551; 5 A. 656; 6 A. 535; 20 A. 96, *Drumm v. Sherman*; 21 A. 291, *Widow De St. Romes v. Levee Steam Cotton Press Co.* See SALE, VIII. (b), Nos. 1, 2, 3.

2. A garnishment process against a judgment debtor, where the judgment is not yet final, is valid, and may be carried into execution when the judgment becomes final. 21 A. 291, *Widow De St. Romes v. Levee Steam Cotton Press Co.*

3. In cases of garnishment, the notice of seizure to the judgment debtor is not essential. *Ib.*

4. The contract of the State with Richard Taylor, in relation to the new canal (acts of 1866, approved March 6), has for its cause, the labor, skill and industry of the defendant in operating, and administering the public highway belonging to the State, and is not therefore liable to seizure. C. C. 1992, 2007; 23 A. 497, *Case v. Taylor*.

TALIAFERRO, J., *dissenting*: Taylor only acquired a right under the contract, and as such it was liable to seizure. C. P. 647. *Ib.*

6. A defendant bound *in solido* under the judgment, cannot be garnisheed. 27 A. 39, *Bayley & Co. v. Lacey, Terry & Co.*

7. Sugar, in the hands of a refiner to be refined, and on which he is to receive two-thirds of the profits after its sale, cannot be seized for the debts of the refiner. 27 A. 449, *Edwards v. Fairbanks et als.* See PARTNERSHIP, I. (c.), No. 11.

8. No garnishment can be made without a *fi. fa.*, nor will a *fi. fa.* against one firm and the individual members thereof, form the basis of garnishment against another firm, even if one of the members be a partner in both firms. 28 A. 319, *Ross & Co., Cain subrogated v. Merchants' Mutual Insurance Company*. See D., § 1, Nos. 15, 20.

9. The property of a seminary of learning, which is a public corporation, under the control of officers appointed by the State, and managed in the manner prescribed by law, and whose property has been received either from the State directly, or has been granted by congress to the State for educational purposes, and which is required to educate free a certain number of students to be named by the governor, cannot be taken in execution on a judgment recovered against it. 2 Woods 71, *Featherman v. Louisiana State Seminary*.

10. Partnership assets, pledged to a partnership creditor, cannot be seized by garnishment process for an individual debt of the partner. 22 A. 51, *Ursuline Nuns v. John Connelly*.

§ 2 Evidences of debt; and claims in the hands of officers of court.

1. The order accepting the cession of property of the corporation having been set aside, the creditors may seize the assets in the hands of the syndic. 18 A. 685, *Jeffries v. Belleville Iron Works Company*.

2. A promissory note may be attached by garnishment process in the hands of the clerk of court in whose possession it is; a suit having been instituted thereon, it is necessary that it be delivered into the hands of the sheriff before the sale. 19 A. 58, *Estate Mille*; 14 A. 821; 6 A. 182, 531, 581; 4 A. 369.

3. The proper mode of seizing a suit or judgment, is to notify both plaintiff and defendant in the suit seized, of the seizure. 23 A. 346, *Safford v. Maxwell, Sheriff*.

4. Garnishment is only cumulative and not necessary. *Ib.*

5. Bonds taken by the sheriff for property sold as perishable, under an attachment, may be seized by any subsequent attaching creditor, subject to the previous seizure. 26 A. 169, *Hoy & Co. v. Eaton & Barstow*.

§ 3 Salaries of office; and obligations due to, or by, the government.

1. The salary of a State officer cannot be garnisheed. 23 A. 752, *Wild v. Ferguson*. See *supra*, § 1, No. 1.

2. The salary of a city assessor is exempt from seizure under article 647, C. P. 16 A. 400, *Chaudet v. DeJong*; C. C. (1987).

3. To render a garnishee liable there must be an existing, absolute liability to pay immediately, or at a future time, and not a conditional one. The salary of an officer of a corporation working on a salary by the month, belongs to the latter class. 29 A. 223, *Maduel, ex. v. Monsseaux et als*.

D. Rights and obligations of garnishees; and mode of proceeding against them.

§ 1 In general.

1. It is not sufficient to merely contradict the answers of the garnishee, plaintiff must show him to be indebted in a specific amount, to recover judgment. 16 A. 349, *Marks & Co. v. Reinberg*.

2. The answers of a garnishee are evidence against the party propounding the interrogatories, and are admissible as evidence. 16 A. 138, *Cator v. Merrill*.

3. The notice of seizure given by the sheriff to the garnishees, need not be served personally, as is the case with the interrogatories. 18 A. 479, *Schindler v. Smith, Bullins & Co.*

4. A garnishee cannot waive service of the proceedings and voluntarily accept service. 18 A. 479, *Schindler v. Smith, Bullins & Co.*; 9 A. 311; 16 A. 105, *Rightor v. Phelps*; 21 A. 380.

5. Garnishees cited to appear and answer through their agents, cannot be made liable by the answers of their agents. 6 A. 562; 7 A. 490; 3 N. S. 57; 18 A. 564, *Lewis v. Franks*.

6. Garnishees being shareholders, are liable only for the sum which they owe the defendants, and should not be made to pay interest until they are in default. 17 A. 177, *Clark v. Powell & Co.*

7. The judgment debtor is entitled to special notice of the subrogation made by plaintiff. A garnishment previous to the service of notice is good. 20 A. 96,

Drumm v. Sherman; C. C. (2613), (2614); 17 A. 258; 2 L. 422; 14 L. 10; 13 A. 551. See SALE, VIII. (b), Nos. 1, 2, 3.

8. Property and effects of the judgment debtor may be seized in the hands of his attorney at law. The latter is bound to answer to the garnishment process. 20 A. 188, *White v. Bird*.

9. No judgment can be rendered against the garnishees who owe the defendant a negotiable note. 28 A. 124, *Pleasants & Sons v. Kemp, Jr.*; 20 A. 195, *Denham v. Pogue*.

10. The answers by one partner, on whom citation in garnishment against the firm was served, in the name of the firm, is good. 25 A. 312, *Bell v. Short*; 27 A. 132; 10 A. 53.

11. A garnishee, indebted to the bankrupt, cannot be compelled to pay to the judgment debtor who has proved his claim against the bankrupt; all persons are enjoined from interfering with the assets of the bankrupt. 26 A. 354, *Canutz v. Bank of Louisiana*.

12. The consignee having accepted, verbally, drafts drawn on him by the shipper, previous to the garnishment, the proceeds of the shipment should be first applied to the payment of the drafts. 26 A. 335, *Kane v. Robertson*. See BILLS AND NOTES, V. (c).

13. Rights and credits can only be seized by the sheriff of the parish, in which the effects to be seized are situated; garnishment being auxiliary thereto, should be issued by a court of the same parish. 3 A. 380, *Featherstone v. Compton*; 4 A. 585; 7 A. 239, *Favrot v. Paine*; 3 L. 127, *Landry v. Dickson*; 24 A. 311, *Rochereau v. Guidry*; 24 A. 516, *Alter v. Pickett*. See No. 24; COURTS, II. (g), 1); (a), Nos. 30, 37.

14. Garnishees, sued as ordinary partners, cannot be condemned *in solido*. 19 A. 130, *McKinbrough v. Costle*; 4 N. S. 317; 12 M. 316; 8 M. 635; 13 L. 449.

15. A *feri facias* is the basis of the garnishment, which is in default thereof *ab initio* null and void; no constructive seizure can be made by the sheriff. 21 A. 37, *Matta v. Thomas*; 7 R. 505, *Simpson v. Allum*; 11 R. 221, *Roliteau v. Faliton*; 2 A. 310, *Copnell v. Fretnell*. See No. 20; c. § 1, No. 8.

16. The liability of the garnishee must be tested by his answers, whenever there is no evidence to contradict them. 27 A. 93, *Flash & Co. v. Norris*.

17. Answers acknowledging no present, nor any future indebtedness to defendant, except upon future and contingent events, cannot, uncontradicted, be made the basis of a judgment against the garnishees. 16 A. 253, *Coleman, Britton and Withers v. Fennimore*. See § 2, No. 7.

18. The service of the garnishment process fixes the right of the seizing creditor from the moment of the service of process. 21 A. 33, *Marchand v. Bell*.

19. Notice of an order on garnishees, residing twenty-five miles from the court house, to answer in open court, the day after the service, is not valid; a reasonable time should have been allowed. 24 A. 168, *Cockfield v. Tourres*.

20. Garnishment process is null, when there is no *fi. fa.* in the hands of the sheriff, when the interrogatories are answered. 26 A. 386, *Mathews v. Crescent City Mutual Insurance Company*. See No. 15, c. § 1, No. 8.

21. No judgment can be rendered against a garnishee on a traverse, when it is shown that the claim in damages sought to be seized, is pending in a suit between the judgment debtor and the garnishees. 27 A. 455, *Peet, Yale & Bowling v. McDaniel & Co.*

22. A garnishee may except to the interrogatories, and the exception being overruled, may answer. 28 A. 691, *Charles Maduel, dative testamentary executor v. P. H. Monsseaux et als.*

23. A garnishee cannot set up defenses which are not urged by the defendant who is satisfied with the judgment. 16 A. 362, *Campbell v. Meyers*; 3 A. 380.

24. Although act 71, of 1874, annexed Carrollton to New Orleans, the Second Judicial District Court retained jurisdiction of said territory, and a garnishment process issued from the district courts for the parish of Orleans, on a resident of Carrollton, must be set aside. 28 A. 881, *Harrison v. Carondelet Street and Carrollton Railroad Co.* See No. 13.

25. For garnishee's right of appeal, see APPEAL, I. (c), 1), Nos. 14, 15, 17.
 26. In garnishment process, notice of seizure to the judgment debtor is not essential. See V. (a), 3), c. § 1, No. 3.
 27. The garnishee has a right to a jury on a rule to cross his answers. See JURY, I. (a), No. 6; (d), No. 1.
 27. For appeals by garnishees, see APPEAL, V. (b), 2.
 29. A garnishee having in his possession unrealized assets of the defendant, should not be condemned to pay plaintiff's claim, but to deliver the assets in the hands of the sheriff. 30 A. 551, *Meyer v. Deffarge*.
 30. See ATTACHMENT, IX. (a); b.

§ 2. Interrogatories and answers.

1. The transferee without notice, of a claim in the hands of garnishees, need not be made a party to the motion for judgment against the garnishees. 17 A. 260, *Relf & Co. v. Boro*.
 2. A garnishee must not lend himself to the advantage of either litigant. 21 A. 380, *Citizens' Bank v. Payne & Gilman*; 18 A. 479; 9 A. 311; 16 A. 105.
 3. No evidence is necessary to take for confessed unanswered interrogatories. 19 A. 128, *Kimbrough v. Castle*.
 4. The answers of a garnishee cannot be amended. Ample opportunity is at first afforded. 26 A. 626, *Thomas v. Fuller*; 19 A. 374, *Taylor & Knapp v. McGee*.
 5. The answers may be amended when, as a whole, they negative an indebtedness. 27 A. 381, *Hennen v. Forget et als*.
 6. When a firm is garnisheed each member need not answer the interrogatories. 27 A. 132, *Dupieris v. Hallisay*; 10 A. 53; 25 A. 312. See No. 9.
 7. Where the answers of a garnishee to the interrogatories, taken as a whole, deny any indebtedness, this is sufficient, although one or more may not be fully explicit. 28 A. 691, *Charles Maduel, dat. test'y ex. v. P. H. Monsseaux et als*; 19 A. 374, *Taylor & Knapp v. McGee*; 27 A. 381, *Hennen v. Forget et als*. See § 1, No. 17.
 8. The answers of a garnishee cannot be attacked otherwise than by a direct traverse. 29 A., N. R., *Edwards v. Fairbanks & Gilman*.
 9. The answer of a partner, for the firm, is sufficient. See No. 6 and § 1, No. 10.
 10. Documents annexed as part of the garnishee's answer, need not be specially offered in evidence. 30 A. 550, *Meyer v. Deffarge*.
 11. The validity of a garnishee's title cannot be enquired by way of garnishment. 30 A. 249, *Ivens v. Johnson*.
 12. If objection be not made to the mode of proceeding, on a rule to traverse the answers of a garnishee, plaintiff may prove the simulation and obtain judgment against the garnishee. 30 A. 550, *Meyer v. Deffarge*.
 13. The answers must be traversed within twenty judicial days. 1877. E. S., p. 45.

E. Debtor's property disposed of fraudulently or bona fide.

1. A party having issued an execution against his judgment debtor, may propound interrogatories to a garnishee, where the object of the proceeding is to ascertain whether he has money or other funds in his hands belonging to the debtor; under such circumstances it is not necessary that the plaintiff should resort to the revocatory action. 15 A. 330, *Shaughnessy v. Fogg*.
 2. A simulated or fraudulent title cannot be attacked by garnishment process. 19 A. 16, *Kearney v. Nixon*. See OBLIGATIONS, VII. (b), 2), A; B.
 3. The garnishment process cannot be used, as a substitute for a direct revocatory action, where the answers deny any indebtedness, and refer the parties to the records of purchases of real estate, which may be fraudulent. 21 A. 417, *Battles v. Simmons*.
 4. When the garnishees answer by setting up title in themselves, from a settlement previously made with the judgment debtor, their title should be

attacked by a direct action and not by a rule to traverse having the features of a revocatory action. 19 A. 16; 25 A. 368, *Hodges v. Graham, Hodge & Co.*

5. In his answers, a garnishee is not called upon to disclose the manner in which his indebtedness to the defendant has been transferred to third parties. 24 A. 32, *Ullmeyer v. Ehrmann Lecann et als.* See ATTACHMENT, X.

6. Where it is shown that an act of donation was not simulated, but a real contract entered into between the parties and carried by them into effect, the judgment creditors of the donor cannot disregard this transfer and proceed by execution. 15 A. 505, *Johnson v. Allen.*

7. The creditor cannot seize the property of a third party, when he does not allege simulation and bad faith in the apparent owner. 23 A. 617, *McEnery v. Letchford.*

8. When the evidence shows that the *proces verbal* of the auctioneer was made in the name of another than the adjudicatee, and an act of loan was made to the real purchaser, the whole being a simulation, the property may be seized by the creditor of the real purchaser. 21 A. 350, *Stewart v. Cohn.*

9. The debtor's real estate may be seized notwithstanding a sale made by him, but not recorded. 21 A. 427, 241; 22 A. 113; 25 A. 290, *Doughty v. Sheriff.*

10. Money belonging to the mother and her two children, but placed to the credit of the former in the books of the garnishee, cannot be seized as regards the two-thirds belonging to the children, on a judgment against the mother. 25 A. 465, *Jurey & Harris v. Hord et als.*

11. Property of the judgment debtor held by a third person, under a simulated sale, may be seized without further formality. 29 A. 4, *Guidry v. Lyons.*

12. A creditor cannot seize bank stock which has been previously pledged to a third person. 3 H. 483, *Black v. Zacharie.*

13. Until delivery, the movables may be seized. See SALE, III, (b), 4), B. Nos, 1, 3, 4, 5. EVIDENCE, III. (b).

4) Amount and divisibility of seizure.

1. When the lots of ground have been separately appraised, the sheriff should, unless otherwise directed by the judgment, sell them separately. 15 A. 697, *Gernon v. Bostick.*

2. The defendant in execution cannot complain of the sale made by the sheriff in a *lump*, unless he alleges and shows that he vainly required him to sell it in distinct and separate parts. 18 A. 659, *Taylor v. Graham*; 10 R. 472; 10 A. 725.

3. The undivided half of a plantation, cannot be divided into lots of ten or more acres, to be sold under execution. 28 A. N. B., *Barron and Husband v. Sollibellas.* See No. 6; SALE, X. Nos. 6, *et seq.*

4. A creditor of the community cannot seize the buildings and improvements put by the community on the separate property of the wife, previous to a dissolution of the community. 28 A. 430, *Bertha Whiteman v. LeBlanc*; 10 A. 308.

5. The vendor of boilers who has recovered judgment for the price, with privilege, may seize and sell the boilers, although they are attached to a sugar house with brick and mortar. 28 A. 749, *Lapene & Jacks v. McCan & Son*; but see No. 14; PRIVILEGE, III. (h), 1).

6. In execution of a mortgage given previous to the adoption of the constitution of 1868, a defendant had the right to order his property to be sold in block, and may obtain an injunction to prevent a sale in lots of ten to fifty acres. 2 A. 546, *Morrison v. Flourney & Co.* See No. 3.

7. A judgment creditor, in order to exercise his rights against the usufructuary of a property sold under a foreclosure of mortgage, should ask a separate appraisement. 27 A. 534, *Lee v. Cummings.*

8. In executing a writ of seizure, the sheriff is bound to take notice of the mortgages resting on the land, and to seize sufficient property to give effect to his seizure. 29 A. 149, *Hefner v. Hesse & Vergez.*

9. An excessive seizure cannot be released nor enjoined; it must be reduced. See EXECUTION, V. (a), 7), No. 3; INJUNCTION, II. (b), 3), No. 12.

10. The revenues of real estate, which belong to the owner, cannot be seized separately from the land. See (d), 12), No. 6.

11. The yard of a hotel cannot be seized separately, in what case, see EXECUTORY PROCESS, I. No. 3.

12. The notice to divide the land need not be given at the same time as the notice of seizure. See INJUNCTION, II. (b), 3), No. 3.

13. See privilege for improvements on land. PRIVILEGE, III. (h).

14. The buildings on which the workmen claim a privilege, cannot be seized separately from the land. 30 A. 187, *Berens v. Weill*. See, also, EXECUTION, V. (a), 1), No. 5; *supra*, No. 5. PRIVILEGE, III. (h), No. 1; *per contra*, see 30 A. 361, *McKnight v. Parish of Grant*.

5) Notice to debtor.

1. It is needless to see whether a notice of seizure has been served on defendants when they have appointed an appraiser. 21 A. 693, *Monition of John Hall v. Lawrence*.

2. After dissolution of the injunction, the sheriff need not make a new demand or serve a new notice of seizure. 26 A. 42, *Walker v. Villavaso*.

3. A slight inaccuracy in the notice of seizure will not invalidate it, when the debtor must have known what property was intended to be designated. 23 A. 550, *Denville v. Hays, sheriff*.

4. Notice of seizure served on the mother before being qualified as natural tutrix, is not sufficient. 26 A. 370, *O'Hara v. Folwell*; but see 30 A. —, *Aufenkolk v. Montéque*. See SALE, VIII. No. 3.

5. If the defendant knew what property was intended to be designated in the notice of seizure and could not be injured by a slight inaccuracy, the injunction should be dissolved. 23 A. 556, *Denville v. Hays, sheriff*.

6. A judicial sale, without notice of seizure, under an expired *fi. fa.*, is null. 28 A. 75, *Graff v. Moylan*; 26 A. 735.

7. To make a valid seizure of property owned by an ordinary partnership, notice of seizure must be given to both partners, even if the judgment be against the partners, *in solido*. 28 A. 749, *Lapène & Jacks v. D. C. McCann & Son*.

8. Notice of seizure on the judgment debtor is not essential in garnishment process. See 3), c., § 1, No. 2.

6) Effects of seizure; and sheriff's rights over property seized.

A. In general.

1. Where a constable has seized property under a writ emanating from a justice of the peace, his possession is that of the law; he may protect his possession of the property seized, by calling to his aid the judicial power, when needed; and when, by an order of a district court, an attempt is made to deprive him of his possession, he is entitled to appeal from such an order, if the case be an appealable one. 15 A. 34, *State v. Judge Fifth District Court*.

2. To make a valid seizure of tangible property, the officer must take actual possession of the thing levied upon. A promissory note, indorsed in blank by the payee, is of that class of property; it is not merely the evidence of debt; with its indorsements, it contains the obligations of several parties, and it is the subject of sale and delivery, as much as any other movable. 18 A. 56, *Miller v. Streecker, Weber, intervenor*; 16 A. 105, *Rightor v. Phelps*; 23 A. 550, *Denville v. Hays, sheriff*; 22 A. 209, *Kilbourn v. Frellsen*; 24 A. 263, *Corse v. Stafford*; 27 A. 265, *Gordon v. Gilfoil*; 299, *Lirette v. Carrane*. See ATTACHMENT, VI. (a), No. 1.

3. In a seizure of real estate, in the parishes of Orleans and Jefferson, actual possession by the sheriff is not necessary. 20 A. 573, *Budd v. Stinson*.

4. In other parishes the sheriff or marshal must take actual possession of the land. 21 Wall. 123, *Watson v. Bondurant*.

5. Where the sheriff went through all the forms necessary, except the taking

of actual possession, there is no seizure and no cause for damage. 28 A. 432, *Bailey v. Quick*; 27 A. 539, *Morgan v. Johnson*.

6. The fact that the sheriff permits the defendant to remain on the property seized, does not vitiate the seizure. 28 A. 854, *Paul v. Hoss*; 5 M. 268; 6 H. 100; 20 A. 573; 21 Wall. 123, *Watson v. Bondurant*.

7. Where an honest execution is issued against a bankrupt, and levied upon his property before a petition for bankruptcy has been filed, the filing of such a petition does not render the execution, and all the proceedings under it null and void. 1 Woods, 257, *Goddard, assignee v. Weaver*.

8. If at the commencement of proceedings in bankruptcy, the bankrupt has no possession of a particular property except as bailee, but the same is in the hands of the sheriff under an execution and levy, the assignee cannot take such property out of the sheriff's hands without paying the debt, or seeking the aid of the U. S. District or Circuit Court sitting in bankruptcy. 1 Woods, 257, *Goddard, assignee v. Weaver*.

9. If in such case, the sheriff proceed to sell the property, there is nothing in the bankrupt act which renders void his acts done after the commencement of proceedings in bankruptcy; the possession of the sheriff is a lawful possession, he has a species of property in the thing. *Ib.*

10. The right of the sheriff, in such case to sell, extends to the entire interest of the debtor, and no assignment of that interest in bankruptcy or otherwise can divest the right of the sheriff. *Ib.*

11. If the assignee can show that the exercise of this right by the sheriff will materially affect the interest of the general creditors, the court will interfere, but not otherwise; it would do this if the bankrupt's interest was only that of a co-proprietor, and the others were about to do any act to the property by which the bankrupt's interest would be sacrificed or compromised. *Ib.*

12. As to the effect of the seizure of real estate, in relation to the rents and revenues, see *infra*, V. (d), 12).

13. Effect as to jurisdiction of courts, see COURTS, II. (d), 6), Nos. 3, 4.

B. Privilege acquired by seizure.

1. The seizing creditor has a preference on the proceeds of sale, over the consignee for his advances of freight, duties, brokerage, etc., when not recorded, and over the vendor who delivered the merchandize in Germany to the vendee. 25 A. 233, *Loeb & Co. v. Blum*. See PRIVILEGE, IV.

2. If the thing seized constitutes the whole of the debtor's property, the proceeds should be distributed according to the rank of his creditors. See (d), 11), No. 1.

7) Forthcoming bonds.

1. When the property seized has been surrendered in accordance with the conditions of the forthcoming bond, *ex parte* proceedings forfeiting the bond and execution issued thereunder, are absolute nullities. Property sold under such proceedings may be recovered. 20 A. 444, *Terrail v. Tinney et als.*

2. To recover the amount of the judgment against the sureties of defendant who enjoined the seizure and obtained a release of the seizure, plaintiff should show that his judgment became worthless by reason of the injunction. 29 A. 149, *Hefner v. Hector & Vergez*; 3 A. 126.

3. An excessive seizure cannot be released without notice to the creditor, on giving bond; it can only be reduced. 29 A. 149, *Hefner v. Hesse & Vergez*.

4. Section 3411, R. S., fixes how a release bond for a seizure must be given. The judge has no right to fix the amount of the bond. 29 A. 149, *Hefner v. Hesse & Vergez*.

(b) Appraisement.

1. Where a debtor waives an appraisement and purchases part of the property himself, he cannot complain of the irregularity of the proceedings. 17 A. 91, *Desplate v. St. Martin*.

2. Property sold under executory process, issued on a twelve months bond, need not reach the appraisement. C. P. 990; 22 A. 90, *Stockett v. Johnson*.

3. The act of 1869, p. 18, which provides that in the event any party should neglect or refuse to qualify as appraiser, under the provisions of said act, then the property shall be sold without any appraisement whatever, applies to all sales made after its passage and is constitutional. 24 A. 716, *Weber v. Gorsuch*.

4. Where the property was not seized by the constable, and the appraiser for defendant was appointed by the justice of the peace, the sale is null. 26 A. 344, *Gallagher v. Abadie*.

5. A stipulation in a contract, that the property of the debtor shall be sold without appraisement in the event of non-payment at maturity, is a fact which ought not to be recognized by a court in the decree rendered upon such contract. 15 A. 245 *Levicks v. Walters*.

6. A mortgager may renounce the benefit of the appraisement. 19 A. 89, *N. O. Mutual Insurance Company v. Bagley*; 18 A. 68, *Broadwell v. Rodriguez*; 12 A. 271; 6 A. 362; 7 A. 143.

7. The appraisement may be validly waived. 29 A. 206, *Jouet v. Mortimer*.

8. The lots having been appraised separately, should so be sold, unless otherwise directed by the judgment. 15 A. 697, *Gernon v. Bestick*.

9. By appointing an appraiser under protest, the consequences of ratification nevertheless follow. 27 A. 314, *Walker v. Sauvinet*. See ESTOPPEL, No. 60.

10. A sale by the United States marshal, for less than two-thirds of the appraisement, or without a previous appraisement, is null. 6 Howard, 14, *Collier v. Stanborough*.

11. If a judgment debtor appoints appraisers when his property is about to be sold, and stands by while the officer is selling without warning bidders that he intends to contest the validity of the sale, he cannot afterwards be heard to say that the sale was void, for informality in the proceedings. 7 H. 172, *Erwin v. Lowry*.

12. One who prevents a separate appraisement cannot be heard to plead that the privilege is lost. See ESTOPPEL, No. 55.

13. For separate appraisement of usufruct, see (a), 4), No. 7.

14. The appraisement is not taken into consideration in enforcing a twelve months bond. See (d), 6), B. No. 2.

(c) *Advertisement and notices, place and day, of sale.*

1. Thirty days advertisement is requisite for a sale of real estate. 15 A. 697, *Gernon v. Bestick*.

2. A waiver of advertisement deprives the sale of its judicial character. 16 A. 165, *Escault v. Cooley*.

3. A waiver of the advertisement by defendant will authorize a sale without that formality. The waiver cannot be withdrawn. 28 A. 355, *Barron and Husband v. Sollibellas*.

4. A military order staying the sale of real estate, but revoked prior to the day of sale, nevertheless stays all proceedings and new advertisements, should be made after the revocation. 19 A. 159, *Humphreys v. Browne*.

5. The re-advertisement being formal and regular, furnished the defendant the information of the postponement of the sale. 21 A. 693, *Hall v. Lawrence*.

6. It is only after the official journal is selected, and notice thereof is given to the sheriff, that his advertisements are null, if not published in such journal. 26 A. 684, *Buckworth v. Payne*.

7. The property having been advertised for sale in lots, contrary to defendant's order, he was not bound to give further instructions on the day of sale, he had a right to legal advertisements, which he was not bound to waive. 25 A. 546, *Morrison v. Flournoy & Co.*

8. Half of a piece of land can be sold, under an advertisement of the whole, if there be a legal cause for staying the sale of the other half. 23 A. 287, *Lossee v. DeLacy*; 24 A. 234, *Clay v. O'Brien*.

9. Where real estate is not offered by the sheriff on the day of sale, he must re-advertise for thirty days. 19 A. 169, *Montgomery v. Barrow*.

10. The property may be advertised the same day of the service of notice of seizure, provided the three days allowed are added to the thirty days advertisement. 29 A. N. R., *O'Donnell v. Durbridge et als.*

11. An advertisement of real estate, seized under execution three times during thirty days after the first advertisement, is sufficient. The articles of the C. C. apply to the notice to be given to an application for the curatorship of vacant estates and the sale of succession property. 29 A. 206, *Jouet v. Mortimer.* See No. 15.

12. A sale of lands in Louisiana, under an execution from the Federal court in that State, must be advertised in a newspaper of the parish where the lands are situated, when there is a newspaper published in such parish; and when the State law requires such advertisement to be made both in English and French, the marshal must conform to this law. 11 Wall. 416, *Moncure v. Zunts.*

13. If the defendant knew what property was intended to be designated in the notice of seizure, and could not be injured, the seizure is valid. See (a), 5), No. 5.

14. Levee tax sales by the collector should be made at the courthouse. See LEVEES, No. 2.

15. Advertisements, in English only, 1874, p. 113; in Orleans three times in ten days, and once a week in thirty days, 1878, p. 157; except Orleans, 1876, p. 146.

(d) Sale and adjudication.

1) In general.

1. A sale in block, for a larger price than the total separate appraisement, is not null. This objection cannot be urged against the title of the purchaser. 21 A. 11, *Marquise de la Villa v. Abat & Générès et al.*

2. Half of a property may be sold under an advertisement of the whole. See (c), No. 8.

3. Boilers loaned by a third person to the owner of the soil and attached to his saw mill, when sold under execution against the owner, may be recovered from the vendee. See QUASI CONTRACTS, II. No. 1.

2) Terms and mode of sale.

1. Purchasers at sheriff's sale are bound by the terms announced by the sheriff at the time of sale. 18 A. 553, *Backen, ad'r. v. Hamilton.*

2. Under article 666, C. P., the plantation and movables forming part thereof, should be sold in the same place. 26 A. 42, *Walker v. Villavaso.*

3. The debtor cannot contest a sale under more favorable terms than cash. See ESTOPPEL, No. 13.

4. The lots being separately appraised should be so sold. See (b), No. 8.

3) Amount of bid and notice of incumbrances.

1. In a judicial sale, of land mortgaged to secure the payment of stocks, where the amount of the adjudication does not exceed the amount of the stock mortgage which is the first in rank, the sale is null; such a defect is not a mere informality, which can be cured by the lapse of five years. 15 A. 630, *Haynes v. Courtney.* See PETITORY AND POSSESSORY ACTIONS, II. (c), 1), No. 5.

2. Where property has been sold to satisfy a mortgage claim, as a general rule, the payment to the sheriff will not exonerate the purchaser; the latter is required to retain the balance in his hands, in order to satisfy special mortgages of subsequent date. The sheriff has no right to collect this surplus; but if the funds are paid over to him and he pays the special mortgage, the purchaser is exonerated. 15 A. 289, *Cummings v. Erwin.* So of a concurrent mortgage, see 8), A. Nos. 6, 7, 8.

3. The sheriff need not announce at a sale the amount of taxes due on the property to be sold; if he does, this is mere surplusage. 27 A. 280, *Gusman v. Leblanc, sheriff.*

4. An adjudication is valid, which has been made for little less than the previous mortgage and taxes, where the penalties had been added to the taxes which were not reported on the certificate of mortgage, and which were afterwards paid in scrip, thus saving an amount much larger than the deficit. 28 A. 561, *W. R. Mills v. Waggaman, sheriff, et als.*

5. Where the privilege for paving was not recorded on the day the contract was entered into, a sale of the property to pay the privilege will be of no validity, if the adjudication price be not sufficient to cover a prior mortgage. See MORTGAGE, VII. No. 8.

6. The minor's unliquidated general mortgage, cannot prevent a sale of the property by posterior judgment creditors of the tutor. 19 A. 363, *Laplace v. Haydel*; 13 A. 508; 12 A. 361; 6 R. 51; C. P. 715.

7. For mortgages as affected by execution sales, see MORTGAGE, VIII. (b).

8. The adjudicatee, by virtue of the first mortgage, with the clause *de non alienando*, may recover the property from another adjudicatee under a second mortgage, who purchased for less than the first mortgage. See PETITORY AND POSSESSORY ACTIONS, II. (c), 1), No. 5.

9. The forced sale of a part owner's share does not transfer the privileges resting on the ship, to the proceeds. See PLEADING, VIII. (d), 2), No. 7.

4) Who may purchase.

Any one capable of contracting may purchase. C. C. 2445.

5) Fraudulent bidders and those who refuse to comply with their bid.

1. A bidder who fails to comply immediately with his bid, by offering sufficient surety, has no cause to complain if the property is again immediately put up for sale, and his bid for a larger amount than the solvability of his surety is rejected. 25 A. 58, *Michel v. Kaiser*.

2. The fact that the bond of the adjudicatee was not given within three days after the adjudication, is no ground to annul the sale. 27 A. 281, *Gusman v. Leblanc, sheriff*.

3. The law will not tolerate any influence likely to prevent competition at a judicial sale, and when a defendant in execution represents that he is bidding in the interest of his lessor, who is absent, and thus induces third persons to refrain out of sympathy from bidding, while in truth the tenant is only using this device, to purchase the property for himself at a low price, the sale will be set aside as unfair and fraudulent. 7 Wall. 559, *Cocks v. Izard*.

6) Twelve months bond.

A. In general.

1. A sale of the debtor's property, and the execution of a twelve months bond, does not discharge the judgment. 16 A. 157, *Baham v. Langfield*; 2 A. 240; 3 A. 382.

2. When the seller and buyer, who are partners, bring a suit in eviction, one against the other, collusively, for the purpose of relieving the one from a compliance with his suretyship on a twelve months bond, and allow a judgment to be rendered in favor of plaintiff, such judgment will be of no effect to arrest the execution on the twelve months bond. 16 A. 266, *Hennen v. Wood*.

3. When the judgment debtor purchases his property, the creditor holding the bond will have no vendor's privilege. See PRIVILEGE, III. (b), 1), No. 2.

B. Requisites of the bond; proceedings on non-payment; and surety's obligation.

1. There is no inconsistency nor nullity in a judgment bearing five per cent., and a twelve months bond bearing eight per cent. 16 A. 266, *Hennen v. Wood*.

2. Under a condition to that effect, contained in a twelve months bond, the property of the principal, as well as security, may be seized and sold without benefit of appraisement. 22 A. 89, *Stockell v. Johnson*. See (b).

3. Under a judgment ordering the property attached, which is of a perishable nature, to be sold, the sheriff cannot sell on a twelve months bond, even

at a second adjudication. Such a bond cannot be enforced by the issuance of writs of *feri facias* as in other cases. 26 A. 271, *Levin v. De Lacey, sheriff*.

4. The sale of property under execution on a twelve months bond, neither satisfies the judgment nor novates the debt. 12 H. 327, *Union Bank of Louisiana v. Stafford*.

5. A second twelve months bond, taken under a sale made by virtue of a twelve months bond, cannot be collected in a summary manner. See EXECUTORY PROCESS, II. (a), No. 6.

7) Sheriff's act of sale and description of thing seized and sold.

1. One who mortgages identically the property by him purchased, and the mortgage is foreclosed under the same description, in which the most important calls are answered, and the identity of the property is established, *aliunde*, does not, by selling a portion thereof, deprive the mortgagee of his rights. 21 A. 578, *Smith v. Logan*.

2. The deputy sheriff may sign a deed of sale. 21 A. 40, *Kellar v. Blanchard*.

3. If the property is insufficiently described, there will be no sale, and this is no ground for an injunction by defendant in execution. 26 A. 156, *Henderson v. Hoy, sheriff*.

4. The proces verbal of the sheriff, when it fulfills the requirements of art. 692, C. P., is, of itself, a deed. 29 A. 270, *Strauss v. Soye*.

5. The judgment, execution and sheriff's return, showing the adjudication and payment of the price are, by the express provisions of the code of practice, sufficient to transfer the property. The sheriff's deed is only an additional muniment of title. 29 A. 206, *Jouet v. Mortimer*; 5 A. 584. See PLEADING, V. (b), 4), No. 7.

6. Each of the undivided co-purchasers at sheriff's sale, is entitled to a deed of sale for his undivided purchase, the co-purchasers cannot oppose the giving of such deed. 30 A. 172, *Montross v. Jamison*.

8) Payment of price; and warranty.

A. In general.

1. It is essential to the perfection of a sheriff's sale that the purchaser should substantially comply with the terms of the adjudication, which is the condition upon which the property is to be his. 16 A. 143, *Haynes v. Breaux*; C. P. 689; 3 L. 475; 7 R. 416; 10 R. 90; 2 A. 361; 13 A. 333.

2. The adjudicatee, at a sheriff's sale for cash, cannot have a title to the property bid, until he pay the price (2 L. 360), and he must pay within a reasonable time; it is not necessary to put him in default. 18 A. 537; C. P. 689; 24 A. 370, *Lossee v. Sauton*.

3. Where the judgment creditors, at the time of the adjudication, entered satisfaction upon the execution to the amount of the bid, the case is different. 16 A. 143, *Haynes v. Breaux*.

4. The sheriff is bound to pay over to the seizing creditor the amount realized on execution after deducting his legal fees.* 20 A. 305, *Silliven v. Bellocq, Noblom & Co.*

5. The sheriff cannot pay out funds subject to conflicting claims, on his own authority. 21 A. 381, *Citizens' Bank v. Payne & Gilman*.

6. The purchaser, under execution, is bound to retain in his hands the *pro rata* of the price of a concurrent mortgage with the ones under which execution issued. 24 A. 381, *Johnson v. Duncan*. See No. 9. So also of a subsequent mortgage, see 3), No. 2.

7. The sheriff being incompetent to receive the funds accruing to a mortgage creditor inferior in rank to the seizing creditor, the purchaser retains the same in hands, and he cannot be forced to pay any amount to the judgment debtor so long as there are mortgages and privileges uncanceled. 18 A. 65, *Quertier & Co. v. Succession Hille*. See 3), No. 2.

8. The purchaser at a judicial sale can retain part of the purchase price only when there exists *privileges* or *special mortgages*, which are preferred to the judgment creditor. 28 A. 593, *Alford v. Montejo*. See 3), No. 2.

9. The debtor should be made a party to a rule taken, for the purpose of distributing the surplus of an adjudication, after paying the seizing creditor's claim. See 11), No. 4.

10. The sheriff, who received Confederate money, in certain cases, is not liable. See EVIDENCE, II. No. 7.

11. The purchaser, who enters into an agreement with plaintiff, relative to the price, may be compelled, by the seized debtor, to pay him the balance after deducting plaintiff's claim. See SHERIFF, II. (b), 2), c. No. 2.

B. Warranty.

1. If the sheriff sell without the formalities of law, and the purchaser be evicted, the sheriff is bound to indemnify the vendee. 17 A. 43, *Friedlander v. Bell*; 10 M. 308.

2. This liability is limited to the direct and immediate injury resulting from such negligence or illegal acts; and it does not extend beyond the amount paid on the contract of sale, which the officer or his legal representative is bound to defend. *Ib.*; 6 L. 731.

3. Before a purchaser evicted from property purchased under execution can demand a reimbursement of the price from the *seizing creditors*, he must first have failed to recover it from the *seized debtor* on execution sued out for that purpose. 15 A. 630, *Haynes v. Courtney*.

4. For warranty in sales, see SALE, III. (c).

9) Validity of sale as affected by the judgment.

1. Where the plaintiff in execution is the purchaser of property sold under execution of a judgment subsequently reversed, on a devolutive appeal, he is obliged to restore the property itself, and place the defendant in the same position he would have occupied if no such judgment had been obtained against him. It is a proper case for the *restitutio in integrum*. 15 A. 97, *Graham v. Eagan*.

2. The sale will be valid although the judgment be reversed on a devolutive appeal. 19 A. 68, *Frost v. McLeod*; 8 N. S. 214; 1 R. 94; 2 A. 211.

3. A sale under proceedings regular on their face, gives a valid title to the purchaser; the judgment being afterwards annulled, does not affect the sale. 26 A. 746, *Richardson v. Smith*.

4. When the record of a suit in the United States court contains the proper averment of citizenship to give the court jurisdiction, an execution sale made under a judgment rendered in such a case, cannot be annulled by the introduction of evidence that the United States court was in fact without jurisdiction. 7 H. 172, *Irwin v. Lowry*; 6 R. 192, *Lowry v. Irwin*.

5. It is a general rule, that a judicial sale made by virtue of a judgment, which the court had jurisdiction to render, will stand, though the judgment itself be afterwards reversed for error. 1 Woods, 234, *United States v. Six Lots of Ground*.

6. The judgment must be annulled, before the sale. See SALE, X. No. 15.

10) Ratification of sale.

1. Where a suit was brought by a surviving wife to recover a slave, upon the ground that the title of her deceased husband, under whose succession the defendant claimed the slave, was invalid, since such slave, being her separate property, was sold by herself and husband to an interposed person, from whom he was the same day acquired by her husband; *Held*: That whether it be regarded as a sale to an interposed person or not, the sale was ratified when the administrator of her deceased husband's succession filed his account, and carried the price of the slave into the same, and the plaintiff claimed in his succession her marital fourth in the price of the slave. 15 A. 535, *Williams v. Springfield*.

2. The seized debtor who, after the sale of his property, applies to plaintiff who purchased, to rent the same, ratifies the title. 29 A. 206, *Jouet v. Mortimer*. See ESTOPPEL, No. 29.

3. The acquiescence must be clearly shown. See ESTOPPEL, No. 51.

11) To whom sheriff must pay proceeds.

1. Upon the allegation that the property seized, constitutes the whole of the debtor's property, a privileged creditor has the right to have the proceeds brought into court for distribution among all the creditors according to their rank. 18 A. 575, *Lewis, Snapp & Co. v. Thatcher & Co.*

2. When the property of a third person is seized and sold confusedly with the property of defendant and plaintiff, prevented a separation, an equitable proportion of the proceeds may be recovered by such third person. 18 A. 653, *Lesseps v. Ritcher.*

3. The law makes it the duty of the sheriff to pay all the taxes due on the property at the date of the sale, and the presumption is that he did so, and that they, if any, were included in the charges paid by the purchasing plaintiff. 17 A. 44, *Freidlander v. Bell.*

4. The debtor should be made a party to a rule to distribute the surplus of an adjudication, after paying the seizing creditor. 28 A. 619, *Buckner v. Gordy.*

5. The purchaser who assumes anterior mortgages, cannot be compelled to pay until all parties in interest are before the court. See MORTGAGE, VIII. (b), No. 2.

6. The sheriff who pays to a wrong creditor, is liable. See SHERIFF, II. (b), 2), c.

12) Effect of adjudication; and what passes to the purchaser.

1. A crop raised and gathered before the actual seizure, cannot be included by the sheriff, in his return. 19 A. 524, *Roman v. Denny.*

2. A crop raised and gathered by defendant, with the knowledge of the seizing creditor who did not object, belongs to defendant, although the same was still on the plantation on the day of the sale. 26 A. 632, *Richardson v. Dinkgrave.*

3. LUDELING, C. J., and HOWELL, J., *dissenting*: The crop, hanging by the roots, when the seizure was made, formed part of the realty, and was therefore seized. *Ib.*

4. The crop raised by the lessee, not yet gathered at the date of the seizure, under a prior mortgage against the landlord, belongs to the lessee, and his ownership is not divested by the sale of the property, although the lease is dissolved. 28 A. 761, *A. T. Poché v. Mrs. Emma Bodin et als.*; 27 A. 629, *Sandell v. Douglass, sheriff.*

5. MORGAN, J., *dissenting*: The lease was a violation of the pact *de non alienando*, and the lessee was in no better position than his lessor. The crop not yet gathered passed to the purchasers.

6. The revenues of real estate which belong to the owner of the property, cannot be seized and sold separately from the land. 29 A. 355, *New Orleans National Bank v. Raymond.*

7. A sheriff's sale without a valid seizure, confers no title. 11 A. 761; 12 A. 275; 19 A. 58; 22 A. 207; 23 A. 512; 24 A. 263. See EXECUTION, V. (a), 3), A. No. 2; (a), 6), A. Nos. 2, *et seq.*

8. When property which a person has leased, is sold at sheriff's sale, on execution against the owner, the sheriff's deed conveys the reversion, and the rent follows as an incident. 19 Wall, 544, *Butt v. Ellett.*

9. When the purchaser at sheriff's sale, sues the tenant for rent, no intervention is admissible for the purpose of claiming the property and rent. See PLEADING, VIII. (d), 2), No. 8.

10. Movables owned by a third person, do not pass to the purchaser. See THINGS, II. (a), Nos. 8, 9.

11. A safe cemented to the wall and placed there by the owner, passes with the house. *Ib.*, No. 10.

13) Avoidance of execution sales; general rules relative to their nullity; and purchaser's equity to re-imbursement

1. The fact that the property sold by a sheriff under execution, did not belong to the debtor in execution, but to the plaintiff in execution, himself,

does not render the alienation void. A person cannot sell the property of another, but he can sell his own property in any manner that he sees fit, provided no law is violated, and no person injured thereby. 15 A. 548, *McIlhenny v. Barbin*.

2. At a sheriff's sale of real estate, according to the terms of the sale, as announced and entered on the sheriff's books, the credit price of the sale was to bear six per cent. per annum to maturity, and eight per cent. eventual interest, the purchasers having given their notes, to bear eventual interest, only, the sheriff, sometime afterwards, took a rule upon them to show cause why they should not comply with the terms and conditions of the sale as announced; *Held*: That the sheriff had made a sale of the property, executed the deed, delivered the notes of the purchasers to the party entitled to them, and returned the writ into court, he was without further interest in the controversy, and the rule taken by him could not be maintained. 15 A. 617, *Succession of Caldwell*.

3. Defendant need not tender the price paid to the sheriff, when he enjoins the purchaser from being put in possession, for irregularities in the sale. 28 A. 126, *Drouet v. Lacroix*. See TENDER.

HOWELL, J., *dissenting*: The adjudication transferred the property to the legal possession of the purchaser, and the object of the injunction is to set aside the adjudication. *Id*.

4. Plaintiff cannot sue for the rescision of the judicial sale, unless he shows injury and tenders back the amount which has inured to his benefit. 3 L. 344; 21 A. 385, *Coulson v. Wells*.

5. No tender need be made when the seizing creditor retained the price in his hands. 24 A. 473, *Houston v. Childress et als*.

6. Community property, sold for community debts, cannot be recovered by the heirs of the wife, without first tendering the amount by which they have been benefited, *i. e.* the price paid by the purchaser. 26 A. 234, *Kellogg v. Duralde, sheriff*. See MARRIAGE, XIII. (e), 4), c.

7. Where the seizing creditor purchased under his writ, and paid the surplus of his adjudication in the hands of the officer who retains the same, plaintiff need not offer to return the price of adjudication before suing for the nullity of the sale. 26 A. 343, *Gallagher v. Abadie*.

8. The minor whose property has been illegally sold, cannot recover where the sale inured to her benefit, without a previous restitution of the price. 29 A. 536, *Fraser v. Zylicz*.

9. Before an action to revoke a judicial sale made to pay the debt of defendant, can be brought, the price which went to extinguish the debt should be refunded to the purchaser or at least tendered back. 28 A. 854, *Paul v. Hoss*; 24 A. 324, *Barelli v. Gauche*.

10. Plaintiff must tender to defendant the price disbursed in paying the incumbrances, on the property before recovering the property. See PETITORY AND POSSESSORY ACTIONS, I. No. 8.

11. The heir of the seized debtor cannot recover property in the hands of an innocent purchaser, sold to pay the just debt of his ancestor, without proving an injury and restoring or offering to restore the benefits received. 30 A. 174, *Brown v. Bouny et als*.

(e) Satisfaction of execution.

1. It has been the custom for plaintiff's attorney to sign a satisfaction of judgment on the docket of the clerk. The clerk certifies the entry, and upon production of this certificate the recorder of mortgages erases the registry of the seizure.

(f) Return and expiration of the writ.

1. After the dissolution of an injunction, the sheriff must proceed, under the copy, in the same manner as though the original writ was in his hands. 16 A. 177, *Wallis v. Bourg*; 1855, p. 253, § 3.

2. The return of the *fi. fa.* by the sheriff, without retaining a copy in his hands, after having served the citation and garnishment process, but before the

answers thereto are filed, does not release the garnishment. 24 A. 164, *Egana et als. v. Bringier*. See ATTACHMENT, X.

3. A crop raised and gathered before the actual seizure, cannot be included by the sheriff in this return. 19 A. 524, *Roman v. Denny*.

4. By returning the writ unsatisfied the sheriff abandons the seizure. 19 A. 524, *Roman v. Denny*.

5. A *fi. fa.* issued by a justice of the peace should be returned within thirty days. See JUSTICE OF THE PEACE, No. 7.

6. See further, SHERIFF, II. (b).

7. At the expiration of a writ of *fi. fa.*, when the sheriff has property under seizure, he should make a return and cause the clerk of court to give him a duly certified copy of the writ within twenty-four hours after the return, else the seizure is released. 30 A. 87, *Billgery v. Ferguson*; C. P. 642.

8. The return *nulla bona* of a *fi. fa.*, is evidence of defendant's insolvency. 30 A. 511, *Lovell v. Payne*.

VI. OF THE WRIT OF CAPIAS AD SATISFACIENDUM.

This writ has been abolished.

EXECUTORS.

See DONATIONS, VI. (b); (e); (f). SUCCESSION, V. (b); VII. (b); VIII. IX. (b). COSTS, III. (d). COURTS, II. JUDGMENT, XV. (c), 3). PLEADING, I. (c), 6). PRESCRIPTION, IV. (d), 2; V. (d).

EXEMPTION.

Of real estate from seizure, see HOMESTEAD, II. EXECUTION, V. (a), 3), A.

EXECUTORY PROCESS.

I. IN GENERAL.

II. OF THE RIGHT TO EXECUTORY PROCESS.

(a) *In general.*

(b) *Sufficiency of title to authorize process.*

1) In general.

2) Derivative titles; and plaintiffs acting as agents or in *autre droit*.

3) Registry of title; its sufficiency as against third possessors, and right to proceed against them.

III. OF THE DECREE AND APPEAL THEREFROM; PROCEEDINGS PREREQUISITE THERETO AND IN EXECUTION THEREOF.

(a) *In general.*

(b) *Affidavit, demand and notice.*

IV. OF THE ELECTION AND CHANGE OF PROCEEDINGS; THE OPPOSITION AND ANSWER.

I. IN GENERAL.

1. The uniform practice is to issue executory process on decrees rendered and signed at chambers. 15 A. 147, *Rust v. Faust*.

2. Where an order of seizure and sale improvidently issues, on appeal, the judgment of the lower court, directing it, will be revoked. 16 A. 118, *Templeton v. Board of Levee Commissioners*; 15 A. 89, 107.

3. An order of seizure and sale for levee taxes should be filed in the clerk's office and not retained by the tax collector in his possession. 16 A. 440, *Templeton v. Morgan*.

4. Executory process may issue in the parish where the defendant resides. 17 A. 126, *Roman v. Denny*. See COURTS, II. (g), 1), Nos. 4, 5; (g), 2), Nos. 1, 2; (1876, p. 106, or where the property is situated.)

5. It is not necessary to allege or prove an amicable demand before suing out executory process. 17 A. 127, *Roman v. Denny*; 13 A. 98; 12 A. 551, 671.

6. General military order No. 15, prohibiting foreclosure of mortgages, was

superseded August 15, 1864, by general order No. 113, which established a commission to report on applications for relief against foreclosures. 18 A. 656, *Taylor v. Graham*.

7. When a suspensive appeal was taken from an order of seizure and sale, and no actual seizure has been made and retained by the sheriff, the last seizure under which the property has been sold must be considered as the only effectual one. 19 A. 524, *Roman v. Denny*.

8. The order of seizure and sale of a slave cannot be affirmed by the Supreme Court, because slaves have been emancipated since the rendition of the order and cannot be reversed, because at its date it was authorized by the law and the evidence. The appeal can only be dismissed *ex proprio motu*. 18 A. 211, *Henderson v. Montgomery*.

9. There is no law which makes provision for the return day of writs of seizure and sale; the tardy action of the sheriff does not render the sale under it null. 18 A. 659, *Taylor v. Graham*.

10. There is no law requiring the return into court of writs of seizure and sale and taking out copies, as in cases of writs of *fieri facias*. 20 A. 523, *State ex rel. v. Judge Second Judicial District Court*; 18 A. 657, *Taylor v. Graham*.

11. The writ of seizure and sale does not expire, even if the clerk directs it to be returned in seventy days. 21 A. 693, *Hall v. Lawrence*.

12. A writ of seizure and sale expires. 22 A. 23, *Surgi v. Colmer*. (When?).

13. When a lot of ground has been mortgaged and two adjoining lots are subsequently bought by the mortgager and a hotel is built thereon, the mortgaged lot being used as a yard, being indispensable, executory process cannot be issued separately against the lot mortgaged. 22 A. 191, *Stinson v. Lelievre*.

14. An injunction does not release the seizure under executory process and the sheriff is bound to hold the property. 27 A. 213, *State ex rel. Gay v. Judge of the Fifth Judicial District Court*.

15. Executory process is not properly a suit but merely the aid of judicial power to give force and effect to what is equivalent to a judgment confessed. 28 A. 186, *Rousseau v. Bourgeois*.

16. When proper credits are given in the petition for executory process, an order for the issuance of a seizure and sale, as prayed for, is sufficient. The judge need not calculate the exact amount due. 29 A. 835, *City vs. Pignoli et al.*

17. Courts of probate cannot issue executory process. See COURTS, II. (d), 1), No. 2.

18. The whole property mortgaged must be sold to satisfy one installment of the mortgage debt. See MORTGAGE, VIII. (b), No. 4.

19. Further, see MORTGAGE, VIII. (b), *execution sales*.

20. Executory process may issue without proof of amicable demand on the drawer of the note. 30 A. 398, *Renshaw v. Richards*.

II. OF THE RIGHT TO EXECUTORY PROCESS. .

(a) *In general.*

1. No executory proceedings can be based upon the certificate of the road and levee inspector that the work has been performed according to the terms of the adjudication, unless the petition be accompanied by the plaintiff's oath, showing the amount due. 15 A. 552, *White v. Winn*.

2. The court is bound to know both the signature and capacity of a tax collector; his return is authentic evidence under the act of 1859, directing the mode of collecting the levee tax in the parishes of Madison and Carroll; and the writ was properly addressed to the tax collector. 16 A. 113, *Board of Levee, etc. v. Marks*.

3. The absent mortgager must be represented by a *curator ad hoc*. 16 A. 392, *State v. Judge Second District Court*; C. P. 737.

4. Executory process may issue, although the mortgager be dead, and his

succession opened and accepted, with benefit of inventory. 20 A. 375, *Lavillebeuvre v. Heirs Frederic and Cosse*; 1 A. 205; 2 A. 145, 209, 509; 12 A. 551. See No. 13; III. (a), No. 7.

5. The holder of the last of a series of notes, secured by the same mortgage, may obtain executory proceedings thereon without proving payment of the others. 18 A. 130, *Ledoux v. Jamison*.

6. Where a second twelve months bond is taken for the sale of property sold in execution of a first twelve months bond, there being no law to authorize the taking of a second bond, the same cannot be collected under the summary process, allowed for such instruments. 21 A. 230, *Wieck v. Babin, sheriff*.

7. The mortgagee may proceed *in rem*, to foreclose his mortgage, without provoking the appointment of an administrator to administer the succession, if there has been no partition of the estate among the heirs, who are absentees, and to whom a curator *ad hoc* has been appointed. 21 A. 486, *Randolph v. Chapman*. See No. 4; III. (a), No. 7.

8. Without authentic evidence of the interruption of prescription, no executory process can issue. 18 A. 626 and 726, *Perroux v. Lacoste*; 11 R. 449; 4 A. 419; 7 A. 548; 10 A. 275.

9. Where the notes are prescribed, on their face, the order of seizure and sale will be set aside. 21 A. 627, *Taylor v. Hill*.

10. The court cannot require authentic evidence of the interruption of prescription, before granting an order of seizure and sale. The doctrine to the contrary, in 7 A. 550, is too boardly stated. 19 A. 267, *Perroux v. Lacoste*; 10 A. 275.

11. Prescription cannot be pleaded in the Supreme Court on the appeal from executory process. 24 A. 618, *Dufossat v. Laiser*.

12. Prescription cannot be considered on an appeal from an order of seizure and sale. 20 A. 219, *Gill v. Hosmer*; 19 A. 266, *Perroux v. Lacoste*.

13. Though property in Louisiana is in course of administration, a creditor of the decedent, who is a citizen of another State, may obtain an order of seizure and sale in the Federal court, and thus take the property out of the hands of the administrator. 7 H. 172, *Irwin v. Lowry*. See No. 4.

14. The mortgagee may proceed *via executiva* against an insolvent estate. 28 A. 622, *Durand, adm'r v. Delahoussaye, sheriff*.

15. If the act be authentic, although the stamping may be deficient, executory process may issue thereon. 26 A. 672, *Pargoud v. Richardson*. See STAMPS.

16. When the stipulation to present the note at the place of payment, does not form part of the authentic evidence, there need be no authentic evidence of compliance therewith, to authorize the issuance of executory proceedings. 26 A. 673, *Pargoud v. Richardson*; 12 L. 615, *Moss v. Byrne*.

17. No law requires authentic proof of the existence of a corporation, acting *sui juris*, to obtain executory process. 26 A. 147, *First National Bank v. Simmes*.

18. The factor, on the faith of a pledge of defendant's mortgage notes, for advances not to exceed ten thousand dollars, and who, nevertheless, advances more than that sum to carry on defendant's plantation, and on settlement of accounts finds a balance of less than ten thousand dollars due to him, may proceed on the mortgage notes to realize this balance. 27 A. 249, *E. J. Gay & Co. v. Deynoodt*.

19. Executory process having issued for too much, the writ was returned, a new petition filed, and a new writ issued for the correct amount; the plea of *lis pendens* based on the first petition, cannot be maintained as to the second writ. 28 A. 186, *Rousseau v. Bourgeois*.

20. Insolvency prevents executory process from being carried into execution. See INSOLVENCY, IV. (b), No. 2.

(b) Sufficiency of title to authorize process.

1) In General.

1. The exact amount of the premium of insurance not being stated, the act of mortgage is not invalidated, but executory process cannot issue

thereunder for the amount of said premium. 17 A. 60, *Pelé Meaux*; 1 A. 279, 6 A. 466.

2. In an order of seizure and sale, when there is no authentic evidence of the amount of premium of insurance, the attorney's fees thereon, which are not called for by the writ, will be presumed to have been abandoned and the order will be affirmed. 26 A. 717, *Widow L'Hote v. Dubuch*.

3. The cost of protest, of copy of act are regulated by law, and must be taxed as costs allowed by the court. Acts 1855, p. 163, §§ 4, 11, 13 and 19. R. S., §§ 750, 770; 24 A. 309, *Urnrich v. Grow*; 25 A. 80, *Durac v. Ferrari*.

4. When the amount of attorney's fees, although stipulated in the act of mortgage is not fixed, executory process may issue for the balance, reserving to plaintiff the right to sue for the fees. 26 A. 500, *Socha v. Renaldo*.

5. Executory process cannot be issued where the note bears interest from its date and the act recites from maturity. 19 A. 141, *Ricks v. Bernstein*.

6. Executory process cannot issue, where there are discrepancies between the note and the act of mortgage. 21 A. 170, *Taylor v. Boedicker*; 19 A. 141, *Ricks v. Bernstein*.

7. A copy of the ordinance of the board of levee commissioners, determining the rate of assessment, an extract from the levee tax so extended by the recorder, and the return of the tax collector showing a demand and failure to pay, constitute under act 1859, p. 80, § 3, authentic evidence for the issuance of a writ of seizure and sale. 16 A. 439, *Templeton v. Morgan*.

8. When the amount secured by mortgage becomes due at the majority of the creditor, there should be authentic evidence of the majority, to authorize the fiat. 22 A. 267, *Hoffman v. Steib*.

9. The balance due on notes secured by mortgage, to commission merchants, after a year's business, should be settled contradictorily with the debtors. 22 A. 464, *Ward v. Douglass*.

HOWE, J. *dissenting*: The facts do not support the doctrine.

10. The additions contained in a notary's certificate that the act is a true and correct copy, except such parts of the original which were burnt, marked (X), means that the copy is a true and correct one of the act as it now exists, and if it contains yet, the material and essential recitals, executory process may issue. 23 A. 303, *Marrero v. Barker*.

11. Where the wife obtained the authorization of the judge to borrow money, the executory process against her, will be maintained. 21 A. 283, *Keller v. Ruiz*. See III. (a), No. 10.

12. The capacity of plaintiff as tutrix of the minor heir of the deceased mortgagee, cannot be contested on appeal, no authentic evidence of the capacity is required to obtain an order of seizure and sale. 28 A. 457, *Marrionneaux, tutrix v. Dardenne*; 12 A. 167; 14 A. 435.

13. HOWELL and WYLY, JJ., *dissenting*: The note not being indorsed by the deceased owner, there was no authentic evidence of ownership in the plaintiff, and no executory process should have issued. *Id.*

14. Evidence necessary on mortgages in favor of Citizens' Bank. See CORPORATIONS, X. (g), No. 5.

15. When the defendant in executory process has been declared a bankrupt, the certificate of the register of bankruptcy is sufficient evidence of the assignee's appointment and acceptance. 30 A. 604, *Dobel v. Delavallade*.

16. Executory process cannot issue against a married woman when it does not appear that the debt inured to her separate benefit, although she was a *feme sole*, when the mortgage was given by her agent holding a procuration signed by her during marriage. See OBLIGATIONS, III. (a), Nos. 23, 24.

2) Derivative titles and plaintiffs acting as agents or in *autre droit*.

1. Where the mortgage to secure a note is made in favor of the payee, or any holder of the note, a formal subrogation is unnecessary to enable the indorsee to enforce the mortgage. 15 A. 346, *Scott v. Turner*.

2. Where a note, payable to order, and secured by mortgage, is transferred by indorsement and sued on by the holder, it is unnecessary to allege the

transfer of the mortgage in the petition, as the transfer of the note, which is an evidence of the debt, includes a transfer of the mortgage which is the accessory of the debt. 15 A. 346, *Scott v. Turner*.

3. Where the note and mortgage are made payable to whomsoever may be the future holder or holders thereof. Executory process may issue without evidence of the capacity of the curator who sues. 19 A. 321, *Bayly, curator, v. McKnight*; 11 A. 4, 34; 2 A. 276; 14 A. 435; 29 A. 28, *Garrison v. Hyman*.

4. The transfer of the mortgage note by notarial act, included its accessory, the mortgage. C. C. (2615); 19 A. 80, *Frost v. McLeod*.

5. The holder of the note, under blank indorsement, must produce authentic evidence of the transfer, to be entitled to executory process. 24 A. 477, *Burns v. Naughton*.

6. The recital in the act of mortgage that the note is indorsed by the payee, although he did not sign the act, is such authentic evidence of the indorsement as will authorize the executory process in favor of transferee of the note. 28 A. N. R., *Clay v. Peyroux*; O. B. 45, fo. 23.

7. An administrator must annex the evidence of his appointment to obtain an order of seizure and sale. 18 A. 80, *Brueys v. Freret*.

8. There must be authentic evidence of the agency of the mortgager to authorize the process. 23 A. 520, *Gaudoz v. Blanque*.

9. Under a writ of seizure and sale, on a twelve months bond, it suffices that the fiduciary capacity of the plaintiff appear in the act of sale and mortgage and in the twelve months bond. 22 A. 90, *Stockett v. Johnson*.

10. One of two solidary obligors, who pays the note, becomes legally subrogated to all the rights of the holder, and may issue executory process on the half due by the other debtor. 25 A. 80, *Durac v. Ferrari*.

11. For transfer of notes, see II. (b), 3).

3) Registry of title; its sufficiency as against third persons, and right to proceed against them.

1. The purchaser who assumes to pay in lieu and place of the vendors certain mortgage debts bearing on the property, is personally bound thereby, and a writ of seizure and sale was properly issued against him. 19 A. 125, *Schlatre v. Greaud*.

2. When the note is made payable to the order of the maker who indorses it, and the mortgage is in favor of the holder, no proof of ownership other than possession, is necessary to sue out executory process. 26 A. 147, *First National Bank v. Simmes*.

3. The mortgagee, with the pact *de non alienando*, may proceed against the mortgager, no matter how many transfers of the property may have been made. 26 A. 618, *Stevens v. Pinneo*.

4. Where the third possessor appeals from executory proceedings issued against the original mortgagor, on an act of mortgage which does not contain the pact *de non alienando*, and to prove his interest to appeal, annexes his deed of sale to his motion, and the deed contains an assumption of the mortgage, the executory proceedings will be maintained. 27 A. 670, *Henry v. Goldman*; 15 L. 185.

5. For transfers of notes, see II. (a), 2).

6. The only question presented by an appeal from executory process, is the sufficiency of the authentic evidence to authorize the fiat. 23 A. 530, *Packer v. Grundy*; 24 A. 425, *Fazende v. Flood*; 21 A. 32, *Citizens' Bank v. Dixey*; 6 R. 60, *Dodd v. Crain*.

7. The court will presume that the judge had the proper evidence before him when he issued the order for seizure and sale, although the note and mortgage were filed by the clerk some days thereafter. 20 A. 256, *Bloom v. Martin*; 8 A. p. 23.

8. An appeal is the proper remedy where a decree of seizure and sale has been obtained on insufficient evidence. 25 A. 80, *Durac v. Ferrari*.

9. Whether there was sufficient evidence to authorize executory process, cannot be examined on an injunction. The remedy is by appeal. 26 A. 709, *City of Shreveport v. Flournoy*.

10. On an appeal from a seizure and sale, the court cannot examine whether

the note was issued by the wife to the husband contrary to law. 27 A., N. R., *Lafon v. V. Joubert*. See II. (b), 1), No. 11.

11. An order granting a writ of seizure and sale, cannot be regarded as anything more than a judgment *nisi*. 15 P. 167, *Levy v. Fitzpatrick*.

12. For obligations of the surety on the appeal bond, see APPEAL, III. (e). 2); 3).

13. Executory process issued for more than prayed for, see CORPORATIONS. X. (g), No. 1.

14. Executory process, or mortgage in favor of Citizens' Bank, see CORPORATIONS, (g), No. 5.

15. Power of the parish judge to sign the order. See COURTS, II. (f), No. 27.

III. OF THE DECREE AND APPEAL THEREFROM; PROCEEDINGS PRE-REQUISITE THERETO AND IN EXECUTION THEREOF.

(a) *In general.*

1. Executory process, issued under the act of 1859, directing the mode of collecting the levee taxes in the parishes of Madison and Carroll, are so far judgments, that an appeal lies therefrom. 16 A. 112, *Board of Levee Commissioners v. Marks*.

2. The delay of appeal is suspended, by plaintiff voluntarily going to trial of a rule to set aside the executory process. 16 A. 373, *Abrams v. Jay*.

3. In executory process, the delay of appeal commences to run from the day the notice of order of seizure and sale has been served. 16 A. 392, *State v. Judge Second District Court*; 14 A. 105.

4. The party against whom a proceeding *via executiva* is taken, is entitled to the delay prescribed by article 736, C. P., in order that he may take a suspensive appeal. 22 A. 22, *Surgi v. Colmer*.

5. On an appeal from an order of seizure and sale, irregularities in subsequent proceedings cannot be examined. 17 A. 127, *Roman v. Denny*.

6. The amount of the bond for a suspensive appeal from an order of seizure and sale, must be one-half over and above the amount actually due at the date of the order. 20 A. 179, *Tournillon v. Ratliff*; 22 A. 35, *Bankhead v. Judge Seventh District Court*.

7. A sale of property under a seizure and sale made after the death of the debtor, without making his heirs parties to the proceeding, is a nullity. 22 A. 20, *Surgi v. Colmer*. See II. (a), Nos. 4, 7.

8. An order of seizure and sale, for levee taxes, may be directed to the tax collector. See LEVEES, No. 1.

(b) *Affidavit, demand and notice.*

1. An order of seizure and sale cannot be set aside, on appeal, on account of subsequent irregularities in its execution. 21 A. 32, *Citizens' Bank v. Dixey*.

2. Three days before the seizure is made in executory process, the defendant must, under pain of nullity, be served with a notice that an order of seizure and sale has been rendered. The seizure first and notice afterwards, is invalid. 22 A. 199, *Birch v. Bates*.

3. The notice of seizure served on the tutrix who qualifies the same day, is sufficient. 25 A. 513, *Banker v. Durand, Jr.*

4. Any irregularities of the advertisement in execution of an executory proceeding, cannot be corrected on appeal. 26 A. 557, *Hoa v. Clancey*.

5. In executory proceedings the informality of serving a notice of demand, signed by the sheriff instead of the clerk, cannot form the basis of an injunction and suit to set aside the sale, without tendering back the taxes paid by the plaintiff who purchased; it was a good ground to enjoin the execution. 29 A. 206, *Jouet v. Mortimer*.

6. Service of the notice of demand by the sheriff after the writ is in his hands, will not vitiate the sale, in executory proceedings. 29 A. 262, *Hart & Hebert v. Pike, Bro. & Co.*

7. In executory process, the notice of demand must be made and signed by the clerk, and served by the sheriff, before the writ can properly issue. 29 A. 262, *Hart & Hebert, etc. v. Pike, Bro. & Co.*

8. Where the sheriff collected rents, under a writ of seizure and sale issued without the previous notice by the clerk, on an appeal from a judgment on a rule to distribute the money so collected, the Supreme Court ordered the writ to be returned into court. 30 A. 84, *Billgery v. Ferguson*.

9. A writ of seizure and sale, issued before the three days demand made by the clerk, is null and void; any seizure made thereunder should be released and the writ returned into court. 30 A. 84, *Billgery v. Ferguson*.

IV. OF THE ELECTION AND CHANGE OF PROCEEDINGS; THE OPPOSITION AND ANSWER.

1. Defendant in injunction has the right to abandon his executory process and change it into an ordinary action, although the plaintiff in injunction was not the defendant in executory proceedings. 21 A. 31, *Dumouchel v. Lemerick*.

2. In such a case the injunction should be maintained. *Ib.*

3. During the pendency, of the executory proceedings, a suit *via ordinaria* cannot be maintained on the notes. 21 A. 639, *Taylor v. Hill*; 8 N. S. 96.

4. A prayer for judgment in an answer to an injunction against executory process, joined to an express allegation of the change, converts the proceedings to the *via ordinaria* and the surety on the injunction bond is discharged. 22 A. 215, *Walker v. Ducros*.

5. A mortgage creditor who obtains a judgment on his mortgage note against a succession, cannot issue a *fi. fa.* to execute the judgment. 25 A. 154, *Succession Patrick*.

6. WYLY, J. *dissenting*: The proceeding was *in rem* and the mortgage creditor had as much right in one form as in another. *Ib.*

7. The change of the proceedings from *via executiva*, is an admission that the writ should not have been issued. 28 A. N. R.; *Lasalle v. Nougé*; O. B., 45, folio 2.

8. Whether the injunction was sued out as an original proceeding or as a third opposition to the executory proceedings, matters not, when the proceedings were changed from the *via executiva* to the *via ordinaria*; the two proceedings then form but one suit, the petition for the injunction standing as the answer. 29 A. 123, *Conrad v. Leblanc, sheriff*. 4 L. 90; 16 L. 109.

9. Plaintiff's suit *via ordinaria* having been dismissed as of non-suit, he cannot afterwards resort to the *via executiva*. 30 A. — *Oliver, Widow Bienvenu v. Decuir, sheriff*.

EXPERTS AND AUDITORS.

I. IN GENERAL; THEIR APPOINTMENT AND COMPENSATION.

II. THEIR DUTIES AND POWERS; EFFECT AND VALIDITY OF THEIR REPORT; AND PROCEEDINGS THEREON.

I. IN GENERAL; THEIR APPOINTMENT AND COMPENSATION.

1. Compensation allowed to experts, auditors and judicial arbitrators, is by article 552, C. P., to be paid as well as taxed costs, by the party cast; and this implies a delay of payment until termination of the suit. 27 A. 394, *Lobdell v. Bushnell et als*; 19 A. 382. See APPEAL, I. (a), 3), No. 11.

II. THEIR DUTIES AND POWERS; EFFECT AND VALIDITY OF THEIR REPORT; AND PROCEEDINGS THEREON.

1. The parties having chosen an expert and agreed to abide by his report, and given receipts based on his estimates, and resting the case on the sole testimony of the plaintiff, judgment should be for defendant. 16 A. 79, *McKie & Co. v. N. O. J. & G. N. R. Co.*

2. Objections to the report are waived by admitting it in evidence without objection. 23 A. 208, *Gagnet v. City*.

3. Notice of the filing of the report of the experts, (C. P. 456), should be served on the defendant, who has ten days within which to file his opposition. 26 A. 439, *Malady v. Malady*.

4. The defendant having taken a rule to show cause why the award of the commissioner should not be homologated, should have notified plaintiff thereof, before taking a judgment. 23 A. 803, *N. O., M. & C. R. R. Co. v. Bougère*.

5. In expropriation matters, where there is a great discrepancy in the report of two sets of commissioners, the case will be remanded. See THINGS, II. (b), 2), No. 3.

6. See ARBITRATION AND ARBITRATORS.

EXPROPRIATION.

1. See NEW ORLEANS, II. (e), 5). THINGS, II. (b), 2).

2. Costs of expropriation. See PAYMENT, II. (b), 2), No. 6.

FACTOR OR COMMISSION MERCHANT.

1. See MANDATE, I. OBLIGATIONS, VII. INSOLVENCY, III. INTEREST. LOAN, III. (b), 1), Nos. 3, 7.

2. The factor has no right to make a profit on his principal. See MANDATE, V. (a), No. 5.

3. A factor who pays currency at a discount when his principal has gold on deposit, should account for the difference. See MANDATE, V. (b), 1), No. 3.

4. A factor cannot, for his own debts, pledge the planter's cotton. MANDATE, V. (b), 3), Nos. 5, 8.

5. The agency expires by the death of the principal or factor. See MANDATE, VII. Nos. 3, 4.

6. The charge of two and one-half per cent. for selling and purchasing goods is not usurious. See OBLIGATIONS, VII. (a), 5), B., § 1, No. 3.

7. Eight per cent. interest is allowed by tacit consent, but as to the administrator, only legal interest is allowable. OBLIGATIONS, VII. (a), 5), B., § 1, No. 4.

8. One who agrees to ship all his cotton to his merchant, in consideration of advances made to him, without commission, is bound for such commission on all cotton sent to other merchants. See OBLIGATIONS, VII. (a), 5), B., § 2, No. 6.

9. One who warrants that his factor shall make two thousand dollars of commission, is bound. See OBLIGATIONS, VIII. (b), No. 3.

10. Advances made by a *negatorum gestor* are prescribed by ten years. See PRESCRIPTION, III. (g), 3), No. 6.

11. The privileges of the factor and lessor are equal. See PRIVILEGE, III. (d), 2), A., No. 3.

12. For plantation supplies, see PRIVILEGE, III. (d), 2), A; B.

13. The factor's privilege should be recorded. See REGISTRY, II. (a), 1), Nos. 16, 17, 18.

14. A factor who has not complied with his contract, cannot enforce a performance. See OBLIGATIONS, VII. (a), 1), No. 12.

15. When a draft, secured by collaterals, is given to a factor for the purpose of enabling him to raise the money with which he makes the advances to the planter, and at maturity the factor pays the draft, he cannot sue on the draft nor the collaterals, which are extinguished; he must sue on his account for advances. 30 A. 529, *Sevin & Gourdain v. Caillouet*.

FAMILY MEETING.

1. Necessity thereof to authorize the tutor to compromise. See MINORS, III. (c), No. 1.

2. See MINORS, VI. PARTITION, III. (b), No. 2.

FATHER AND CHILD.

See DONATIONS, I. (d). MINORS. PARENT AND CHILD.

FAULT.

See MANDATE, V. (b). OFFENSES AND QUASI OFFENSES, II. (c).

FEES.

See ABSENTEES, III. Fees of their *curator ad hoc*, ATTORNEY, II. (c).
CLERKS OF COURT, III. COSTS. CRIMINAL LAW, XIX. PRIVILEGE, II. (a).
PRESCRIPTION III. (e). SUCCESSION, VI. (b); VIII. (f), 8), B.

FELICIANA SAVINGS AND EXCHANGE BANK.

Acts 1870, E. S., p. 207.

FENCES.

See SERVITUDE, II. (a), 2), c. Nos. 13, 14.

FERRIES.

1. The State, through its legislature, in the exercise of its sovereign power to regulate ferries, which are part of the public highway, has a right to withdraw their management from the town or parish, and transfer the same to another corporation. See acts of 1870, p. 67. 5 A. 663; 24 A. 242, *Marks adm'r. v. Donaldsonville*; acts 1870, E. S., p. 58.

2. Ferry privileges: Assumption, 1869, p. 202; Avoyelles, 1871, 172; Berwick's Bay, 1870, E. S., 204; Calcasieu, 1870, E. S., 202; Concordia, 1871, 198; East and West Baton Rouge, 1875, 31; Grand Ecure, 1873, 177; 1874, 130; Iberville, 1870, E. S., 205; Jefferson, 1870, E. S., 215; Madison, 1869, 73; Point Coupée, 1870, E. S., 203; 1371, 154; St. Landry, 1876, 147.

FIDEI COMMISSA.

See DONATIONS, III.

FINE.

See CRIMINAL LAW, III; XVI. (d). NEW ORLEANS, II. (d), 1); 3).

FIRE ALARM.

Protection of, 1875, p. 103.

FIRE LIMITS.

1. Power of political corporations to define. See CORPORATIONS, II. (b), No. 8.

FISCAL AGENT.

1. The term fiscal agent used in act No. 3, of 1874, does not mean the receiver of all public funds. 27 A. 29, *Baldwin v. Dubuclet*.

2. Acts 1877, p. 75; 1878, p. 51.

FISH.

See Acts of 1876, p. 26.

FLOUR.

Inspection of, 1870, E. S., p. 156.

FORCED HEIR.

1. Right to sue for the nullity of a simulated sale. See DONATIONS, I. (d), No. 3; II. (d), No. 2.

2. Burden of proof. See DONATIONS, II. (a), No. 1; (d), No. 1.

FOREIGN.

1. Proof of foreign laws. See EVIDENCE, XIX. (e); XX.; XXI. (d).

2. Execution of foreign judgments. See EXECUTION.

3. Transmission of funds. See SUCCESSION.

4. Tax on foreign heirs. See TAXES, I.

FRANKLIN.

Portion of Tensas annexed to the parish of Franklin, 1870, E. S., p. 189; portion of Catahoula also, 1878, p. 64.

FRAUD.

1. For elements essential to the constitution of fraud, see *INSOLVENCY*, II. (a); (c). *OBLIGATIONS*, III. (b), 3); VII. (b), 2). *SALE*, III. (d), 3), A.
2. Actions to avoid fraudulent contracts. See *OBLIGATIONS*, (b), 2). *PRESCRIPTION*, III. (c), 6).
3. Liability of brokers in cases of fraud. See *MANDATE*, VI.

FREE MASONS.

Act 1870, E. S., p. 69; 1872, p. 123.

FRENCH.

See *LAWS*, II. (b). *NATCHITOCHES*.

FUND.

School fund, State debt fund, abolished, 1872, p. 134.

FUNDING.

1. By act 35 of 1865, the legislature authorized the issuance of one thousand bonds of one thousand dollars each, and these bonds were paid and were again under authority of the legislature, sold and pledged; *Held*: That they evidence a valid indebtedness of the State, and should be funded. 28 A. 219, *State ex rel. Attorney General v. Clinton*.
2. See *BONDS*, Nos. 1, *et seq.*
3. Acts of 1874, p. 39; 1875,*p. 110; 1877, p. 77.

GAMBLING.

1. See *PLEADING*, V. (a), 3), A., No. 2. *LEASE*, I. (c), 1), No. 18.
2. Licensing gambling, 1869, p. 149; repealed, 1870, p. 11; against gambling, 1870 p. 31.

GAME.

Protection of, 1877, p. 100.

GARNISHEE.

See *ATTACHMENT*, X. *EXECUTION*, V. (a) 3), D. §§ 1 and 2.

GENERAL ASSEMBLY.

See *LEGISLATURE*. *CONSTITUTION*, II. (c).

GOLD.

See *DEPOSIT*, II. No. 2. *COIN*. *CURRENCY*.

GOOD WILL.

See *MARKET*, No. 5.

GOVERNOR.

See *CONSTITUTION*, II. (d).

GRAND LODGE OF LOUISIANA.

See *CORPORATIONS*, I. No. 3; II. (a), No. 1; Supreme Council, 1870, E. S., p. 69.

GRANT.

1. See DONATIONS. FERRIES. MARRIAGE, III. (b), 4). PRESCRIPTION, II. (b), 1), B. PUBLIC LANDS. SERVITUDES, II. (b), 1), A.
2. Parish of, created, 1869, p. 79; 1870, E. S., p. 70; burnt records, 1875, p. 61.

HABEAS CORPUS.

2. In matters of *habeas corpus*, the jurisdiction of the Supreme Court is original, and not appellate. The original power to bail precludes the idea of the exercise of an appellate jurisdiction in relation to the same subject. 15 A. 347, *State v. Keeper of Parish Prison*.
2. The Supreme Court and each of its judges have power to issue writs of *habeas corpus* in cases where the court may have appellate jurisdiction. C. P. 792; 24 A. 120, *State ex rel. Van Norden v. Sauvinet, sheriff*.
3. Where the accused is detained under a sentence rendered by a competent court, the writ of *habeas corpus* cannot be issued for the purpose of determining whether all the forms of law have been observed previous to the judgment. This writ is not a writ of error. 28 A. 82, *Application of David Fenderson for habeas corpus*.
4. The Supreme Court or any judge thereof may issue writs of *habeas corpus* in any case where an appeal would lie, although none be pending. 29 A. 755, *State ex rel. Daniel v. Rose*.

HAY.

Inspection of hay is not a regulation of commerce. See CONSTITUTION, II. (c), No. 2; 1868, p. 120.

HEIR.

1. See DONATIONS, I. II. VI. (b); (c). JUDGMENT, XV. (a), 2); (c). MARRIAGE, XIII. (b), 4). OBLIGATIONS, VIII. (a). PLEADING, I. (c). 6). PARENT AND CHILD. SUCCESSION.
2. Taxes on foreign heirs, see TAXES, II. (a).

HIRE.

See LEASE, II.

HOMER.

1. The act of 1874, p. 207, which confers judicial power on the mayor of the town of Homer, is unconstitutional. 27 A. 544, *Mayor, etc. v. Blackburn*.
2. ON REHEARING: The legislature has the right to confer the power of committing magistrate on the mayor. A fine imposed by him, in accordance with the act, is valid. 27 A. 545, *Mayor v. Blackburn*; 30 A. 497, *State and town of Plaquemines v. Ruff*.
3. For appeal bond in favor of Homer college, see APPEAL, III. (b), No. 51.

HOMESTEAD.

I. OF THE WIDOW AND MINOR.

II. EXEMPTION FROM SEIZURE.

I. HOMESTEAD OF THE WIDOW AND MINOR.

1. The administrator may, without answer to the opposition of a widow claiming a homestead, show that she has concealed and disposed of the community property, or that she and the children, or either of them, hold property in their own right. 11 A. 386, *Succession Aaron*.
2. In computing the amount of property owned by the widow who claims the homestead, her indebtedness is not to be deducted. 11 A. 67, *Duchamp v. Butterly*. See Nos. 9, 10.
3. If the widow or children own collectively, or separately, the sum of

one thousand dollars, no homestead is due by the estate. 15 A. 527, *McCall v. McCall*.

4. The widow may sue the estate, for her homestead, before the final liquidation. 16 A. 254, *Harbour v. Haynes*; 5 A. 265.

5. The widow's claim for a homestead is determined by her circumstances at the time of the death of her husband, she being a resident of Mississippi at the time of the death of her husband, is not entitled thereto, although after the death she fixed her residence here. 18 A. 36, *Succession Morton*.

6. The husband being domiciliated in this State at the time of his death, his widow left in necessitous circumstances, is entitled to the homestead, although she has never been in this State. 20 A. 283, *Succession Christie*.

7. The widow must be in necessitous circumstances at the time of the death of her husband, to claim the homestead. 24 A. 491, *Succession Lisle, Sr.*; 29 A. 702, *Succession White*; 28 A. 832, *Succession Robertson*.

8. She must also be in necessitous circumstances when her claim is made. 26 A. 686, *McCoy and Husband v. McCoy*. (Overruled by 29th A. 702, ante, 7.)

9. The value of the furniture retained by the widow, and the amount of rents collected by her, should be deducted from the allowance of the homestead. 26 A. 539, *Succession Drum*; 28 A. 640, *Succession Fontelieu*. See No. 2.

10. The widow is the usufructuary of the homestead, the naked ownership is in the children; the debts due by the widow to the succession of her husband, or her maladministration, cannot be pleaded as an offset against the homestead. 16 A. 195, *Succession Schexnaydre*; 13 A. 352, *Gimble v. Goode*.

11. The use of the husband's property by the widow and her children, does not offset their rights to a homestead. 24 A. 96, *Succession Cerisé*.

12. The claim of the widow to her homestead cannot be taken from partnership assets, previous to the payment of partnership debts. 21 A. 520, *Succession Stauffer*.

WYLY, J., dissenting: The funds belonged to the succession, and the widow should have been paid first. See 21 A. 605.

13. The decree of separation from bed and board, does not dissolve the bonds of matrimony; the surviving widow, if in necessitous circumstances, may recover the one thousand dollars allowed by the act of 1852, 171. 22 A. 9, *Succession Liddell*; C. C. (3216); R. S. 1870, § 333.

14. A child of the second marriage, in necessitous circumstances, has no right to claim the homestead from the succession of the first husband. 22 A. 81, *Leat v. Williams*.

15. The life policy of insurance being in favor of the wife and children, their right thereto existed before the death, and the liability of the insurance company became fixed and exigible by the death of the insured. They must, therefore, be considered as owners of the amount when the insured died. 22 A. 455, *Succession Kugler*.

16. The widow's claim for the homestead need not be recorded. 25 A. 433, *Succession Bouvet*.

The widow's homestead is superior to the landlord's privilege. *Ib.*; 26 A. 166, *Succession Cooley*.

18. The claim of the widow as heir and as creditor of the homestead, are not inconsistent. 26 A. 686, *McCoy v. McCoy*.

19. The widow has no right to claim her homestead from a twelve months bond given for the purchase of her husband's property, seized and sold, during his life time. 24 A. 74, *Murphy v. Ruhl*.

20. The widow's homestead should be paid by preference over a twelve months bond, given by the deceased, who purchased his own property, which had been seized. 25 A. 116, *Succession Heitzler*.

21. If the minor children of the first marriage owned in their own right one thousand dollars, the widow by second marriage, with whom the deceased had no children, has no right to the homestead. 25 A. 535, *Succession Mélangon*; 13 A. 398, *Stuart v. Stuart*; 15 A. 527, *McCall v. McCall*.

22. A widow left in necessitous circumstances, may claim by way of third

opposition to be paid in preference to a mortgage creditor, suing by executory process, before a court of ordinary jurisdiction. 24 A. 130, *Mangum v. Bacon*; 21 A. 429, *Quertier v. Hill*.

23. An injunction against the purchaser, to prevent him from entering into possession of property bought, is not the proper proceeding for a widow to claim her homestead. 26 A. 465, *Rau v. Katz*.

24. The widow, by second marriage, is entitled to the homestead, if her property and that of the minor child of her husband, by first marriage, do not amount to one thousand dollars. She is entitled only to the usufruct and must give bond. The tutor of the minor need not have applied for the homestead. 26 A. 615, *Corner v. Bourge*; 12 A. 885. See No. 32.

25. Where the succession property was worth four thousand dollars, and debts and liabilities amounted to one thousand two hundred dollars, at the time of its opening, and the widow borrowed money by mortgaging the property, she is not entitled to her homestead, because the succession was fully solvent at the date of its opening. 27 A. 99, *Succession Marx*. (N. B. *The inventory showed only a peice of real estate, it was appraised at four thousand dollars, and subsequently sold for just enough to pay the mortgage creditor*).

26. Minor children left in necessitous circumstances, are entitled to the homestead from their mother's succession. 27 A. 289, *Succession Coleman*.

27. The attorney for absent heirs, has no right to claim the homestead for the heirs. 27 A. 364, *Succession O'Loghlen*.

28. In default of proof that the widow has no property, the homestead cannot be allowed to the children. 27 A. 364, *Succession O'Loghlen*.

29. When after the payment of the debts, the succession is solvent, so as to leave the sum of more than one thousand dollars to be distributed between the widow and the minor children, the widow will not be entitled to a homestead. 28 A. —, *Succession of John M. Smith*.

30. A widow who is the heir of her husband, and who accepts his succession purely and simply, and sells the movables, as owner, becomes liable for his debts, and cannot claim her homestead, although she may have been left in necessitous circumstances. 28 A. 872, *Claudel v. Palao*; *ib.*, N. R., *Letten v. Arno*.

31. The removal of the widow to another State, does not impair her rights to the homestead. 29 A. 702, *Succession White*.

32. The creditors of a succession cannot demand that the widow shall give security for the safe return of the homestead to the heirs. 29 A. 702, *Succession White*.

33. The heirs of the widow left in necessitous circumstances, but who died without claiming the homestead, have no right to the same. 28 A. 832, *Succession Robertson*.

34. The surviving widow, although a former concubine, and only married a few days before her husband's death, is entitled to her homestead, when left in necessitous circumstances. 29 A. 412, *Succession Marc*.

35. If the widow dies before having claimed her one thousand dollars of homestead, her heirs of age cannot claim the same. 30 A. 669, *Succession John Durkin*.

II. EXEMPTION FROM SEIZURE.

1. Revised Statutes, 1870, § 169, exempting one hundred and sixty acres of land from seizure, applies to execution and not succession sales. 23 A. 336, *Burnett v. Walker*.

2. The homestead law cannot affect contracts entered into anterior to its passage, even if the mortgage was recorded after its promulgation. 25 A. 142, *Mills v. Sheriff*; 20 A. 244, *Roupe v. Carradine*.

3. The act of exemption, being in derogation of common right, must be strictly construed. 21 A. 686, *Guillory v. Deville*; 28 A. 667, *Todd v. Gordy*.

4. The act of 1865, exempting property from seizure and sale, does not apply to property mortgaged before the passage of the act. 20 A. 374, *Lavillebeuvre v. Heirs Frederic and Cosse*.

5. The homestead does not impair the obligation of a contract entered into

previous to its passage, it impairs only the security for the payment of the debt. The judgment was never recorded, therefore the homestead law acted like a subsequent mortgage duly recorded previous to the seizure. 25 A. 200. *Robert v. Coco*.

6. A defendant who mortgaged his plantation during the existence of the homestead act, has a right to its benefit. 26 A. 149, *Fugua v. Chaffe & Bros.*

7. A mortgage executed subsequent to the homestead law, is subject to its provisions. 27 A. 276, *Moore v. Beelman*.

8. Act 33 of 1865, exempting certain property from seizure as a homestead, must have effect even as to debts created anterior to its passage. 27 A. 356. *Doughty v. Sheriff*; 25 A. 199.

LUDELING, C. J., *dissenting*: The law in such a case would be unconstitutional. 6 N. S. 591.

9. An undivided share in certain land is not subject to the claim of homestead, and defendant cannot enjoin a seizure by reason of this claim. 26 A. 156, *Henderson v. Hoy, sheriff*; 28 A. 355, *Borron v. Sollibellas*; 608, *Sinon v. Walker*.

10. Where the husband without descendants leaves the State apparently with the intention not to return, his wife has no right to claim the homestead exemption in his name or for herself. 26 A. 610, *Mallon v. Gates*.

11. The exemption is to preserve a homestead for a farmer, in order that his family might be supported and his occupation not broken up; it has no application to the residence of an attorney at law. 26 A. 646, *Hargrove v. Flournoy, sheriff*; 25 A. 219, *Crilly v. Sheriff*. See Nos. 25, 26.

12. Section 1691, R. S. of 1870, providing an exemption from seizure of certain property not exceeding two thousand dollars, relates to predial and not to urban property. 25 A. 219, *Crilly v. Sheriff*.

13. Property situated on the outskirts of the town of Pineville, owned by a cooper, who resides with his family thereon, but who does not follow the business of coopering regularly, and who lives from the produce raised on his land, cannot be seized, being exempt under the homestead law. 27 A. 226, *Baden v. Reeves*.

14. A claim for homestead exemption cannot be made after the sale of the property. 28 A. 416, *Willitson and husband v. Schmidt & Zeigler*.

15. The homestead exemption cannot be exercised to the prejudice of the vendor's privilege. 28 A. 416, *Willitson and husband v. Schmidt & Zeigler*; 783, *Ventress v. Collins*. See *infra*, 27.

16. A claim for homestead exemption cannot be made after the sale. 28 A. 90, *Kuntz v. Baehr, sheriff*.

17. At the time of the seizure of defendant's undivided half of the plantation and movables thereon, he was not entitled to the homestead exemption. The property having been divided since, and the residence falling to his share, does not give him a right to the homestead in preference to the seizing creditor. 28 A. 355, *Barron and husband v. Sollibellas, sheriff*.

18. The homestead exemption is personal, and does not descend from the debtor to his heirs. 29 A. 64, *Briant v. Lyons, sheriff*; 1865, p. 52, R. S. § 1691.

19. A widow who acquired land, and who is the head of a family, with two children, is entitled to the homestead exemption. N. R., O. B., 43, folio 358, *Cole & Hoy*. See No. 29.

20. The husband, who has the usufruct of the community property, is entitled to claim his homestead exemption on said community property. 29 A. N. R., *Marcotte v. Messick, sheriff*.

21. The renunciation of the creditor to the homestead exemption, is against public policy and therefore not valid. 29 A. 333, *Wolf & Cerf v. Mary L. Harand*.

MANNING, C. J. and SPENCER, J., *dissenting*: The waiver is valid as should be enforced.

22. The homestead is so far exempt from seizure, that any mortgage given thereon is of no validity, and the mortgager may dispose of the same free from said mortgage. 29 A. 330, *Van Winckle v. Landry*.

23. SPENCER, J., *dissenting*: The mortgage is not null; when the conditions, upon which the homestead is allowed, cease to exist, the mortgage should be enforced. *Id.*

24. The homestead is specifically exempt from seizure, whether the debtor owns other property or not, and whether he has disposed of the property pending the suit to recover the debt. 29 A. 572, *White v. Givens*.

25. A printer, by occupation, and keeper of a ferry, has no right to the homestead exemption. 28 A. 575, *Roberts v. Gordy*; 26 A. 645. See No. 11.

26. The occupation of the defendant, at the time of the seizure, must determine whether he is a farmer or not. 28 A. 641, *Ray v. Hayes*.

27. Defendant is entitled to the homestead exemption, as against plaintiff, who loaned the money to pay the price, and afterward accepted a mortgage to secure the loan. 28 A. 829, *Lear v. Heffner*; R. S. 1870, sec. 1692. See No. 15.

28. A mule, corn and fodder of a farmer, necessary for the current year, are exempt from seizure by the act of 1865. C. P. 645; 28 A. 641, *Ray v. Hayes*.

29. The homestead exemption does not extend to married women. 28 A. 594, *Fuselier v. Buckner*. See No. 19.

30. Where the debtor resided in a dwelling worth more than two thousand dollars, at the time of the seizure, he could not, by removing into another house of less value, on the same plantation, become entitled to the homestead. 28 A. 667, *Todd v. Gordy*.

31. Land entered by an actual settler, under the homestead act of congress of May, 1862, is not liable to seizure for debts contracted prior to the issuing of the patent. 28 A. 795, *Patton v. Richmond, sheriff*.

32. The soil being exempt from seizure under the homestead law, the mill and machinery having a foundation in the soil, cannot be seized separately. 28 A. 793, *Tison v. Taniehill, sheriff*.

HOMOLOGATION.

See SUCCESSION, VIII. (f), 2); 3); 4). JUDGMENT, XV. (c). PARTITION. III. (c).

HOTEL.

See INN.

HOUMA.

1. For history of Houma grant, refer to 5 A. 75, *Foley v. Harrison*; 16 A. 302, *Laforrest v. Downing*.

2. See INCORPORATION, I. *verbo* Houma.

HOUSEKEEPER.

1. Claim for services, see LEASE, II. (c), 1), No. 7.

HUSBAND AND WIFE.

See MARRIAGE, IV.

IBERIA.

Parish of, created, 1868, p. 272.

IGNORANCE.

See ERROR. MARRIAGE, IV. NEW TRIAL, III. (b).

IMMIGRATION.

1. Section 1723, R. S., in requiring a bond that the immigrants will not become a burden upon the community is simply directory. 26 A. 30, *Commissioners of Immigration v. Brandt*; 14 A. 207; 7 R. 219.

2. The immigration law is only a police regulation not contrary to the constitution of the United States. *Id.*; 7 Howard, 523; 16 Peters, 625; 5 Howard, 471.

3. 1869, p. 106; 1871, p. 14; 1874, p. 271.

IMPOST.

1. See TOLLS.

2. Inspection of hay not an impost. See CONSTITUTION, II. (c) 1), No. 2. TAXES, II. (b), 1), No. 1.

3. Wharf charges on boats, is not an impost. See NEW ORLEANS, II. (d), No. 3; *per contra*; 4, 5, 6, 7, 8, 9.

4. See SALE, III. (b), 1), Nos. 1, 3.

5. A tax levied on consignees of goods from other States is unconstitutional. See TAXES, II. (b), 2), A. No. 3.

IMPRISONMENT.

See ARREST. COURTS, III. CRIMINAL LAW.

IMPROVEMENTS.

See ACCESSION, II. (a). LEASE, I. (b), 2). MARRIAGE, XIII. (e) 4), E. PETITORY AND POSSESSORY ACTIONS, II. (d). POSSESSION, II. PRIVILEGE, III. (a). QUASI CONTRACTS, I.

IN.

1. For *in autre droit*, see APPEAL, II. (b). EVIDENCE, XII. (h); (j), 4). EXECUTORY PROCESS, II. (b), 2). JUDGMENT, XV. (a); (c), 2). PLEADING, I. (b).

2. For *in chief*, see CRIMINAL LAW, XII. (f), 3). EVIDENCE, XVI. (c).

3. For *in commendam*, see PARTNERSHIP, V.

4. For *in esse*, see DONATIONS, I. (a).

5. For *in extremis*, see CRIMINAL LAW, XII. (c).

6. For *in fieri*, see APPEAL, I. (b). JUDGMENT, IV.; XV. (d). OBLIGATIONS, III. (b), 2). SUCCESSION, V. (a); (b).

7. For *in foro conscientie*, see INSOLVENCY, XIII. (b).

8. For *in limine*, see APPEAL, VI. (b). PLEADING, VI. (a), (b).

9. For *in mora*, see OBLIGATIONS, VII. (a), 2); 3).

10. For *in nullo est erratum*, see APPEAL, VI. (b).

11. For *in personam* and *in rem*, see ATTACHMENT. EXECUTORY PROCESS. JUDGMENT, XIV. MORTGAGE, VI. (c).

12. For *in solido*, see OBLIGATIONS, VIII. (c).

13. For *in transitu*, see ATTACHMENT, VII. (b); (d). PRIVILEGE, III. (b). (d), SALE, III. (b), 3).

INCORPORATION.

I. OF CITIES AND TOWNS.

II. OF FIRE COMPANIES.

III. OF MISCELLANEOUS.

IV. OF RAILROADS.

I. OF CITIES AND TOWNS.

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INJUNCTION.

I. IN GENERAL.

II. OF THE RIGHT TO AN INJUNCTION.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>To restrain or enforce action in judicial matters.</i></p> <p>1) In general.</p> <p>2) To establish claims and defenses available before or silenced by the judgment; also of the extinction of the obligation and executory process.</p> | <p>3) To regulate the mode or effects of execution; of concurrent seizures and the seizure of the property of third persons.</p> <p>(c) <i>To restrain or enforce action in matters in Pais.</i></p> |
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III. WHAT COURT MAY ISSUE THE INJUNCTION.

IV. OF THE AFFIDAVIT.

V. OF THE BOND AND SURETY.

VI. OF THE EXECUTION AND EFFECT OF THE WRIT.

VII. OF THE DISSOLUTION OF THE WRIT; THE PLEADINGS, EVIDENCE AND TRIAL.

VIII. OF THE DAMAGES, COSTS AND INTEREST.

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| <p>(a) <i>In general.</i></p> | <p>(b) <i>Measure of damages; interest and fees of counsel.</i></p> |
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I. IN GENERAL.

1. Power is vested by an amendment of the Code of Practice, in the clerks of district courts, to grant orders of injunction in the absence of the judge from the parish, or when he is interested in the cause; but they are in all cases required to take bond and security from the party at whose suit the order of injunction is granted. 15 A. 328, *Witkowski v. Selby*.

2. Contrary to the English decisions, an injunction may compel parties to do certain acts as well as *restrain* them from acting, especially where the consequences may be considered irreparable. 18 A. 242, *Pierce v. City*; 7 R. 442; 9 M. 519; 2 R. 342.

3. A writ of injunction issued by the clerk before the adoption of the constitution of 1868, did not become void on the adoption of the constitution. 21 A. 468, *Williams v. Douglas*.

4. The State has the right to restrain by injunction persons who have combined together for the purpose of doing what is prohibited by law and to prevent such persons from interfering with her agents in the execution of the legislative will. The attorney general of the state is the proper officer to institute proceedings against such persons. 22 A. 545, *State ex rel. S. Belden v. Wm. Fagan*.

5. The parish judge who signs an order for an injunction is without authority to set it aside. 23 A. 581, *Wooley v. Russ*.

6. No tax payer has the right to enjoin the city to receive only legal currency in payment of taxes. They are without interest. 27 A. 446, *Louisiana National Bank v. City of New Orleans*.

7. A rule *nisi* is to enable defendant to show, if he can, that on the face of the papers the injunction ought not to be granted. Affidavits are not admissible in evidence. 29 A. 58, *Heyniger & Co. v. Hoffnung*.

8. A rule need not be taken to show cause why an injunction should not be granted. 28 A. 889, *State ex rel. Dardenne v. Judge Fifth Judicial District Court*.

9. If the requirements of the Code of Practice be complied with, plaintiff, as a matter of right, is entitled to an injunction. The practice of issuing rules *nisi*, and the rules of the district courts for the parish of Orleans, creating such practice, are not valid. 29 A. 796, *Beebe v. Guinault*; 30 A. —, *Watson v. Winter and Hunter sheriff*; 798, *Crescent City Live Stock and Slaughterhouse Company Larrieux*.

10. The writ of injunction issues on the principle of a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right which on just and equitable grounds ought to be prevented. 1 Woods, 196, *McComb v. Ernest et als.*

11. The tax payers have no interest to enjoin the mayor from putting before the voters of the corporation the question of levying a tax to build a railroad; it will be time enough to ask for relief if the tax be voted for. 29 A. 271, *Rodanez et als. v. Mayor and Administrators of New Orleans*.

12. For appeals from injunctions, see APPEAL, I. (b), 2), F.

13. Plaintiff in injunction must prove the allegations of his petition. See EVIDENCE, VII. No. 14.

14. For amount of the bond on appeals from injunctions, see APPEAL, III. (c).

15. An injunction cannot issue to enforce a mandamus. See MANDAMUS, II. No. 13.

16. For injunction against taxes, see TAXES, III. (d), 1).

17. The dissolution of an injunction, issued on a petition asking simply that the injunction be made perpetual, leaves nothing for the court to decide on the merits. 30 A. 660, *Wade v. Loudon, sheriff*. See APPEAL, I. (b), 2), E.

II. OF THE RIGHT TO AN INJUNCTION.

(a) *In general.*

1. A party plaintiff is entitled to an injunction to restrain a third person who is in possession of a sum of money in controversy, from paying it over to

the defendant, where the plaintiff is in danger of losing it, owing to the claim of defendant and his insolvency. 15 A. 456, *Denson v. Stewart*.

2. A judicial discretion is vested in the court of the first instance to refuse to issue an injunction where it is manifest that it is in direct conflict with the decree of the Supreme Court between the same parties and where it necessarily implies a contempt of the authority of the court. 16 A. 234, *Polar Star Lodge v. Third District Court*.

3. A writ of *feri facias* can only be stayed by an injunction. 19 A. 189, *Wiley v. Woodman*.

4. Real estate in possession of a third party in no manner connected with the partnership, and who holds, under a recorded title translatif of property, cannot be taken out of the possession of the presumptive owner, and an injunction cannot issue to prevent him from disposing thereof. 23 A. 420, *McKee v. Griffin*; 628.

5. Where a party enjoins a seizure, on the ground that the judgment under which it is issued is null and void, because it was rendered and signed at chambers, he should deny under oath that either he or his counsel consented, to the submission of the case to the judge to be decreed at chambers, before he attempts to avail himself of the omission of the clerk to enter such submission upon the minutes of the court, or complains that it was not reduced to writing and signed by the parties and their counsel. 15 A. 477, *Rust v. Faust*.

6. The allegation that plaintiff has been apprised that defendants have expressed their intention to remove the mill, etc., is not sufficient to base an injunction. 29 A. 508, *Thibodeaux v. Keller*.

7. A tax payer who is liable to be assessed for the public taxes that will be necessary to pay the State debt and interest thereon, cannot maintain a private suit against the State officer to prevent them from executing and issuing bonds which the legislature has unconstitutionally authorized, and required to be issued. 1 Woods 124, *Morgan v. Graham*.

8. It is a general rule that an individual cannot maintain a private suit for any injury which he sustains in common with every other citizen. 1 Woods, 124, *Morgan v. Graham*.

9. Money collected to pay the interest on the consolidated bonds of New Orleans, levied, collected and set apart according to provisions of the act of the legislature, is a trust fund for that purpose, and the municipal corporation may be enjoined from using it for any other purpose without the consent of the bondholders. 2 Woods 108, *Maenhaut v. City of New Orleans*. See OBLIGATIONS, II. No. 3.

10. A municipal corporation being required by law to levy an annual tax to pay interest on certain designated bonds, and having levied and collected the tax for that purpose, has no right to divert the fund to other purposes, and, upon application by the holder of the bonds, will be enjoined from so doing. 2 Woods, 128, *Ranger v. New Orleans*.

11. Where a tax to pay interest on certain bonds had been levied by a municipal corporation for a series of years, and the interest due from year to year had been paid in full, although a portion of such interest tax for those years was in arrears, an injunction to restrain the corporation from receiving payment of said arrears in city scrip was refused, it being made to appear that unless scrip were taken the tax in arrears could not be collected at all. 16.

12. Tax payers may enjoin the police jury from levying a tax to meet a contingent liability. See TAXES, I. No. 5.

(b) *To restrain or enforce action in judicial matters.*

1) In general.

1. The debtor cannot, because of the transfer of a litigious right, enjoin the execution before tendering payment of the price given. 26 A. 45, *Walter v. Villavaso*.

2. An injunction cannot be granted to a creditor of the insolvent, to prevent a purchaser of the property sold by the syndic, from taking possession thereof. 24 A. 268, *Dunbar v. Steib et al.*

3. An injunction against the purchaser to prevent him from entering into possession of property sold, is not the proper proceeding for a widow to claim her homestead. 26 A. 465, *Rau v. Katz*.

4. An injunction cannot issue to prohibit one from suing or exercising his rights before a court of justice; if there be a proper defense to the action, it should be made before the court where the suit is brought. 26 A. 500, *Butchers' Association v. King Cutler*; 28 A. 262, *Brott v. Eager, Ellerman & Co.*

5. One not a party to an injunction, is not bound thereby. 28 A. 350, *State ex rel. Bloomfield v. Clinton, auditor*; 27 A. 494, *State ex rel. Lubie v. Administrator Finance*.

6. There being no actual seizure, no cause exists for an injunction. 28 A. 357, *Richardson v. Cramer*. See 3), No. 1.

7. Where defendant enjoined the writ of *feri facias*, because no notice of judgment had been served on him, and thereupon plaintiff returns the writ unconditionally into court, and has the proper notice served in due time, he may issue an alias writ of *feri facias*, notwithstanding the pendency of the injunction. 20 A. 278, *Smith v. Purves et als.*; 6 A. 73.

8. For right of the bankrupt to issue an injunction and plead his discharge, see BANKRUPTCY, III. (a).

9. A rule does not suspend execution. See EXECUTION, II. No. 3.

10. A judgment creditor has no interest to enjoin proceedings in partition. See PARTITION, I. No. 7.

11. Movables used in carrying out the industry, to which the real estate was subject, becomes immovable by destination; the mortgagee may enjoin their sale, when he had purchased the land under foreclosure of his mortgage. See THINGS, II. (b), 1), No. 6.

12. Plaintiff's suit *via ordinaria* having been dismissed, as of non-suit, an injunction may be issued to prevent him from proceeding *via executiva*. See EXECUTORY PROCESS, IV. No. 9.

2) To establish claims and defenses available before, or silenced by the judgment, also of the extinction of the obligation and executory process.

1. The rule, that such matters of defense as might have been pleaded on the merits, cannot form legal grounds for an injunction, in arrest of the execution of the judgment, finds an exception in cases of persons incapacitated from contracting generally or specially. As long as the disability lasts, a judgment obtained against them, under such circumstances, and which has not acquired the force of the thing adjudged, is liable to the same objection as the obnoxious obligation. 15 A. 621, *Medart v. Fasnatch*.

2. Where, previous to the obtaining of an order of seizure and sale for the price secured by mortgage on the property sold, the vendee had commenced an action of *quanti minoris* against the vendor, which if successful would absorb the amount of the executory demand; *Held*: That an injunction against an order of seizure and sale should be perpetuated without prejudice to the eventual rights of the defendant in injunction. 15 A. 689, *Walker v. Cucullu*.

3. Execution cannot be enjoined on grounds which might have been pleaded before judgment. 21 A. 166, *Butman v. Forshay*; 8 L. 101; 6 A. 282; 800; 8 A. 489; 8 N. S. 513; 20 A. 551, *Lee v. Hubbell*; 12 A. 181; 8 A. 101; 20 A. 209; 1 A. 284; 26 A. 34, *Mahan v. Accommodation Bank*; 21 A. 465, *Groat v. Johnson*. See No. 12.

4. An injunction will not lie, to restrain an execution, on the ground that the amount of the judgment is erroneous. 21 A. 560, *Stinson v. Hill, sheriff*.

5. A defendant who does not plead in bar to the suit, his discharge in bankruptcy, cannot enjoin the judgment on this ground. 26 A. 41, *Calaher v. Michel*; 2 Woods, 138, *Goodrich v. Hunton*. See BANKRUPTCY, III. No. 15.

6. An injunction should not be granted where the payment pleaded might have been set up before judgment. There must be an end to litigation. 28 A. 276, *Rudman v. Bockel and Husband*.

7. No prayer for the nullity of the judgment being made in the petition, the injunction should be dissolved with damages. 23 A. 599, *Bell v. Frankee et als.*

8. An injunction cannot issue to arrest the execution of a writ of seizure and sale, on the same ground presented by a devolutive appeal taken from the order, for the purpose of gaining, practically, all the benefits of a suspensive appeal. 25 A. 538, *Naughton v. Dinkgrave*.

LUDELING, C. J., *dissenting*: There is no good reason why the injunction may not issue, and there is no law against such a proceeding. *Ib.*

9. The property being under seizure by virtue of a writ of seizure and sale, and *a. fi. fa.*, an error of calculation in the latter writ, should not arrest execution under the former. 26 A. 45, *Walker v. Villavaso*.

10. The sufficiency of the evidence to authorize executory process, cannot be examined on an injunction; the remedy is by appeal. 26 A. 709, *City of Shreveport v. Flournoy*.

11. For the injunctions issued by bankrupt courts, see BANKRUPTCY, II. No. 2.

12. A mandamus will issue from the Supreme Court, to compel the lower court to execute the judgment of the appellate court, notwithstanding an injunction issued on grounds which might have been pleaded before judgment. See MANDAMUS, I. (a), 3), No. 3.

13. All the informalities and objections which might have been urged by the sureties on the bail bond, on appeal from a judgment declaring the forfeiture of the bond, cannot form the basis of an injunction. 30 A. 441, *O'Conner v. Sheriff et als.*

14. When the widow may enjoin a judgment rendered for the price of her share in the community property bought by her, see SUCCESSION, VIII. (e), 7), c.

3) To regulate the mode or effects of execution, and herein of concurrent seizures and the seizure of property of third persons.

1. The defendant has no right to enjoin an execution on the ground that the property was not seized and taken possession of by the sheriff. 9 R. 182; 23 A. 550, *Denville v. Hays*. See 1), No. 6.

2. The wife cannot arrest the sale of the husband's property seized under execution, on the ground of preference over the seizing creditor. 18 A. 665, *Marot v. Her Husband*. See MORTGAGE, IV. (c), 1), No. 4.

3. Not only ordinary, but even privileged and mortgaged creditors cannot arrest an execution, but must claim their preference by third opposition. 19 A. 62, *White, adm'r. v. Blanchard*.

4. A mortgage creditor cannot enjoin the seizure of the property by other creditors, much less, if he has consented to the erasure of his mortgage. 28 A. 95, *Smith v. Hoey, liquidator*.

5. The execution cannot be restrained by a third party who holds the property seized under simulated title. 22 A. 168, *Dewey v. Bird, sheriff*.

6. A mere mortgagee cannot enjoin the sale. If it be null it does not affect his rights, if it be valid, his remedy is by third opposition, to claim the proceeds. 26 A. 245, *James v. Breauz, sheriff*.

7. Mortgage creditors cannot enjoin the seizure on the ground that the seizing creditor's mortgage is lost for want of re-inscription. 19 A. 132, *Robinson v. Haynes*.

8. An injunction cannot issue to prevent the sale of property on a prior mortgage, although the same was previously sold on a second mortgage, and the purchaser sought to divide the proceeds *in concurso* between the creditors of the mortgager. 27 A. 60, *Hibernia National Bank v. Smith et als.*

9. Where the seized debtor was to receive a certain portion of the profits arising from the sale of a painting, and the sheriff seized the interest of the debtor and took possession of the painting, the real owner has a right to enjoin the execution and claim the property. 28 A. 673, *Paul Poincy v. Mrs. V. C. Burke*.

10. If the minor's prior mortgage would more than cover the property seized, he has a right to enjoin its sale. 28 A. N. R., *Keene v. Guier*, and *Guier v. Tibbetts*.

11. A surviving wife who obtained from her husband a transfer of one-half

the revenues of his property, and a promise not to alienate or encumber the property, duly recorded, cannot enjoin executory process issued against the succession of her husband, on mortgage notes given by the husband subsequent to the agreement; she must exercise her rights on the proceeds. 26 A. 644, *Hoss v. McWilliams*.

12. An injunction does not lie, because the seizure is excessive. 29 A. 149, *Hefner v. Hesse & Vergez*. See EXECUTION, V. (a), 7), No. 3.

13. It is not necessary that the notice to divide the land seized, in lots, be given at the time of the seizure; it must be done before the sale, and defendant cannot presume that the sheriff will not follow the law and enjoin the sale. 28 A. 848, *Howard v. Walsh*. (*The division of land cannot now be carried into execution, 1877, E. S., p. 87*).

14. Plaintiff who alleges, must prove the want of service of the notice of seizure, by a competent officer. See EVIDENCE, VIII. No. 21.

15. An insufficient description of the property seized, is no ground for an injunction. See EXECUTION, V. (d), 7), No. 3.

16. An injunction against the purchaser is not the proper remedy for a widow to claim her homestead. See HOMESTEAD, I. No. 23.

17. A rule does not suspend execution. See EXECUTION, II. No. 3.

(c) *To restrain or enforce action in matters in päs.*

1. The existence of an incumbrance on property sold, for a less amount than an installment of the price which has become due, justifies only the suspension of the payment to the extent of the incumbrance, to which extent the injunction should be limited. 15 A. 689, *Walker v. Cucullu*.

2. Defendant, who claimed the property as his, cannot afterwards enjoin its seizure, on the ground that he holds as fiduciary. See ESTOPPEL, No. 40.

3. The vendee may enjoin the seizure of his property until the danger of eviction ceases, or security is furnished. See SALE, IV. (b), 3), A. No. 2.

4. The purchaser, at whose risk the property is put up, *à la folle enchère*, has no right to enjoin the second sale. See SALE, VII. (a), No. 1.

III. WHAT COURT MAY ISSUE INJUNCTION.

1. If the plaintiff issued execution to another parish, the district court of that parish has jurisdiction to issue an injunction on a third opposition, and to try the question raised by it, although the plaintiff in execution resides out of the parish where the injunction suit issued. 16 A. 11, *Coleman v. Brown*; 4 N. S. 388; 2 A. 323, 492; 4 A. 84; 5 A. 648; 19 A. 206, *Giffen, Smedes & Co. v. Manning*; 21 A. 199, *Arenstein v. Weber*. See COURTS, II. (g), 1).

2. The execution of a judgment can be enjoined by no other court than that from which the writ issued, even if the defendant in injunction be the clerk of court. 18 A. 339, *Dufossat v. Behrens*; 13 A. 253; 4 N. S. 390; 16 A. 110; 5 A. 644; 4 A. 84; 2 A. 323, 492. See COURTS, II. (f), Nos. 10, 11.

3. The process of a Federal court cannot be enjoined by a State court on the ground that the thing seized does not belong to the seized debtor. 23 A. 450, *Brooks v. Montgomery*.

4. Several seizures being effected by the parish court on some cotton, each for an amount below five hundred dollars, the plaintiff enjoined all, properly before the district court, claiming the ownership of the cotton valued over five hundred dollars. 23 A. 609, *McFarland v. Russ, sheriff*. See Nos. 6, 9.

5. Where plaintiff, in the parish of Orleans, claims to be the owner of a judgment rendered by another court, he may apply to the Eighth District Court to prevent the execution of the same to his prejudice. 26 A. 351, *Robertson v. Emerson*.

WYLY, J., *dissenting*: The only court authorized to enjoin, was the court which rendered the judgment. *Id.*

6. The parish court alone can enjoin an execution issued by it. No consideration must be taken of the value of the property seized. 27 A. 606, *McGinty v. Richmond*. But see COURTS, II. (f), Nos. 10, 11.

7. The district court is without right to enjoin the parish court from entertaining a suit. 28 A. 598, *Bonin v. Monot*.

8. Federal courts will not compel by injunction, State officers to execute State laws. 2 Woods, 13, *McCauley v. Kellogg et als.* See CONSTITUTION, II. (e), 2), Nos. 2, 3 and 4.

9. The district courts may enjoin the executions of the parish courts in certain cases. See COURTS, II. (cc), No. 3.

10. The tax payer who pays less than five hundred dollars of taxes, cannot enjoin the police jury before the district court, as to bonds, etc., see COURTS, II. (g), 1), No. 12.

11. Granting an injunction against the judgment of the Supreme Court, when not a contempt, see COURTS, III. No. 2.

12. A parish court may enjoin an administrator, who has not properly qualified, from exercising the duties of his office, and amongst other things, from issuing execution on a judgment rendered by the district court. 30 A. 507, *Brown v. Brown.*

MARR, J., *dissenting*: The parish court cannot enjoin the execution of a judgment rendered by the district court. *Ib.*

IV. OF THE AFFIDAVIT.

1. The non-appearance of the judge's signature to the *jurat* will not vitiate the injunction, if it appeared by the order, signed the same day, that the affidavit was really made and considered. 12 R. 130; 23 A. 171, *Lewis et al. v. Daniels, sheriff.*

2. If the affiant did not appear before the clerk to take the oath, although the same appears to be regular, the injunction will be dissolved, with damages. 23 A. 203, *Barron v. Richardson.*

3. Plaintiff who enjoins a seizure of his property, is not bound to give the nature of his title. 26 A. 707, *Lewis v. Winston, Morrison & Co.* See PETITORY AND POSSESSORY ACTIONS, I. No. 10.

4. An affidavit that the facts and allegations are true is sufficient; "all" the facts, etc., is unnecessary. 26 A. 707, *Lewis v. Winston, Morrison & Co.*

5. Annexing documents and swearing to petition, see PLEADING, V. (a), 4).

V. OF THE BOND AND SURETY.

1. Injunctions, attachments, etc., are matters of strict law, but it does not follow that because a party has given an informal bond, that the same by proper averments and proof may not still be enforced by an action. 15 A. 465, *Vicksburg Railroad v. Barksdale.*

2. The injunction bond, which is made payable to the sheriff, is only the evidence of a contract, which would exist were the bond lost, and the court will look at the petition for injunction and the order granting it, to find out what obligation the plaintiff in injunction and his surety assumed. *Ib.*

3. An injunction bond improperly made payable to the sheriff, his heirs and assigns, instead of to the defendant in the suit, is nevertheless sufficient to sustain an action in behalf of the real parties in interest. *Ib.*

4. The attorney at law cannot sign an injunction bond for the plaintiff, who is present. 12 A. 448; 19 A. 3, *Bank of Louisiana v. Wilson.*

5. The principal and surety on the bond given for an injunction to prevent the sale of property seized and afterwards illegally released by the sheriff, are not liable for damages occasioned by the release, nor can the sheriff when sued, call them in warranty. 26 A. 359, *Cohen & Wilson v. Avery.*

6. The judgment ordered the injunction to be dissolved, with ten per cent. damages, etc., but did not condemn the surety, and cannot be executed against him. 28 A. —, *Charles L. Frantz v. Waggaman et als.*

7. The plaintiff, transferee of a judgment enjoined, can recover damages on the injunction bond, subscribed in favor of his transferer. 26 A. 283, *Pottier v. Grant.*

8. Where an injunction to prevent an officer from collecting the fees of office, pending a suit under the intrusion act, is set aside by bonding, the surety will be responsible for all the fees collected, according to the fee bill. 30 A. 770, *George v. Taylor.*

VI. OF THE EXECUTION AND EFFECT OF THE WRIT.

1. The sheriff, enjoined from selling one undivided half of a plantation, may proceed to sell the portion not enjoined, and half of the appraisement of the whole, is valid for the half sold. 23 A. 287, *Losee v. De Lacy, sheriff et als.*
2. The writ of injunction may have issued improperly, but this cannot defeat the action of nullity and third opposition coupled therewith. 25 A. 532, *Miguez v. Delahoussaye.*
3. An injunction does not release the seizure. See EXECUTORY PROCESS, I. No. 14.

VII. OF THE DISSOLUTION OF THE WRIT; THE PLEADINGS, EVIDENCE AND TRIAL.

1. When the acts complained of amount to a trespass and a change of possession of immovable property, the writ cannot be dissolved on bond. 22 A. 512; 24 A. 154, *Boedicker v. East et als.*
2. An injunction to prevent defendant from cultivating plaintiff's land, cannot be dissolved on bond. 24 A. 154, *Boedicker v. East et als.*
3. An injunction issued on the allegation that the act complained of would cause plaintiff an irreparable injury, cannot be dissolved on bond. 26 A. 603, *Simon v. Sheriff.*
4. If the injunction be bonded, contrary to law, the appellate court can simply annul the order setting aside the injunction. 26 A. 604, *Simon v. Walker.*
5. An injunction based on the allegation that the property seized belongs to third opponent, cannot be dissolved on bond. 29 A. 297, *Union Insurance Company v. Benit.*
6. The plaintiff must be limited to the grounds contained in the petition; no other proof can be admitted on trial of the writ, and where no ground appears on the face of the papers, rendering an injunction necessary, it will be dissolved. 22 A. 89, *Stockett v. Johnson.*
7. Where the cause for the injunction is good, the judge may permit additional security to be given, as another writ could have been immediately granted. 22 A. 207, *Woolfolk v. Woolfolk.* See No. 13.
8. On the trial of a rule to dissolve an injunction, on the ground that it was improvidently and illegally issued, the allegations of the petition are to be taken as true for the purposes of the rule. 16 A. 7, *Ferrieu v. Schreiber, et. als.*
9. A motion to dissolve an injunction on the face of the papers, may be made after issue joined. 21 A. 165, *Butman v. Forshay.*
10. Defendant in injunction has the right to call by rule on the plaintiff to prove in a summary manner the truth of the allegations. Such a rule is not an answer. 26 A. 651, *Richardson v. Dinkgrave.* See No. 22.
11. On a motion to dissolve an injunction, allegations putting at issue the truth of the averments of plaintiff's petition, should be referred to the merits. 21 A. 468, *Williams v. Douglass.*
12. An injunction cannot be set aside without notice to plaintiff; service of a rule to dissolve, at the office of plaintiff in his absence, is bad. 29 A. 362, *Marin v. Thierry.*
13. Plaintiff in injunction opens and closes the argument. 26 A. 651, *Richardson v. Dinkgrave.*
14. It is well settled that an injunction will not be dissolved, if it appears from the record that there exists good cause for an injunction. 22 A. 464; 23 A. 171; 18 A. 111; 21 A. 324; 25 A. 222, *Dupré v. Swafford.* See No. 7.
15. A supplemental petition in an injunction suit should only be allowed for the promotion of justice, and when allowed, an affidavit of the truth of the allegations of the petition, and of the causes that make the amendment necessary, should always be required. 15 A. 40, *Maillot v. Martin.*
16. The vendees of a tract of land enjoined an order of seizure and sale sued out to enforce the payment of notes due by their vendor to his vendor, and secured by mortgage on the property; the petition for injunction stated

that the vendors of the plaintiff became parties to the suit, and adopted the allegation of the petition; *Held*: That plaintiff's vendors could not be considered parties to the suit, as they had neither taken the oath nor given the bond required by law to obtain an injunction. 15 A. 713, *Chambliss v. Miller*.

17. An amended petition setting forth the plea of prescription may be filed after the granting of the injunction. 26 A. 230, *Hawley v. Crescent City Bank*.

18. Where the defendant in a rule to dissolve an injunction fails to offer evidence in support of his objections, the judgment of the lower court will be affirmed. 17 A. 168, *Wheeler v. Stewart*.

19. Defendants in injunction should offer in evidence the judgment enjoined, so as to fix the damages and interest. 19 A. 40, *Bronson v. Balch, Warden et als.*

20. Where the plaintiff in injunction failed to offer in evidence the writ and return, and it is made probable by the record that the seizure was made as alleged, and plaintiff would immediately be entitled to a new injunction, the case will be remanded for further proceedings. 21 A. 324, *Citizens' Bank v. Crooks & Maristany*.

11. Where plaintiff's title to the note is denied, and not shown otherwise than by the admission of the attorneys of the real owners, amongst whom are minors and married women, not authorized to appear in court, an injunction against the executory process will be made perpetual. 19 A. 108, *Burton v. Kron*.

22. A rule to dissolve an injunction, is not an answer to the merits, no judgment on the merits should be rendered, because the rule has been dismissed. 28 A. 726, *State v. E. Booth*. See Nos. 10, 11.

23. The injunction being dissolved, the sheriff must proceed, etc. See EXECUTION, V. (f), No. 1.

24. An injunction against executory process should be tried without a jury, except as provided by art. 494, C. P. See JURY, I. No. 2.

25. The judge cannot be compelled to dissolve the injunction on bond. See MANDAMUS, I. (a), 2), No. 9.

26. The city of New Orleans need not give bond to have an injunction dissolved in cases where bond is ordinarily required. 20 A. 300, *Wells v. City*; 30 A., — *Jefferson City & Lake Railroad v. City*.

27. The words "without prejudice" in the judgment, does not authorize a subsequent injunction on the same grounds. See JUDGMENT, III. No. 13.

VIII. OF THE DAMAGES, COSTS AND INTEREST.

(a) *In general.*

1. Where the injunction is dissolved by rule, on the ground of insufficient security, the defendant is not precluded thereby from claiming, on the trial of the merits, a judgment for damages against the principal and surety on the bond. 15 A. 52, *Betts v. Mougin*.

2. The act of 1855, authorizing the court to allow damages on the dissolution of an injunction, applies only where the sheriff is restrained from seizing specific property. *Ib.*

3. Where the plaintiff in injunction partially succeeds, and the equitable remedy of injunction has not been palpably abused, damages will not be allowed under the statute. 15 A. 81, *Raiford v. Thorn*.

4. Where the plaintiff partially succeeds in an injunction suit, he is entitled to recover the costs of suit. 15 A. 175, *Stillman v. Bryant*. See *infra*, No. 14.

5. Defendant who voluntarily complies with the injunction, waives his claim for damages. 18 A. 578, *Shreveport v. LeRosen*.

6. It is the duty of the court to mulct in exemplary damages those who wantonly abuse the equitable remedy of injunction. 11 L. 486, 2 A. 360, 5 A. 155; 23 A. 436, *Pendleton v. Eaton & Barstow*.

7. Where the evidence shows that the plaintiff in injunction had no ground for an injunction, he and his sureties will be condemned, *in solido*, to pay damages. 24 A. 182, *Stewart v. Robinson*.

8. Damages cannot be awarded where a money judgment has not been enjoined. 22 A. 286, *D'Meza v. Générés*; 9 A. 303, see No. 17.

9. The injunction having been refused on the trial of a rule nisi, defendant is not entitled to damages. 28 A. 136, *Beer v. Dirmeyer*.

10. The injunction should be perpetuated for the amount paid on the debt, but dissolved with damages for the amount due. 27 A. 173, *Michel v. Meyer*; 4 A. 150; 3 A. 125.

11. Succession creditors who join the defense of the administrator to have an injunction against the sale of the succession property dissolved, cannot obtain damages in their favor even if the writ was wrongfully issued, this would increase their debt; but the succession is entitled to the damages. 25 A. 194, *Jefferson Wells v. J. M. Wells*.

12. The law imposing one hundred per cent. damages for wrongfully enjoining a tax, does not apply to an injunction against a judgment assessing a tax on the parish. 28 A. 261, *Wilson, executor v. Anderson*; Act No. 47 of 1873: repealed by act No. 96, 1877. See (b) Nos. 5, 6.

13. An injunction should be dissolved with damages, when it has been sued out to enjoin the execution of an entire judgment, on the ground that the defendant is indebted to the plaintiff in a sum bearing an insignificant proportion to the amount of judgment. 15 A. 70, *Barrow v. Robichaux*.

14. Damages should not be allowed, if the injunction be sustained in part. 19 A. 78, *Pointer v. Roth*. See *supra*, No. 4.

15. Where a party obtained an injunction to arrest the execution of an order of seizure and sale, without giving bond and security, as required by Article 739 and 740 of the Code of Practice; Held: That, the injunction being dissolved, the party against whom it was wrongfully obtained is entitled to recover from the party obtaining it, five per cent. damages on the amount of the judgment enjoined. 15 A. 328, *Wilkowski v. Selby*.

16. Damages cannot be allowed on the dissolution of an injunction issued without bond under article 739 C. P.; 19 A. 182, *Ricard v. Harrison*; 15 L. 101; 4 A. 240.

17. Damages can only be allowed in the decree dissolving an injunction, when a money judgment has been enjoined. 29 A. 630, *Sheen v. Stothart*; 30 A. 742, *Crescent City Live Stock Landing and Slaughter House Company v. Larrieux et als*.

18. Where the injunction did not stay the execution of a moneyed judgment, the remedy for damages is by a suit on the injunction bond. 28 A. 859. *Willis v. Elam*.

19. The surety should be condemned with the principal. See JUDGMENT, XII. No. 2.

20. A judgment which makes no mention of the injunction does not debar a suit in damages on the bond. See JUDGMENT, XV. (a), 3). No. 3.

21. For dissolution of the writ in tax cases, see TAXES, II. (c).

22. The sureties cannot be condemned in damages in the injunction suit, where the judgment enjoined was one ordering the sale of succession property to pay debts. 30 A. 580, *Scott & Williams v. Sheriff*.

(b) *Measure of damages; interest; and fees of counsel.*

1. On the dissolution of an injunction restraining an execution on a twelve months bond, bearing eight per cent. interest, damages can only be awarded at the rate of twelve per cent. 15 A. 183, *Campbell v. Oliver*.

2. Five per cent. interest as damages cannot be allowed where the judgment bears eight per cent. 19 A. 368, *Lallande v. Ingram*.

3. If the remedy of the injunction be abused, and the administration of justice trifled with, the highest damages allowed by law will be awarded. 23 A. 800, *Walker v. Villavaso*.

4. No attorney's fees should be allowed to the plaintiff in injunction when the injunction is maintained. 28 A. — *Jules Chappuis v. R. L. Preston*; 20 A. 573, *Bank of New Orleans v. Toledano & Taylor*; 14 A. 701.

5. The one hundred per cent. damages on taxes enjoined, applies to cases

where the assessed tax payer enjoins, and not a third person, although he may be the owner. 26 A. 698, *Gerey v. Gruber*. See act No. 47, of 1873; repealed by act No. 96, 1877. See (a), No. 12.

6. Where the land was forfeited to the State, no damage should be decreed against the former owner who enjoins the sale of the tax collector. 27 A. 338, *Garner v. Anderson*; 26 A. 702, *Marrion v. Larkin*.

7. Plaintiff who enjoins a wrongful seizure, may recover, as damages, his attorney's fees. 29 A. 571, *White v. Givens*.

8. Plaintiff must show that his judgment became worthless by reason of the injunction and release of his seizure, to recover against the surety on the release bond. See EXECUTION, V. (a), 7), No. 2.

INN.

1. Keepers of hotels are responsible for the larceny of monies and other effects contained in the traveller's trunk, when no notice is posted in accordance with the act of 1860. 18 A. 156, *Woodworth v. Morse & Moore*.

2. Inn keepers are required to provide knotted ropes in each room. 1877, E. S., p. 179.

INSANE ASYLUM.

R. S., section 1761; 1874, p. 89; 1875, p. 109; appropriation, 1876, p. 16; 1877, No. 3.

INSANITY:

1. See DONATIONS, I. (b); INTERDICTION; OBLIGATIONS, III. (a), No. 12.

INSPECTION.

Of hay. See CONSTITUTION, II. (c), 1), No. 2.

INSOLVENCY.

I. IN GENERAL; AND THE DISTINCTION BETWEEN THE FORCED AND VOLUNTARY SURRENDER.

II. OF THE APPLICATION FOR A SURRENDER; DISCHARGE FROM CUSTODY; OPPOSITION AND CHARGE OF FRAUD.

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| <p>(a) <i>Application for a surrender; by whom, and how, to be made; and when ordered.</i></p> <p>(b) <i>Discharge from custody.</i></p> | <p>(c) <i>Opposition and charge of fraud; its constituents and penalty; and further proceedings against the fraudulent or absconding debtors.</i></p> |
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III. OF THE MEETING OF CREDITORS; PRELIMINARY PROOF OF CLAIMS; APPOINTMENT OF DEFINITIVE SYNDICS; AND THE OPPOSITION.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>The meeting; mode of proceeding; and right to vote.</i></p> | <p>(c) <i>Syndic's appointment, qualifications and security; return and homologation of the proceedings; and the opposition.</i></p> |
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IV. OF THE PROPERTY THAT PASSES BY THE CESSION AND CREDITORS' RIGHTS THERETO; STAY OF PROCEEDINGS AND EFFECT THEREOF.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>When, and how far, the creditors are arrested in their individual action.</i></p> | <p>(c) <i>What passes to the creditors; debtors' interest; and his acts in violation or fraud of the surrender.</i></p> |
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V. OF THE BOOKS AND ACCOUNTS TO BE SURRENDERED.

VI. OF THE SCHEDULE AND ITS OMISSIONS.

IX. OF COMMISSIONERS AND PROVISIONAL SYNDICS.

X. OF THE GENERAL POWERS AND LIABILITIES OF DEFINITIVE SYNDICS;
THEIR REMOVAL; AND TERMINATION OF THEIR TRUST.

- (a) *In general.* (b) *Deposit of funds in bank; termination of trust; and removal.*

XI. OF THE SALE OF ASSETS.

- (a) *In general.* (c) *Rights and obligations of the purchaser; warranty and rescission of the sale.*
(b) *Formalities, terms, and order of sale.*

XII. OF THE TABLEAU OF DISTRIBUTION AND CONTEST BETWEEN CREDITORS; DEBTS AND CHARGES; THEIR FINAL PROOF AND PAYMENT.

- (a) *In general.* (d) *Syndics' commission; attorneys' fees, and other charges; and payment without order of court.*
(b) *Notice; opposition; and final proof of claims.*
(c) *Interest on claims and their maturity.*

XIII. OF THE DISCHARGE FROM DEBT AND SUBSEQUENT LIABILITY; EFFECT AND CONSTITUTIONALITY OF THE INSOLVENT LAWS.

- (a) *In general.* (c) *Effect of the discharge and insolvent laws; and their constitutionality.*
(b) *Proceedings after the cession; subsequent liability and promise to pay.*

I. IN GENERAL; AND OF THE DISTINCTION BETWEEN THE FORCED AND VOLUNTARY SURRENDER.

1. A corporation created under the act for the organization of corporations for works of public improvement and utility, approved March 14, 1855, cannot avail itself of the provisions of the act relative to the voluntary surrender of property, approved March 15, 1855. 15 A. 19, *Jeffries v. Belleville Iron Works Company*; 18 A. 685, *same v. same*. See CORPORATIONS, VIII. (a), No. 1.

2. Under our jurisprudence, a surrender made out of the State, of property situated here, cannot have any binding effect. 15 A. 110, *Brent v. Shouse*.

3. In an action for a forced surrender by judgment creditors, other creditors of the insolvent may object to the irregularity of the proceedings. 16 A. 150, *Letchford v. Daunequin*; 10 M. 667; 14 A. 424.

4. To justify an order for a forced surrender, the sheriff must return the execution indorsed, *specifically*, "No property found after due demand." It is his duty to seize either partnership effects, or property belonging to the individual partners, if he knows of any such. 16 A. 150, *Letchford v. Daunequin*; 17 L. 416; 13 A. 264.

5. A protest does not establish insolvency, nor revoke a power of attorney. Failure is defined in C. C. 3556, section 15. 19 A. 198, *Lea v. Bringier*; 12 L. 260.

6. An application for a new surrender by the insolvent, could not have been made under our laws, after the passage of the bankrupt laws of the United States congress. 21 A. 446, *Fisk v. Montgomery*; 19 A. 497, *Makins v. Their Creditors*.

7. A *cessio bonorum*, under our insolvent laws, can be of no effect as long as the United States bankrupt act is in existence. 29 A. 635, *Stevens v. Helpman*.

8. Insolvent laws are remedial. See CONSTITUTION, II. (c), 3), c. No. 1.

9. "The act to provide for the liquidation of banks," approved March 14, 1842, was suspended by the bankrupt act. See CORPORATIONS, VIII. (a), Nos. 4, 5.

10. Conversations of an insolvent are not legal evidence to prove a claim. See EVIDENCE, XII. (a), No. 1.

11. Insolvency, in a revocatory action, cannot be shown, unless alleged. See OBLIGATIONS, VII. (b), 2), c. § 2.

12. The respite being refused, the creditors may accept the cession. See RESPITE, No. 1.

13. The return *nulla bona* of a *fi. fa.* is evidence of defendant's insolvency. 30 A. 511, *Lovell v. Payne*.

II. OF THE APPLICATION FOR A SURRENDER; DISCHARGE FROM CUSTODY; OPPOSITION AND CHARGE OF FRAUD.

(a) *Application for a surrender; by whom, and how, to be made; and when ordered.*

1. The order accepting the surrender being set aside, the assets may be seized. See EXECUTION, V. (a), 3), c. § 2, No. 1.

2. A direct action is necessary to set aside the order accepting the surrender. See PLEADING, I. (c), 6, No. 1.

(b) *Discharge from custody.*

Imprisonment for debt is abolished; but see § 27, of act 1855, p. 256.

(c) *Opposition and charge of fraud; its constituents and penalty; and further proceedings against the fraudulent or absconding debtors.*

1. To deprive a debtor of the benefit of the insolvent laws, on account of alleged fraud, the specific acts alleged, must be clearly established. 18 A. 698, *Turpin v. Maury*.

2. An insolvent, guilty of fraud, will be deprived of the insolvent laws, and sentenced to imprisonment under section 27, of act 1855, p. 256. 20 A. 21, *Longis v. His Creditors*.

3. Charges of fraud, in an opposition to the application of an insolvent for his discharge, should be definite and specific. 20 A. 364, *Burdon v. His Creditors*.

4. For contracts giving a preference to certain creditors, see OBLIGATIONS, VIII. (b), 2), B. § 4.

III. OF THE MEETING OF CREDITORS; PRELIMINARY PROOF OF CLAIMS; APPOINTMENT OF DEFINITIVE SYNDICS; AND THE OPPOSITION.

(a) *In general.*

Any agreement of the debtor to buy the vote of a creditor by giving security for the payment of his debt, must be considered as fraudulent, and the creditor whose vote is thus bought cannot recover the amount of his debt against the surety. 18 A. 241, *Weaver v. Waterman*; 5 R. 105; 14 A. 30.

(b) *The meeting; mode of proceeding; and right to vote.*

1. In the choice of a syndic, act 1855, p. 434, section 13, requires only that the creditors should be placed on the schedule, and their respective claims certified on oath either in person or by proxy to entitle them to vote for a syndic. It is not sufficient to oppose the vote before the notary, but in all cases the complainant must destroy by proper evidence the presumption of indebtedness arising from the sworn declaration. 16 A. 82, *Mercadal v. His Creditors*.

2. The oath of the creditor is *prima facie* proof, as required by law, to entitle such creditors to vote in the election of a syndic. 19 A. 49, *Blake v. Hall*.

3. The dative tutor of minors whose property has been adjudicated to their father, who died insolvent, may vote in the meeting of creditors. 21 A. 689, *Deblanc v. Gary*.

(c) *Syndic's appointment, qualifications, and security; return and homologation of the proceedings; and the opposition.*

See R. S. Insolvency.

IV. OF THE PROPERTY THAT PASSES BY THE CESSION AND CREDITORS' RIGHTS THERETO; STAY OF PROCEEDINGS AND EFFECT THEREOF.

(a) In general.

1. When a debtor becomes insolvent, the rights of the creditors are fixed at the moment of the surrender, none can do any act impairing the rights of the others. 20 A. 359, *Ventress v. His Creditors*.

2. A creditor cannot enjoin the purchaser from taking possession of property sold by the syndic. See INJUNCTION, II. (b), 1), No. 2.

(b) When, and how far, the creditors are arrested in their individual action.

1. A surrender of property, made by a debtor in another State, does not make his debts due and exigible here, so as to relieve the creditor, who seeks to attack the property in this State, from the necessity of swearing that he is about to remove such property out of the State before the falling due of his claim, as required by article 242, C. P. 15 A. 110, *Brent v. Shouse*.

2. A debtor can arrest the executory process of his creditor, whose act of mortgage contains the non alienation clause, by surrendering his property to his creditors, when the executory proceedings must be cumulated with the proceedings in insolvency. The case is different, as to mortuary proceedings. 18 A. 673, *Wheeler v. Stewart*.

3. Creditors become parties to an amicable assignment, and bound by it, without signing the instrument, by knowingly accepting the dividend declared thereunder. 27 A. 631, *Wallace & Co. v. Cumming & Morrison*; 7 H. 276.

4. For contracts making a partial distribution among creditors, see OBLIGATIONS, VII. (b), 2), B., § 5.

(c) What passes to the creditors; debtor's interest; and his acts in violation or fraud of the surrender.

See III. (a), No. 1; SALE, V. (b), Nos. 1, 2.

V. OF THE THE BOOKS AND ACCOUNTS TO BE SURRENDERED

1. Entries on the books of an insolvent, when they are shown by witnesses to have been made in good faith, and at the time they purport to have been made, and most of them for matters, within the knowledge of the witnesses, are admissible, and sufficient to correct an error, made by the syndic in his tableau of distribution. 15 A. 87, *Hernandez v. His Creditors*.

VI. OF THE SCHEDULE AND ITS OMISSIONS.

1. An insolvent cannot recover from the syndic, tools of his trade, which he, of his own accord, permitted to be included in his schedule. 15 A. 167, *Bier v. His Creditors*.

2. When the insolvent failed to swear that his schedule contains a correct and faithful statement of his assets and liabilities, a discharge by a majority of the creditors in number and amount will not bind the others. 20 A. 364, *Burdon v. His Creditors*.

IX. OF COMMISSIONERS AND PROVISIONAL SYNDICS.

1. Where the judge, by virtue of the acts of 1855, authorized the sheriff to perform the duties of syndic of the creditors of the insolvents, the order must have effect until reversed, and meanwhile no other person can be appointed. 20 A. 181, *Tournillon v. His Creditors*.

2. Provisional syndics are entitled to one per cent. on the appraised value of the goods and effects confided to them as such. 16 A. 292, *Spiller & Allen v. Their Creditors*. See XII. (d).

X. OF THE GENERAL POWERS AND LIABILITIES OF DEFINITIVE SYNDICS; THEIR REMOVAL; AND TERMINATION OF THEIR TRUST.

(a) In general.

1. Where the creditors of an insolvent have been enriched by an unauthor-

ized act of the syndic, his successor in office may be compelled to refund the amount. 16 A. 45, *Back v. Miller*.

(b) *Deposit of funds in bank; termination of trust; and removal.*

See SUCCESSION, VIII. (d).

XI. OF THE SALE OF ASSETS.

(a) *In general.*

1. As a general rule, the powers of syndics of creditors are only those of administration; but under the authorization of the courts, he may make sales of property, and, by their aid, may recover damages for property destroyed or abstracted from the mass, when, otherwise, there would be a failure of justice. 15 A. 293, *Nouvet v. Bollinger*.

2. Although the property surrendered is vested in the creditors, the majority have no right to deprive the minority of the right of having their claims paid within a reasonable delay, as by ordering the plantation to be cultivated for the benefit of all the creditors. 18 A. 292, *Laforest v. His Creditors*.

(b) *Formalities, terms and order of sale.*

1. The creditors have a right to fix the terms of sale of the assets surrendered by an insolvent. 18 A. 292, *Laforest v. His Creditors*.

(c) *Rights and obligations of the purchaser; warranty and rescission of the sale.*

1. One who has made a cession of his property to his creditors cannot complain of fraud in the sale thereof; the creditors alone can complain. 23 A. 338, *Steib v. Kaiser*.

2. The purchaser must pay the price; a compromise cannot be made by the syndic. See SALE, I, (d), No. 1. SUCCESSION, VIII. (e).

XII. OF THE TABLEAU OF DISTRIBUTION AND CONTEST BETWEEN CREDITORS; DEBTS AND CHARGES; THEIR FINAL PROOF AND PAYMENT.

(a) *In general.*

1. Where the claim of a creditor making opposition to a tableau of distribution has been dismissed by a judgment of non-suit, he may, when another tableau is filed, prove his claim, and demand to be paid, out of the funds to be then distributed, such an amount as will place him on a par with the other ordinary creditors who had partaken in the former distribution. 15 A. 130, *Allinet v. His Creditors*.

2. Where a party obtains judgment against his debtor, previous to his surrender, and has the same recorded after his debtor has obtained a stay of proceedings, such registry of the judgment does not give him a mortgage. His rights, in that respect, are fixed by the surrender, although his judgment has not been carried on the bilan. 15 A. 397, *Freeman v. His Creditors*.

3. Where such a creditor has not been a party to the proceedings by which property seized and sold was subjected to the payment of the claims of other creditors, he cannot claim to be paid by preference out of the funds or proceeds so realized. 15 A. 397, *Freeman v. His Creditors*.

4. The syndic of an insolvent estate, in filing an account of his administration, must make an accurate statement of the active mass of the estate, and also of the passive mass; mention must be made of the privileges and mortgages as well as the ordinary debts. 15 A. 705, *Shropshire v. His Creditors*.

5. Where there is no agreement that the father is to pay wages to his son, a promise to pay such, after the father's insolvency, can only be considered as a donation which cannot prejudice the creditors. 16 A. 289, *Ouliber v. His Creditors*.

6. In cases of insolvency, all ordinary debts, whether due or not, must be paid *pro rata*. 17 A. 323, *Bank of Tennessee v. Bullitt, Miller & Co.*

7. The legislature has no right to make a distribution of assets. See CONSTITUTION, II. (c), 6, No. 1.

8. For entries in the books of the insolvent, see V. No. 1, EVIDENCE, X. (c), No. 1.

(b) *Notice; opposition; and final proof of claims.*

1. Opposing creditors, who succeed in having certain items rejected from the syndic's tableau, have no privilege thereon, and are not entitled to receive the same solely. The amount must be distributed between all the creditors. 16 A. 12, *McIntosh v. Planters' Insurance Company*.

2. In a contest between the creditors of an insolvent, the notes or obligations of the insolvent are not conclusive proof of the debts evidenced thereby. They must be supported by such additional evidence as will satisfy the judge of their fairness. 16 A. 178, *Johnson v. His Creditors*.

3. A tableau of insolvency, not opposed, is *absolute*, and no creditor can make opposition thereafter, or avail himself of oppositions filed by others before homologation. 20 A. 359, *Ventress v. His Creditors*.

4. The entries in the books of the insolvent are sufficient proof of claims in certain cases. See EVIDENCE, X. (c), No. 1. INSOLVENCY, V. No. 1.

(c) *Interest on claims and their maturity.*

See INTEREST, No. 21.

(d) *Syndic's commission; attorney's fees and other charges; and payment without order of court.*

1. The fees paid by the syndic of an insolvent estate to counsel, for the prosecution or defense of suits for the estate, are entitled to be classed as law charges. But it is the duty of the syndic not to burthen the estate with onerous charges, for the remuneration of such services, for they are paid on the hypothesis that they inure to the benefit of the estate. 15 A. 705, *Shropshire v. His Creditors*.

2. The syndic of an insolvency is only entitled to five per cent. commission on the net amount of money received. 19 A. 87, *Gaillard v. His Creditors*.

3. A syndic may be entitled to an allowance for the hire of a bookkeeper, when they allege and prove that extraordinary skill as an accountant was required to unravel complicated accounts. 16 A. 292, *Spiller & Allen v. Their Creditors*.

4. Provisional syndics are entitled to one per cent. commission. See IX. No. 2.

XIII. OF THE DISCHARGE FROM DEBT AND SUBSEQUENT LIABILITY; EFFECT AND CONSTITUTIONALITY OF THE INSOLVENT LAWS.

(a) *In General.*

1. Commission merchants holding the proceeds of their consignment, cannot be discharged of this debt created in a fiduciary capacity by proceedings in insolvency. 25 A. 187, *Tate v. Laforest & Demare*. See BANKRUPTCY, IV.

2. When the schedule is not sworn to the discharge of the insolvent is not binding on creditors who do not consent thereto. See VI. No. 2.

(b) *Proceedings after the action; subsequent liability and promise to pay.*

See BILLS AND NOTES, XI.

(c) *Effect of the discharge and insolvent laws; and their constitutionality.*

1. There is no law by which a creditor, in consequence of his debtor's failure and proceedings in insolvency, is remitted to the ordinary remedy (petition and citation) on the balance of a claim embraced in the insolvent proceedings. 22 A. 577, *Akin v. Giraud*.

INSPECTOR.

1. For inspection of hay, see CONSTITUTION, II. (c), No. 2; HAY.
2. For inspection of coal oil, see COAL OIL.
3. For inspection of flour, see FLOUR.

INSURANCE.

I. OF FIRE INSURANCE.

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|---|---|
| (a) <i>In general.</i> | (e) <i>Risks covered by the policy, and evidence of the cause of loss.</i> |
| (b) <i>Insurable interest and their valuation; double insurance and re-insurance.</i> | (f) <i>Interest insured; property covered and extent of indemnity.</i> |
| (c) <i>Termination of the interest and assignment of the policy.</i> | (g) <i>Proceedings and proof in adjustment of the loss and payment thereof.</i> |
| (d) <i>Representation and warranty.</i> | |

II. OF LIFE INSURANCE.

III. OF MARINE INSURANCE.

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|---|---|
| (a) <i>In general.</i> | (e) <i>Representation.</i> |
| (b) <i>Nature and validity of the contract; premium; policy; its construction and assignment; the parties and property it covers.</i> | (f) <i>Usual perils within the policy.</i> |
| (c) <i>Insurable interests; valuation and proof thereof.</i> | (g) <i>Risks excluded by the usual memorandum.</i> |
| (d) <i>Warranty and evidence relative thereto.</i> | (h) <i>When the policy attaches and terminates.</i> |
| 1) <i>In general.</i> | (j) <i>Abandonment.</i> |
| 2) <i>Seaworthiness.</i> | (k) <i>Adjustment of the loss.</i> |

I. FIRE INSURANCE.

(a) *In general.*

1. Where the policy compels the assured to labor for the protection of the goods and they are injured or stolen in the attempt to avoid the fire, the insurer is responsible. 16 A. 427, *O. Talamon & Co. v. Home etc., Insurance Co.*; 15 A. 217.

2. The insured having requested a friend to renew her policy, and having refused to pay the premium, the company is still liable, although they sent the bill to the party who ordered the renewal, and he advised the cancellation of the policy, which was done. 27 A. 113, *Latoix v. Germania Insurance Co.*

3. Where the policy contains a clause that no insurance, original or continued, shall be considered as binding until the actual payment of the premium, parol proof may be offered to show that it was the general usage of the company, not to require payment at the time of delivery of the policy, that the proposition to insure was accepted and a policy made out in duplicate. 19 A. 233, *Pino v. Merchants' Mutual Insurance Co.*

4. The insurance companies of New Orleans having offered a reward for the conviction of any person guilty of the crime of arson, and having published the same, are bound thereby. 22 A. 339, *Salvadore v. Crescent Mutual Ins. Co.*

5. An insurance company will not be liable, because the fire warden advised the removal of property from a burning building, and it was stolen during the transit. 17 A. 131, *Fernandez v. Merchants' Mutual Insurance Co.*

6. A failure to pay the premium, does not forfeit the policy. 24 A. 349, *Société de Bienfaisance v. Morris & Co., agents.*

7. Under the clause, the policy of insurance that all claims are barred, unless prosecuted within one year from the date of the loss, prescription commences to run from the date of the fire. 26 A. 298, *Carraway v. Merchants' Mutual Insurance Co.*

8. The express condition that the insured shall have notice of other insur-

ance taken on the property, acknowledged by the insurers in writing, should be complied with, to be able to recover. 27 A. 63, *Meyers & Winehill v. Germania Insurance Co.* See (b), Nos. 2, 3.

9. MORGAN, J., *dissenting*: Presentation to the company of the other policy was a compliance with the clause. *Ib.*

10. For liability of consignees who fail to insure, as directed, see MANDATE, V. (b), 6), No. 1.

(b) *Insurable interest and their valuation; double insurance and re-insurance.*

1. The value of the property at the time and place of the inception of the risk of insurance, is to be taken. 20 A. 583, *Wolf & Pretto v. National Marine and Fire Insurance Company*; 1 R. 442; 1 M. 128.

2. Under a clause that the policy is vitiated, if the insured shall cause other insurance to be effected, without an acknowledgment in writing by the insurer; insurance effected by third persons, in which the original insured has no interest, will not vitiate his policy. 27 A. 410, *Roos & Co. v. Merchants' Mutual Insurance Company*. See (a), No. 8.

3. The insured must comply with the conditions of his policy, and if, contrary to its stipulations, he does not notify the company of the insurance effected in another company, upon the same property, the company will not be held liable. 23 A. 332, *Duclos & Co. v. Citizens' Mutual Insurance Company*. See (a), No. 8.

4. In a contract of re-insurance by the insurance company, the policy holder has no right to sue the re-insuring companies; no privity of contract exists, nor has the contract been made for the benefit of *autrui*. 27 A. 368, *Egan v. Firemens' Insurance Company et als.*

5. Advances made in a foreign port to equip a vessel, and to procure for her a cargo to a port of destination, are *prima facie* presumed to be made on the credit of the vessel. 20 Wall. 159, *Insurance Company v. Baring*.

6. They are a lien on the vessel and constitute an insurable interest. *Ib.*

7. No proof of plaintiff's interest in the property insured need be made under a general denial. See PLEADING, V. (b), 5), B. No. 11.

8. The sheriff cannot insure and charge the premium as costs. See SHERIFF, III. No. I.

(c) *Termination of interest and assignment of policy.*

1. The clause, that the policy is not assignable without the consent of the insurers, does not vitiate the policy, in the case of a transfer by one partner to the other. 26 A. 69, *Dermati v. Home Mutual Insurance Company*.

2. Parol is admissible to show that one-half of the insurance effected on certain buildings, is in part for the benefit of the lessee. See EVIDENCE, XIV, (c), No. 1.

(d) *Representation and warranty.*

1. The assent of the insured to all the provisions of the policy is presumed, if he makes no objection, one month after delivery of the written policy to him. 23 A. 219, *Reeves, Case & Co. v. Phoenix Insurance Company*.

2. The insured having stored in the premises loose and unbaled hay, contrary to the insurance contract, increased the danger and risk of fire on his premises, and thereby vitiated the policy. 23 A. 459, *Dittmer & Pell v. Germania Insurance Company*.

3. If hay pressed in bales be accepted as hazardous, for the reason that it is easy to ignite, *a fortiori* in a loose and unbaled state, it is far more so. *Ib.*

4. Where the goods were not contained in such a building, as is designated in the application, and the building in which the goods are, is determined as *extra hazardous* in the policy, the policy will be declared null. 27 A. 695, *Prudhomme v. Salamander Insurance Company*.

5. The insurance company may prove fraud and want of title in plaintiff, by his admissions, although his written title had been received in evidence. See EVIDENCE, XII. (a), No. 4.

6. Under the general denial, the insurance company cannot prove that the building was represented to be of brick, when it was of wood. See *PLEADING*, V. (b), 5), c. No. 5.

(e) *Risks covered by the policy and evidence of the cause of loss.*

1. It is the proximate, and not the remote cause of the loss, which is to be regarded in order to ascertain whether the loss is covered by a policy of insurance. 15 A. 217, *Cabellero v. Home Mutual Insurance Company*.

2. Where a fire occurs on the premises insured, by which an explosion of gunpowder takes place, the insurer is responsible for the loss which is the direct consequence of the combustion. *Ib.*

3. Where the fire did not happen on the premises insured, but broke out in a building about two hundred feet distant, causing the explosion of gunpowder, which, by the concussion of the air, injured the building insured against fire; *Held*: That such a loss could not have been within the reasonable intendment of the parties, and was not covered by the policy. *Ib.*

4. Where it is stipulated in a policy of insurance that the company shall not be liable against fire which may happen by reason of explosion, and a building covered by such policy becomes ignited in the course of a conflagration produced by an explosion in another building, the insurance company will not be liable. 7 Wall. 44, *Insurance Company v. Tweed*.

5. An insurance company is bound to indemnify the insured for damages done to his property by water thrown to abate the flames. 19 A. 297, *Getsek v. Crescent Mutual Insurance Company*.

6. The insurance company must prove the violation of the policy. See *EVIDENCE*, VIII. No. 20.

(f) *Interest insured; property covered and extent of indemnity.*

1. Under the clause that the insurance is void for fraud and false swearing, the insurance company cannot be released where they wish to rebuild and ask for a plan which they aver to be incorrect, and which is only so in an unimportant particular. 28 A. N. R., *Henry Laskey v. Merchants' Mutual Insurance Company*.

(g) *Proceedings and proof in adjustment of the loss and payment thereof.*

1. It becomes useless to make preliminary proofs where the company ignores all responsibility, after notification of the loss. 24 A. 349, *Société de Bien-faisance, etc. v. Morris & Co., agents*.

2. The lessee, who, under his contract, insures the buildings for the benefit of the lessor, deducting the premiums from his rent, and afterwards transfers the policy to one of his creditors, cannot, by this transfer, in case of loss by fire, deprive the lessor of the right to claim the insurance money. 27 A. 525, *Pritchett v. Mechanics' and Traders' Insurance Company*.

3. Where the policy stipulates a delay of sixty days for the payment of the loss, after adjustment, and the assurers make reasonable efforts to effect an adjustment, interest will run only from judicial demand. 29 A. 30, *Gettwerth v. Teutonia Insurance Company*.

II. OF LIFE INSURANCE.

1. A notice served on the insured, whereby his policy shall be forfeited, unless certain payments are made within thirty days after publication, during eight days, constitutes a contract, and the policy will not be forfeited by seven days advertisement, and a declaration of forfeiture before the end of the thirty days. 25 A. 444, *Fitzpatrick v. Mutual and Benevolent Life Insurance Company*.

2. Where a note is accepted in part payment of the premium on a policy of life insurance, although the policy recites that payments are to be made at or before noon of a specified day, yet the note may be paid at its maturity during business hours, where nothing is said therein. 26 A. 437, *Leigh v. Knickerbocker Life Insurance Company*.

3. Unless the condition of a policy, which stipulates that the same shall not be binding before being countersigned by the company's agent, be fulfilled, no recovery can be had on said policy. 26 A. 242, *Hardie v. St. Louis Mutual Life Insurance Company*.

4. A policy of life insurance is not a piece of property, it is the evidence of a contract; therefore the wife cannot be made to bring in her husband's succession, the policies on his life made in her favor, or even the life policy of any one transferred to the husband, and by him to her. 26 A. 326, *Succession Hearing*. See Nos. 7, 8.

LUDELING, C. J., *dissenting*: The premiums were paid by the husband, and the policy, although acquired in the name of the wife alone, was community property, and should therefore figure in the inventory of the estate. *Ibid*.

5. The clause in a policy of life insurance exempting the company from liability, "if the insured should die by his own hands," means voluntary self-destruction of the insured, by whatever means accomplished. 26 A. 405, *Phillips v. Louisiana Equitable Life Insurance Company*.

6. The burden of proof is on the company, when it alleges that the deceased committed suicide, and the evidence offered should exclude all other reasonable hypothesis. 26 A. 405, *Phillips v. Louisiana Equitable Life Insurance Company*.

7. A policy of insurance effected by the wife on the life of her husband is her property, and she has the right to dispose of it with the authorization of her husband. 28 A. N. R., *Lotspeich v. Copes*.

8. The policy of insurance of the husband in favor of the wife does not form a part of his succession. 29 A. 714, *Succession Bofenschen*; 26 A. 326; 27 A. 269. See Nos. 4, 7.

9. To secure policy holders. 1877, E. S., p. 64.

III. MARINE INSURANCE.

(a) *In general.*

1. In a policy on goods *laden or to be laden*, the insurance company must make a special defense to put the insured on the proof that all the goods were actually at their risk. 19 A. 527, *Hinck v. Home Insurance Company*.

2. In a suit on an open policy the plaintiff failed to make returns of shipments, in accordance with its terms, but the insurance company continued to do business with plaintiff, having a knowledge of said facts; certain goods insured subsequent to said breach of contract being lost, the company must either pay the amount of the lost goods or return the premiums received after the breach. 28 A. 19, *Jesse R. Powell v. Factors' and Traders' Insurance Company*.

(b) *Nature and validity of the contract; premium; policy; its construction and assignment; the parties and property it covers.*

1. Contracts of insurance made with any steamboat navigating the waters of the United States, without the proper inspection papers, are null, and the premium cannot be enforced. 19 A. 463, *Benton v. Hope & Tally*.

2. It is proved to be a custom to consider all cotton shipped to a merchant who has an open policy, as covered by it, unless it is expressed to the contrary in the bill of lading. 24 A. 590, *Brenstein & Bender v. Crescent Mutual Insurance Company*.

3. A clause that the property, lost or not lost is covered, when approved and entered, will cover a consignment lost at the time of the entry. 25 A. 41, *Marx v. Mutual Marine Insurance Company*.

4. The insurance company having failed to insure the risk applied for, cannot recover its premium, even if notes were given by the insured before the issuance of the policy. 25 A. 121, *Eureka Insurance Company v. Tobin & Williams*.

5. The following clause in an open policy: "This insurance is declared to be

on such property, in such sums, to and from such ports or places, and by such good and seaworthy steamboat or other river craft, as may be approved by the company and entered in the book attached to this policy. It being expressly understood and agreed that no risk under this insurance is or shall be binding until so approved and entered," covers an entry on a boat navigating one of the Alabama rivers. 25 A. 41, *Marx v. Mutual Marine and Fire Insurance Company*.

6. The indorsement by a clerk of an insurance company, on an open policy, is not a ministerial duty, which the company can disclaim or ratify at pleasure. 28 A. 682, *Perez & Bethancourt v. Merchants' Mutual Insurance Company*.

(c) *Insurable interests; valuation and proof thereof.*

1. A consignee who has accepted a draft drawn against freight, has an insurable interest which is distinct from that of the captain and ship owners. The latter may however benefit by an insurance effected by the former, by assenting to the contract, and making themselves liable for the premium, but this is the result of a contract on their part. 15 A. 651, *Williams v. Crescent Insurance Company*.

2. The insurance company having indorsed in accordance with their agreement, on the open policy, the goods to be insured, and having fixed their valuation, with all the facts before them, transformed the open into a valued policy, and being accepted by the insured, the valuation is final and conclusive on both parties. 16 A. 236, *Howes v. Union Insurance Company*.

3. The exceptions to the above rules, are: A wager policy, an insurance without interest, an evaluation out of all proportion, with intent, to defraud, and fraudulent representations and concealments, which vitiate the instrument. *Ib.*

4. Plaintiff, who out of extreme caution introduced evidence as to the value of the goods shipped on a valued policy, cannot prejudice his case when the pleadings did not open the policy generally. 16 A. 236, *Howes v. Union Insurance Company*; 10 A. 809.

5. ON RE-HEARING: An indorsement of the value of the property insured, on an open policy, does not make it a valued policy, and the insured can only recover the value of the goods. *Ib.*

6. Advances made to a ship in a foreign port, constitutes an insurable interest. 20 Wall. 159, *Insurance Company v. Baring*.

7. When the insured takes a policy for the benefit of whomsoever it may concern, in his own name, on vessels which are nominally his under a contract termed, a sale, but which is really not such, but a mere pledge and contract of mandate, and such vessel is lost by the barratry of the master, the pledgees may recover, notwithstanding the policy which excludes the barratry of the master, in case the insured be the owner of the vessel. 26 A. 393, *Pike v. Merchants' Mutual Insurance Company*.

8. Where the vessel was seized and about to be sold, and the assignee of creditors who claimed the vendor's privilege, stated all the facts to the insurance company, desiring to know whether his insurable interest may continue as heretofore, and an indorsement to this effect is made by the president of the company; *Held*: That the subsequent sale by the marshal vitiated the policy, and that the insurance company was not bound by an *estoppel in pais*. 26 A. 505, *Pike v. Merchants Mutual Insurance Company*.

9. A policy insuring freight at a fixed amount, is a valued policy. 28 A. 939, *Donally & Son v. Merchants Mutual Insurance Company*.

10. Three insurance companies insured a steamboat for forty-five hundred dollars each, valued in each of the policies at twenty-seven thousand dollars. The boat was sunk by a collision; *Held*: That if she were a total loss, or if she were abandoned to the insurers, they were bound to pay the full sum insured. 2 Woods, 64, *Levi v. New Orleans Insurance Association*.

(d) *Warranty and evidence relative thereto.*

1) In general.

1. Where the consignor of a vessel effected an insurance on freight, with the

warranty, "no other insurance" and the consignee, who had accepted a draft against such freight, without instructions from the consignor, effected another insurance on the freight at the place of destination; *Held*: That this last insurance could not be considered a violation of the warranty contained in the former. 15 A. 651, *Williams v. Crescent Insurance Company*.

2. Where the insurance is effected only against general average and absolute total loss, the insurers are not liable for a partial loss although the goods saved be afterwards sold for salvage. 20 A. 260, *Gould v. Louisiana Mutual Insurance Company*; 2 L. 432.

2) Seaworthiness.

1. Where the sheriff of Orleans, having a steamboat in custody, insured her "against harbor risks in the port of New Orleans," and she sank in port; *Held*: That in an action by the sheriff to recover the amount of insurance, neither of the parties litigant being able to assign the specific cause of the disaster, the law will presume the unseaworthiness of the boat, and the burden of proof is on the owner to show the contrary. 15 A. 688, *Parker v. Union Insurance Company*.

2. In every policy there is an implied warranty of seaworthiness. 28 A. 939, *Donally & Son v. Merchants' Mutual Insurance Company*; 8 Peters, 557.

3. It is not usual for flatboats navigating the Mississippi river to carry anchors. 28 A. 939, *Donally & Son v. Merchants' Mutual Insurance Company*.

(e) Representation.

See (c), No. 8; (a), No. 2.

(f) Usual perils within the policy.

1. It is the proximate, and not the remote cause of the loss, which is to be regarded in order to ascertain whether the loss is covered by a policy of insurance. 15 A. 217, *Caballero v. Home Mutual Insurance Company*.

2. Where the sinking of a vessel is occasioned by the direct consequence of a fire, the insurance policies cover the loss. 20 A. 102, *Pointer v. Merchants Mutual Insurance Company*.

3. The capture of the goods by a mob, not acting under the authority of any government, is covered by the clause of the policy: "pirates, rogues and thieves." 23 A. 315, *Babbitt, Goode & Co. v. Sun Mutual Insurance Company*.

(g) Risks excluded by the usual memorandum.

1. Under a clause of warranty, "free from all claim for loss or damage, arising from or growing out of the collision of our government with others," in a policy of insurance, covers the destruction of the vessel by the confederate authorities. 19 A. 388, *Marcy v. Merchants' Mutual Insurance Company*.

2. The insurance company is liable for the loss of the vessel insured when the defense is failure of the master to employ a licensed pilot to enter port; the evidence showing that the custom was complied with and that the vessel was in charge of a pilot familiar with the bar and channel and in the habit of piloting. 19 A. 481, *Domingo v. Merchants' Mutual Insurance Company*.

3. A clause in a river policy of insurance, in which it was warranted and agreed by the insured that the boat should be navigated free from any loss or damages by barratry, or by the negligence of those in charge of the boat at or before the time of any accident or disaster, relieved the insurance company from liability to pay a loss resulting from a collision occasioned by the negligence of the pilot. 2 Woods 64, *Levi v. New Orleans Insurance Association*.

(h) When the policy attaches and terminates.

1. Where the insured had no knowledge of the loss of the steamer on which the goods were insured, although he presented himself for insurance before business hours, and during the course of the day the president of the insurance company declined the risk, which was already entered in the open policy by an

employee of the company, the contract is binding. 28 A. 730, *Horter, Peterson & Fenner v. Merchants' Mutual Insurance Co.*

(j) *Abandonment.*

1. Under a marine policy of insurance, there must be a technical total loss, to entitle the insured to abandon the vessel; when the insured have not the right to abandon, the captain cannot be considered as the agent of the insurers. 15 A. 201, *Hannon v. Louisiana Mutual Insurance Co.*

2. The ratification of an abandonment to the agent of the underwriters, dates back to the time when the act or contract was ratified. 17 A. 47, *Graham v. Ledda*; 2 A. 224; 2 A. 816.

3. Where an abandonment is notified to and accepted by the agent of underwriters, the property passed to the underwriters when he took control of it. 17 A. 47, *Graham v. Ledda*.

4. When an abandonment would be an idle ceremony, it becomes useless, and the company cannot complain. 23 A. 315, *Babbit, Good & Co. v. Sun Mutual Insurance Co.*

5. A demand of payment as for a total loss, amounts to an abandonment. *Ib.*

6. An insurance on a vessel which arrives safely at her port of destination, and which, after being partially unloaded, takes fire, and the balance of the cargo is damaged, gives a claim to the insured for a partial loss. To entitle the insured to claim an abandonment, the loss must amount to more than fifty per cent. 24 A. 305, *Merchants' Mutual Insurance Company v. Other Insurance Companies.*

7. Re-insurers may set up the same defenses, and urge the same objections, as the original insurers. *Ib.*

(k) *Adjustment of the loss.*

1. The valuation, at the time of effecting the insurance, is to be taken as true. See I. (b), No. 1.

2. *Foreign insurance companies must have agents in this State, on whom citation can be served.* 1877, No. 21.

• INTERDICTION AND INTERDICTED.

1. By articles 402 of the C. C. and 962 of the C. P., the law on the subject of tutorship is made applicable to the curatorship of interdicted persons in respect to many matters, and particularly in reference to the oath, the inventory, and the security. 15 A. 6, *Interdiction of Rochon.*

2. By this law the district judge is vested with a discretionary power in fixing the bond of a curator of an interdicted person, over a portion of the amount, which is to constitute the sum of the bond; and the law makes it his duty to embrace in the bond: 1st, an amount equal to the active debts; 2d, the money and other movable effects stated in the inventory; and, 3d, such other sum as he shall deem sufficient to cover any loss or damage which the curator may occasion the interdicted person by maladministration of his estate. *Ib.*

3. The discretion vested in the district judge, is a legal discretion, and may, in a proper case, be revised by the Supreme Court on an appeal; but if parties wish to question the exercise of this discretionary power by the district judge, they should place on file testimony to show that the judge was governed by an unnecessary caution towards the party giving bond. *Ib.*

4. The husband, when appointed curator of his wife, interdicted for insanity, is bound to give security for the faithful administration of her estate confided to his care. 15 A. 162, *Woodward v. Woodward.*

5. An administrator, *pro tempore*, of an interdicted person, cannot bind the interdicted for the payment of any specified amount, in order to effect a liquidation of partnership affairs. 15 A. 426, *Espinola v. Blasco.*

6. One who loans money to a curator of an interdicted, without the advice of a family meeting and sanction of the judge, becomes the creditor of the curator, and not of the interdicted, and as such shows no better right to the

curatorship of the vacant succession of such interdicted than a previous applicant. 18 A. 25, *Succession Girodeau*.

7. The appointment of a provisional administrator during the pendency of the suit for an interdiction, cannot be revoked at the pleasure of the judge. A mandamus will lie to compel the granting of a suspensive appeal from the judgment of revocation. 18 A. 523, *State ex rel. Duncan v. The Judge of the Twelfth Judicial District*.

8. The law does not authorize the appointment of a *curator ad hoc* to represent the party sought to be interdicted; he must be cited, otherwise the judgment of interdiction is null. 23 A. 26, *Gernon v. Dubois*.

9. Mere weakness of mind in a married woman will not justify a decree of interdiction, when in view of all the evidence adduced, such decree is not necessary, either for the protection of her property or person, or of society. 29 A. 302, *Justus Francke v. His Wife*.

10. An interdicted person, like a minor, may, when the interdiction is revoked, oppose the final account of the curator, and set up illegal charges in other accounts which have been homologated. These accounts are only *prima facie* correct. 28 A. 824, *Curatorship Beecroft*. C. C. 356.

11. The community is liable for the fees of the attorney employed by the wife to defend a suit for her interdiction, brought by the husband. See MARRIAGE, VIII. (c), No. 15.

INTEREST.

1. Although the account be acknowledged by defendant as correct, and interest is therein charged at 8 per cent., yet a judgment rendered thereon can only decree interest at the rate of five per cent. from the day of the acknowledgment. 29 A. N. R., *DeHaven & Son v. Simon*. See No. 22.

2. For loan on interest, usury and compound interest, see LOAN, III.

3. For insurable interest, see INSURANCE, I. (b); III. (c).

4. Interested witnesses, see EVIDENCE, XVI. (b), 2).

5. Interest due by agents, tutors, etc., see MANDATE, III. (b); V. (b), 7). MINORS, III. (e); (f), 2). SUCCESSION, VIII. (d); (f), 2), c.

6. Interest on conventional obligations, see OBLIGATION, VII. (a), 5), B.

7. Interest on damages *ex delicto*, see OFFENSES AND QUASI OFFENSES, II. (g).

8. Interest on city notes, see BILLS AND NOTES, XIV. (a), No. 10.

9. Interest on bank notes, see BILLS AND NOTES, XIV. (a), Nos. 8, 9.

10. Interest on bills and notes, see BILLS AND NOTES, XIV. (a); (b).

11. Interest on particular legacies, see DONATIONS, VI. (b), 3), No. 8.

12. Parol is not admissible to prove an agreement to pay eight per cent. See LOAN, III. (a), No. 8.

13. Interest on the separate debts of the wife, paid by the community, see MARRIAGE, XI. (b), No. 4.

14. Interest due may be settled by a note which itself carries interest, see OBLIGATIONS, III. (c), 1), No. 11.

15. Eight per cent. interest has been allowed by reason of a tacit agreement, but only legal interest can be allowed as against an administrator. See OBLIGATIONS, VII. (a), 5), B. § 1, No. 4.

16. All debts bear legal interest. See OBLIGATIONS, VII. (a), 5), B. § 1, Nos. 5, 6.

17. See, further, *ib.*, No. 7 *et seq.*

18. To avoid interest, a real tender must be made. See PAYMENT, IV.

19. The assumption of a bond carries the interest. See OBLIGATIONS, VIII. (g), No. 7.

20. Discount of promissory notes, 1860, p. 41.

21. Interest does not cease to run by a voluntary surrender. 30 A. 714, *Blouin v. Liquidators of Hart & Hebert*.

22. Interest not prayed for cannot be allowed. 30 A. 735, *Brown v. Besson*; 22 A. 53, *Citizens' Bank v. Condran*.

INTERMEDDLERS.

1. A provisional administrator who takes an oath and gives a bond, will not be considered as an intermeddler, even if he does not account for all the money received by him. 24 A. 466, *Gooch v. Gooch*.

2. The husband who administers as a *negotiorum gestor*, the succession of his deceased wife, cannot be called upon by the heirs for an account. 26 A. 623, *Rentz v. Cole*.

INTERNAL REVENUE.

See REVENUE.

INTERPRETATION.

1. See LAWS, II. CONSTITUTION, II. (a). CRIMINAL LAW, I.
2. For interpretation of contracts, see OBLIGATIONS, V. VI. (b), 1).
3. For interpretation of verdicts and judgments, see JUDGMENT, III. XV. (e). JURY, IV. (c).

INTERPRETER.

1. For the First District Court of New Orleans, 1860, p. 34. (N. B. *This office has been abolished*).

INTERROGATORIES ON FACTS AND ARTICLES.

See EVIDENCE, XVIII.

INTERVENTION.

See PLEADING, VIII. (a).

INTOXICATION AND INTOXICATING LIQUORS.

See CRIMINAL LAW, IX. (g), 1).

INTRUSION IN OFFICE.

1. The rights of defendant to exercise the functions of notary public, cannot be tested in a suit by mandamus instituted by the keeper of notarial records, to recover the archives of said notary; proceedings under the intrusion act should be instituted. 21 A. 337, *State ex rel. Hero v. A. Pitot, Jr.*

2. A suit under the intrusion act, (No. 156 of 1868), is not to inflict punishment or disabilities on defendant, but simply to enquire into his right to hold office. 21 A. 631, *State ex rel. Sandlin v. Watkins, judge*.

3. Proceedings under the intrusion act, (No. 156, of 1868), must be brought by the district attorney or district attorney *pro tem.* of the parish in which the case arises, in the name of the State. 21 A. 655, *Hayes v. Thompson*. He may be compelled to bring the suit. See MANDAMUS, I. (a), 4), No. 1; OFFICE AND OFFICER, No. 25.

4. The action under the intrusion act, (No. 156 of 1868), must be brought by the attorney general. 21 A. 710, *State ex rel. Wickliffe v. Delassize*.

5. Private citizens cannot contest the right of an officer to his office. 23 A. 25, *Voisin v. Leche*; 787, *State ex rel. Rills v. Lynch*; 26 A. 272, *Cramer v. Brown*.

6. Parish judges, when acting *pro hoc vice* in place of the district judge, recused, are invested with all the functions and powers which the district judges possess under the intrusion act. 22 A. 33, *State v. John Lewis, judge*.

7. Where a party took an oath to support the constitution and laws of the United States, and afterwards voluntarily engaged in rebellion against the United States, in aid of the Confederate States, he is ineligible to any office. *Id.*

8. The act of 1868, No. 156, nowhere deprives the defendant of the general right to a jury, and thereunder the judge may appoint a special term and summon a jury. 22 A. 55, *State ex rel v. Head*. See No. 18.

9. The act of 1864, creating the office of tax collector, was repealed by the act of 21st October, 1868, "to provide a revenue to support the State govern-

ment and the manner of collecting the same." The officer elected under the act of 1864, has no right to hold office after the appointment of an officer under the act of 1868. 23 A. 111, *State ex rel. Montieu v. Lavigne*.

10. The appointments to be made under act of 1868, No. 27, entitled "an act to determine the mode of filling vacancies in all offices for which provision is not made in the constitution," must be confirmed by the Senate. 23 A. 140, *State ex rel. George v. Tucker*.

11. Section 2605, R. S., provides that cases under the intrusion act may be tried in chambers, or at a special term called by the judge, on legal notice being given to the parties interested; a judgment rendered in vacation, without such notice, is null. 23 A. 799, *State ex rel. Weber v. Billings*.

12. Failure to take the oath testing the eligibility of the officer, and to file it in the office of the secretary of State, in the time limited by act No. 39 of 1868, does not, *ipso facto*, vacate the office. 23 A. 785, *State v. Dranguet*; 21 A. 492.

13. It matters not whether relator is entitled or not to the office, the State is the party plaintiff, and if defendant be an intruder he must be ejected. *Ib.*

14. A commission issued in error by the governor, on the supposition that the incumbent had left the State permanently, does not divest the incumbent of his office. 24 A. 20, *State ex rel. Robinson v. McNeely*.

15. Where the sole ground for the proceeding to remove an officer is that the office has ceased to exist, the action under the intrusion act cannot be maintained. 25 A. 487, *State ex rel. Hunter v. Hawley, public administrator*.

16. There is no conflict between the intrusion act and the one to regulate contestations between persons claiming a judicial office; an action lies under both. 26 A. 374, *State ex rel. Carroll v. Jorda*.

17. The state is not interested in the fees of office accruing to a contestant. The intrusion suit having been brought, the contestant was authorized to institute an action to preserve his rights to the fees of office. 27 A. 67, *George v. Tucker*.

18. The parties are entitled to a trial by jury. See JURY, I. Nos. 7, 8.

19. The provisions of the act do not apply to a city notary. See NOTARY, No. 3.

20. For proceedings by rule, see SUMMARY PROCESS, II. No. 11.

21. Proceedings in contestations for judicial office, 1873, pp. 51, 78; when the judge is interested, 1877, E. S., p. 197; plaintiff may discontinue, 1873, p. 80.

INVENTORY.

1. See NOTARY, Nos. 7, 11. PARTITION, III. (a).

2. For second appraisalment of succession property, see SUCCESSION, VIII. (e), 4).

3. The testator may dispense the usufructuary from taking an inventory. See SERVITUDES, I. No. 1.

4. Appraisers' fees, 1870, p. 66.

JACKSON.

Territory added to Jackson, from Lincoln, 1877, p. 31.

CITY OF JEFFERSON.

1. The thirteenth section of act, September 14, 1868, repealing the charter of the city of Jefferson, of 1867, did not abolish the offices of the corporation; it only repealed the old charter in so far as its provisions were not incorporated in the new charter. 21 A. 482, *State v. Kreider*.

2. The failure to hold an election under the charter of 1868 did not vacate the offices held under the charter of 1867; the governor had no power to appoint without a vacancy. *Ib.*

3. For application for paving, see NEW ORLEANS, II. (e), 4), No. 10.

4. Charter amended, 1868, p. 98; Jefferson annexed to New Orleans, 1870. E. S., p. 45.

JEFFERSON.

Parish of, shell road, 1870, E. S., p. 86; juries, 1870, E. S., p. 87; Barrataria road, 1871, p. 164; justice of the peace, 1871, p. 205; relief for levee, 1872, p. 21; shell road, 1873, p. 1; road from New Orleans to Kenner, 1874, p. 97; term of parish court, 1877, p. 30.

JOINDER AND JOINT.

1. For joinder of action, see CRIMINAL LAW, VI. (e). PLEADING, II.
2. For joinder of issue, see PLEADING, VII.
3. For joinder of parties to actions, see CRIMINAL LAW, VI. (f). INJUNCTION, VIII. (a). JUDGMENT, XII. PARTITION, II. PLEADING, I. (c); V. (b), 3).
4. For joint obligations and joint trespassers, see OBLIGATIONS, VIII. (e). OFFENSES AND QUASI OFFENSES, II. (b).
5. For joint ownership or possession, see MARRIAGE, XIII. (e), 4). PARTITION. PARTNERSHIP. SERVITUDES, II. (a), 2); c.

JUDGE.

1. See CONSTITUTION, II. (e), 1). COURTS, III. EVIDENCE, XVI. (b), 5). JUSTICE OF THE PEACE. MANDAMUS, I. (a). MARRIAGE, XIV. (c). RECUSATION.
2. Contestation for office, 1873, pp. 51, 78; when interested, 1877, E. S., p. 197; discontinuance, 1873, p. 80.

JUDGMENT.

I. IN GENERAL.

II. OF THE REASONS FOR JUDGMENT.

III. OF THE CERTAINTY AND INTERPRETATION OF JUDGMENT.

IV. OF THE DATE, ENTRY AND SIGNATURE OF JUDGMENT.

V. OF THE CONDITION OF JUDGMENT; AND ITS CONFORMITY TO THE PLEADINGS AND VERDICT.

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| <p>(a) <i>Conformity to the pleadings.</i></p> <ol style="list-style-type: none"> 1) In general. 2) Matters subsequent to the institution of suit. 3) Injunction and executory process. 4) Accessory rights; and prayer for general relief. | <p>(b) <i>Conformity to the verdict; and of a remittitur.</i></p> <p>(c) <i>Conditions of judgment.</i></p> |
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VI. OF THE AMENDMENT OF JUDGMENT.

VII. OF THE NOTICE OF JUDGMENT.

VIII. OF NON-SUIT AND JUDGMENT IN CASES OF DOUBT.

IX. OF JUDGMENT BY DEFAULT.

X. OF THE CONFESSION OF JUDGMENT.

XI. OF THE NULLITY OF JUDGMENT.

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| <p>(a) <i>In general.</i></p> <p>(b) <i>Grounds of nullity; and sufficiency of the allegations and evidence.</i></p> | <p>(c) <i>By what court the nullity may be declared; the parties and decree.</i></p> |
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XII. OF JUDGMENT AGAINST CO-OBLIGORS.

XIII. OF PERSONAL JUDGMENTS IN COURTS OTHER THAN THOSE OF THE STATE.

XIV. OF JUDGMENTS IN REM; AND JUDGMENTS OF COURTS OF ADMIRALTY.

XV. OF RES JUDICATA.

- (a) *Identity of the parties and their capacity.*
 - 1) In general.
 - 2) Estates under administration; heirs and ayans-cause.
 - 3) Sureties.
- (b) *Identity of the thing and cause of action.*
- (c) *Judgments of homologation in probate and insolvent proceedings.*
- 1) In general.
- 2) Parties concluded by the judgment; of citation and notice.
- 3) Matters concluded by the judgment.
- (d) *Form of proceeding and finality of judgment.*
- (e) *Its interpretation and effect; and other matters.*

XVI. JUDGMENTS HOW REVIVED AND OBJECTIONS THERETO.

I. IN GENERAL.

1. A judgment appointing a tutor, rendered by a court of competent jurisdiction, cannot be attacked collaterally by a debtor of the minor; so long as the judgment stands unreversed, it constitutes a full warrant, for the demand and collection of the debts due the minor, by the person named therein as the tutor. 15 A. 27, *Succession of Gorrisson*.

2. A judgment emancipating a minor cannot be attacked collaterally. 15 A. 505, *Johnson v. Alden*. See MINORS, IV.

3. A judgment, which is not an absolute nullity, cannot be collaterally attacked. 23 A. 17, *Succession Robinson*.

4. The adjudication of community property to the surviving spouse being duly made, cannot be collaterally questioned. *Ib*.

5. A consent judgment is binding between the parties, unless reversed in the mode and within the time prescribed by law. 20 A. 276, *Dunn v. Pipes*; 12 A. 426. See No. 12; X. No. 8.

6. The validity of a judgment is not to be enquired into in a proceeding to reinstate a record destroyed by fire. 19 A. 471, *McFeely v. Osborn et al*.

7. Money judgments can only be rendered for legal currency. 18 A. 616. *Alanyer v. Blanchard, Jr.*; 16, *Galliano v. Piène & Co*. See CURRENCY, No. 1.

8. All judgments for money should be expressed in dollars and cents. 24 A. 77, *Erlanger v. Avegno*.

9. A judgment can only be rendered on an obligation which has matured, and cannot order a note to be paid at maturity. 24 A. 50, *Christen v. Rhulman*.

10. A judgment absolutely null has no existence in law, and one relatively null has an existence till set aside. 24 A. 253, *Walworth v. Stevenson*.

11. The parties in interest not being before the court, no judgment can be rendered upon the question of title. 26 A. 147, *First National Bank v. Simmes*; 20 A. 382, *St. Romes v. Levee Steam Cotton Press Company*. See PLEADING, V. (a), 3), E. No. 2; SALE, VI. (c), No. 14.

12. The decree of a court in a case in which there has been no earnest controversy, decides nothing, and cannot be relied upon as a precedent. 12 H. 472, *Gaines v. Relf*. See No. 5; X.

13. A privilege not created by the seizure, exists independently of the judgment. 29 A. 845, *Hill & Co. v. Bourcier et al.*; 7 N. S. 340; 9 R. 118; 10 R. 412, 155; 18 L. 414, C. C. (3077), (3096); *per contra*, see V. (a), 4), No. 1.

14. An objection that a judgment of the Supreme Court of Louisiana, is to be treated as void, because rendered some days after the passage of the ordinance of secession of that State, is not tenable. That ordinance was an absolute nullity, and, of itself alone, neither affected the jurisdiction of the Supreme Court of Louisiana, nor its relation to the appellate power of the Supreme Court of the United States. 6 Wall. 443, *White v. Cannon*.

15. As to weight of decisions rendered by state courts with the federal courts, see COURTS, I. No. 11; II. (b), Nos. 7, 12, 13.

16. For binding force of a judgment to which the depositor is not a party, see DEPOSIT, III. No. 17.

17. When a judgment acts as an estoppel, see ESTOPPEL, No. 46.

18. The legislature has the right to provide that the judge shall decide certain cases when the jury fails to agree. See JURY, I. No. 14.

19. For judgments of separation of property, see MARRIAGE, XIV. (c).

20. The tutor who seeks to commute the minor's general mortgage, is entitled to a formal judgment. See MINORS, III. (i). No. 1.

21. A consent decree not rendered in accordance with the mortgage, does not novate the mortgage, nor merge it into the judgment. See NOVATION, II. No. 12.

22. For interest on judgment, see OBLIGATIONS, VII. (a), 5), B. § 1, No. 7, *et seq.*

23. A judgment against a dead defendant, is null. See PLEADING, I. (d), No. 6.

24. The judge cannot order a tax to be levied, to pay the judgment against the parish. Acts 1877, E. S., p. 87.

II. OF THE REASONS FOR JUDGMENT.

1. Reasons for judgment, orally assigned, are sufficient. 18 A. 271, *Beard v. Simon et al.*

2. "When after hearing pleadings, evidence and counsel, it is ordered," etc., is as much a reason for judgment in favor of plaintiff as defendant, and does not comply with the constitution. 18 A. 260, *Gallot v. McCluskey*.

3. "When the court, considering the law and the evidence, it is ordered," etc., is as much a reason for rendering judgment in favor of plaintiff as for defendant, and does not meet the requirements of the constitution of 1864, article 76, tit. 5. 20 A. 27, *Dorr v. Jouet*; 19 A. 525, *Emmanuel v. Hatcher*.

4. The absence of exception or answer is a sufficient reason for judgment, and the phrase, by reason of the law and the evidence, necessarily refers to the evidence adduced by plaintiff. 3 R. 156; 24 A. 523, *Powell v. O'Neill*.

5. The reasons form no part of the judgment itself, and the judge of the lower court is not bound by any expressions used by the Supreme Court beyond the decree. 23 A. 108, *Davidson v. Carroll, Hoy & Co.*

6. It is no ground for the appellate court to reverse a correct judgment, simply because the judge gave wrong reasons. 25 A. 486, *Seyburn v. Degris*.

7. No statement of the judge's reasons need be given in an order of seizure and sale. 29 A. 28, *Garrish v. Heyman*.

III. OF THE CERTAINTY AND INTERPRETATION OF JUDGMENT.

1. A judgment in the words "that the dam erected by plaintiff across the prong of the Bayou Paul, be torn down, and the prong be placed in a state of nature," is not ambiguous. 15 A. 223, *Avery v. Police Jury*.

2. It is only when the terms of a judgment are of doubtful construction, that resort may be had to the pleadings or to the reasoning for judgment adduced by the court in obedience to the constitution. *Ib.*

3. A judgment must be construed with reference to the pleadings, and, when it admits of two constructions, that one will be adopted which is consonant with the facts and law of the case. 15 A. 679, *Peniston v. Somers*.

4. In construing a judgment, although the court is not permitted to look into the evidence in the suit to determine how the facts ought to have been decided, under our system of practice the court may do so, to learn the issues, in the absence of reasons given for the decree, and ascertain what matters were presented for adjudication at the time the decree was rendered. 16 A. 365, *Bonvillain v. Bourg*.

5. A general judgment perpetuating an injunction, may, by reference to the facts existing at the time of its rendition, be restricted to mean as long as the property seized, remains *dowry*. 16 A. 365, *Bonvillain v. Bourg*.

6. Judgment as between the parties must be construed with reference to the nature of the obligation declared upon. 23 A. 296, *Barns v. Bidwell*.

7. The words *in solido* being omitted in the judgment, when the parties are so bound for the debt, does not prevent execution against either defendant for the whole amount of the claim. *Ib.*

8. Where the judgment is simply for defendant, it is a mutual dismissal of the suit and the reconvention. 19 A. 304, *Kellogg v. Hene*. See PLEADING, VIII. (b), 1), No. 5.

9. A judgment recognizing the heirs as such, but not putting them in possession, and ordering the administrator to file an account, can only be construed as ordering the filing of a tableau of distribution. 28 A. N. R., *Succession Luca Giaconi*.

10. Judgment of Federal courts, how interpreted in certain cases. See COURTS, II. (c).

11. The mere dismissal of a rule, how construed. See JUDGMENT, XV. (d), No. 1.

12. The reasons do not control the decree. See XV. (e), No. 5.

13. The words "without prejudice," inserted in a judgment dissolving an injunction, do not affect the decree which will support the plea of *res judicata* against another injunction. All the grounds should have been pleaded in the first suit. 30 A. 230, *Porter v. Morère*.

IV. OF THE DATE, ENTRY, AND SIGNATURE OF JUDGMENT.

1. The signature of the judge, affixed by consent, in vacation, is a sufficient authentication of a decree in an ordinary action to authorize an execution. 15 A. 477, *Rust v. Faust*. See Nos. 3, 4.

2. The signature of the "judge" to the minutes, is not to be regarded as his signature to a final judgment. 24 A. 259, *Scott v. Goodrich*. See No. 16.

3. A judgment signed in vacation must be considered as not signed. 23 A. 523, *James v. Fellows*; 21 A. 306, *Culver, Simonds & Co. v. Levy et als.*; 26 A. 119, *State ex rel. Dixon vs. Judge Fifth District Court*. See No. 1.

4. A valid judgment, even as to third persons, may be rendered and signed in vacation by agreement of the parties. 27 A. 403, *Morrison v. Citizens' Bank*. See No. 1.

5. Judgment cannot be rendered against a garnishee during vacation. 26 A. 74, *Denouvion v. McKnight*; 29 A. 241, *City v. Morris*. See No. 9.

6. Where an acting judge signed an order as "judge of the Second District Court," in the place and stead of the judge of the second judicial district of Louisiana, recused, omitting the word "judicial;" *Held*: That this was sufficient. 17 A. 85, *Millaudon v. Davis*.

7. The judgments of the provisional court of Louisiana are valid without signature? 22 A. 631, *Burke v. Trègre*.

8. When a judgment is signed prematurely, if the delays prescribed by article 546 of the Code of Practice have expired, error in the judgment cannot be corrected by a new trial; the remedy is by appeal. 9 R. 50; 6 L. 69; 23 A. 110, *Succession Aimée Carraby*.

9. A judgment rendered in vacation, on a rule against the surety on an appeal bond, is null and void. 21 A. 306; 23 A. 483, *Hermundez v. James et al.* See No. 5.

10. HOWE and HOWELL, JJ., *dissenting*: The judgment was perhaps irregular but could not be annulled for that reason. *Ib.*

11. A judgment on a rule to be put in possession of property sold by the sheriff, is a final decree requiring signature. 28 A. 451, *State ex rel. Meux v. Judge Fourth District Court*.

12. Appeal as affected by the signature of the judgment, see APPEAL, I. (b), 1).

13. If the court be divested of jurisdiction the day the judgment is rendered, the judge cannot sign it. 23 A. 502, *Hoyle v. New Orleans City Railroad Company*.

14. A judgment rendered in vacation in a case under the intrusion act, without the requisite notice, is null. See INTRUSION IN OFFICE, No. 11,

15. The judge cannot sign the judgment as to one of the parties when he has granted a new trial in general terms. See NEW TRIAL, I. No. 2.

16. The signature of the judge to his reasons for judgment, is not a signature of the judgment. 30 A. 63, *Saloy v. Collins*. See No. 2.

V. OF THE CONDITIONS OF JUDGMENT; AND ITS CONFORMITY TO THE PLEADINGS AND VERDICT.

(a) *Conformity to the pleadings.*

1) In general.

1. Where a plaintiff offered to discontinue a suit, having given the clerk of the court instructions to that effect, prior to the filing of a reconventional demand, but the defendant resisted the discontinuance and was sustained by the court; *Held*: That whether the plaintiff's original demands were urged to the jury or not, it was an error to disregard them on the final judgment. If no evidence was offered to sustain them, a judgment of non-suit should have been rendered; if they were proved to have been novated, judgment should have been rendered against the plaintiff; if any were established plaintiff should have had judgment. 15 A. 299, *Smith v. Amacker*.

2. The court cannot go *ultra petitionem* and condemn *de novo* the plaintiff in injunction, to pay the amount of the execution on the twelve months bond. 16 A. 266, *Hennen v. Wood*.

3. A judgment cannot be rendered for more than is demanded in the petition. 6 P. 172, *Cox v. United States*.

4. Evidence received without objection by way of reconvention, will be considered as if the formal plea had been made. 17 A. 37, *Kean v. Brudon*; 4 A. 193; 5 A. 184; 9 A. 255. See EVIDENCE, V. (c).

5. Where the agreement sued on, shows an indebtedness of a certain amount, plaintiff can recover no greater amount. 21 A. 379, *Cincinnati Insurance Company v. Harrison*.

6. One who sues upon a verbal lease cannot recover judgment on a tacit reconduction. 22 A. 378, *Jackson et al. v. Beling*.

7. If one demand less than is due him, and does not amend his petition to augment his demand, he should lose the overplus. *Ib.*

8. Defendant, who causes a supplemental petition alleging his personal indebtedness and a default thereon to be dismissed on the ground that the suit was against the commercial firm, and that he could only be condemned as a member thereof, may nevertheless be condemned individually on the original petition, when the evidence shows that the draft sued on was given out of the usual course of the partnership business, without authority. 25 A. 562, *Louisiana Mutual Insurance Co. v. Walters & Elders*.

9. Where the charges made under the writ of seizure and sale are received in evidence without objection, and are uncontradicted, the judgment for the difference between the mortgage notes and the adjudication will not be disturbed. 28 A. N. R., *D'Aquin v. Lacroix*; O. B. 45, fo. 28.

10. An attorney who makes a contract for a stipulated fee, cannot recover on a *quantum meruit*. 24 A. 349, *Walker v. Bietry*.

11. Plaintiffs who sue on a contract cannot recover on a *quantum meruit* and *vice versa*. 25 A. 281, *Mazureau & Hennen v. Morgan*; 14 A. 793, 848; 7 N. S. 300; 4 L. 117; 9 L. 176; 11 L. 255; 14 L. 339; 9 A. 163; 1 A. 176; 11 Wheaton, 258. See QUANTUM MERUIT. PLEADING, V. (e), No. 1.

12. Under an action to compel an heir to accept or renounce a succession, no judgment can be rendered decreeing the heir to be liable for the debt due to plaintiff. 28 A. 843, *Cole v. Heirs Reddick*.

2) Matters subsequent to the institution of suit.

1. If one of the partners composing the defendant partnership die before judgment, and his representatives are not made parties to the suit, a judgment against the firm is null. 29 A. 141, *McCloskey, Bigley & Co. v. Wingfield & Bridges*.

3) Injunction and executory process.

1. See INJUNCTION. EXECUTORY PROCESS.

2. Parish courts cannot enjoin the judgments of district courts. See COURTS, (f), No. 10.

4) Accessory rights; and prayer for general relief.

1. Where the petition claims judgment on the note, with privilege, and the judgment is silent as to the privilege, so far as third persons are concerned, the privilege is lost. 27 A. 370, *Nicholson & Co. v. Citizens' Bank*. *Per contra*, see I. No. 13.

2. For interest allowed by judgment on certain accounts, see INTEREST, No. 1.

(b) Conformity to the verdict; and of a remittitur.

1. See REMITTITUR. APPEAL, I. (a), 1), No. 4; IX. (g), 1), No. 3.

(c) Conditions of judgment.

1. Where a conditional order is issued by a judge to a sheriff, and the facts which constituted the *proviso* or condition are true, the order becomes in effect a peremptory mandate to the sheriff. 15 A. 489, *Brainard v. Head*.

VI. OF THE AMENDMENT OF JUDGMENT.

1. A judgment improperly signed and altered, can be corrected by appeal, not by injunction. 20 A. 558, *Levy v. Converse, Harding & Co.*

2. When the suit has been dismissed for failure on the part of plaintiff to appear, the judgment cannot be changed by an *ex parte* motion. 19 A. 88, *Lacroix v. Bangs*.

3. The party who complains of errors of calculation, must point out the errors; else they will not be noticed. 20 A. 202, *Lee v. Frahan*.

4. HOWELL, J.: No addition should be made to a decree changing the judgment after it has become final. 27 A. 214, *State ex rel. Gay v. Judge Fifth Judicial District Court*.

5. A trivial error made in the amount of credits given by the judge, should be corrected by an application on the part of the defendant's counsel. 23 A. 556, *Thompson v. Comeau*.

6. If the judgment allows one year more interest than plaintiff is entitled to recover, the judgment must be amended at the costs of the appellee. 24 A. 39, *Cenas v. Shackelford*.

7. The judge has no right, *ex proprio motu*, even before signature of the judgment, to annul the judgment in favor of defendant, and render judgment immediately for plaintiff. 29 A. 91, *Miller v. Chandler*.

8. Final judgment having been rendered on the mandamus, to compel defendants to allow relator to examine their books, the judge was without power afterwards to amend the judgment and appoint experts to assist relator. 28 A. 874, *State ex rel. Mahan v. Accommodation Bank*.

9. A judgment of partition may be amended on the petition of the administrator, to have his name inserted in place of the designated auctioneer. See PARTITION, III. (a), No. 8.

10. An order of sale of succession property, may be modified from a cash sale to one partly on credit. See SUCCESSION, VIII. (e), 2), A. No. 1.

VII. OF THE NOTICE OF JUDGMENT.

1. An appeal from a judgment of divorce must be taken within thirty days, not including Sundays, after the signing of the judgment. Acts 1871, p. 151. The notice of judgment having been served at the domicile assigned to the wife, who was personally cited, although she had left the State, was valid, and the appeal taken more than thirty days after such notice, must be dismissed. 25 A. 51, *Holbrook v. Bronson, his wife*.

2. The copy of judgment served need not bear the signature of the judge. 25 A. 392, *City v. Crescent Mutual Insurance Company*. See No. 5.

3. Execution cannot legally issue on a judgment by default in an appealable case, until after notice of judgment has been served on the defendant. 21 A. 464, *Greene v. Johnson*.

4. Anterior to act No. 24, of 1876, p. 50, it was necessary to give the defendant notice of all judgments confirmed by default, whether the citation was personal or not. 29 A. N. R., *Angèle de Sentmanat v. Nelvil Soulé et als*. See IX. No. 4.

5. The notice of judgment need not bear the signature of the judge. See NEW ORLEANS, II. (e), 1), No. 9; *supra*, No. 2. APPEAL I. (f), 1), Nos. 5, 6, 9.

VIII. OF NON-SUIT AND JUDGMENT IN CASES OF DOUBT.

1. A non-suit entered upon the failure of the plaintiff to appear on the day of trial, cannot be considered as a voluntary abandonment of the action. 25 A. 118, *Locke v. Barrow*.

2. Having decided that the potestative condition upon which the penal clause was to become exigible, had not happened, a judgment of non-suit should have been rendered. 20 A. 538, *Thompson & Co. v. Moulton*; C. P. 158; 13 L. 404; 18 L. 537.

3. Where evidence is not offered to support the reconventional demand, the judgment therein must be one of non-suit. 18 A. 49, *McClendon v. Bennett & Addison*.

4. There is no law requiring a judgment of non-suit to be rendered on motion of plaintiff. 20 A. 237, *Yorke v. Allen*.

5. Where the evidence of the value of the stock of goods lost by fire is vague, a judgment of non-suit should be rendered. See EVIDENCE, XIII. (a), No. 2.

6. See also, for sufficiency of evidence, EVIDENCE, XIII. (a)

IX. OF JUDGMENT BY DEFAULT

1. The declaration of the judge, in the judgment confirming a default, that two judicial days had elapsed from the date of the default, does not make proof of the fact when the contrary appears from the minutes of the court. 15 A. 224, *Deblanc v. Leblanc*.

2. A judge cannot refuse a default at the proper time, and continue the cause without legal grounds. A mandamus will issue to compel him to try the cause according to law. 17 A. 252, *State ex rel. Tooreau v. Posey, judge fifth judicial district*.

3. A judgment by default, taken and confirmed after the filing of exceptions, is null. 18 A. 629, *Francis v. Steamer Black Hawk*.

4. No judgment can be confirmed without a previous default. 18 A. 187, *Braunsdorff v. Fay & Masson*; 7 N. S. 287.

5. When a judgment has been confirmed without a previous default, the judgment will be reversed on appeal, and the case remanded. 19 A. 373, *Riggin & Co. v. Merchants' Bank*.

6. Under the acts of 1855 and 1858, for the forfeiture of a bank's charter, it is necessary that a default should be taken previous to final judgment. 18 A. 350, *Huntington v. Crescent City Bank*.

7. No default can be confirmed as against the defendant where the intervention has been filed and the delay of citation thereon not expired. 27 A. 202, *Lane v. Clark*; 20 A. 257, *Perkins v. Perkins*.

8. A judgment confirmed without default, is null. 21 A. 665, *Taylor and Wife, etc. v. Littell*.

9. Where there is no answer to an amended petition containing matters of substance, nor default taken, all subsequent proceedings are irregular, and will be set aside on appeal. 21 A. 461, *Brown v. Brown*.

10. An entry made in an inventory, taken by the husband, of the effects of his deceased wife, acknowledging receipt of her paraphernal funds, is sufficient to authorize judgment homologating the account. 22 A. 255, *Minors Smith*.

11. Where a judgment by default was confirmed upon testimony sworn to

before the deputy clerk, but his attestation does not show that it was taken in open court, it is liable to objection; but the objection will not be examined by the Supreme Court, unless brought before it by bill of exceptions or in some other legal form, as the defendant should have been present to protect himself from the effects of illegal testimony. 23 A. 54, *Forke & Co. v. Scott & Co.*

12. Citation served on the first, entitles plaintiff to a default on the twelfth. C. P. 180; 1 R. 448; 25 A. 136, *Hart & Co. v. Nixon & Co.*

13. The default being properly entered, no judgment could be rendered. *Ib.*

14. A judgment by default, even after the overruling of an exception, to become executory, must be notified to the defendant. 25 A. 213, *Taylor v. Woodward*. See VII.

15. Where a judgment is inadvertently confirmed by default, after answer filed, and a subsequent judgment is contradictorily rendered, the latter alone is of any validity and effect. 26 A. 491, *City v. Kerr*.

16. A default cannot be taken on a supplemental petition, not sworn to, in an injunction suit. 26 A. 651, *Richardson v. Dinkgrave, sheriff*.

17. A default cannot be confirmed during the pendency of an exception, else the case must be remanded. 26 A. 730, *State v. Valette*.

18. When the answers to interrogatories on facts and articles are not made within legal delay, plaintiff, without previous default, is not entitled to a judgment taking the interrogatories for confessed, and also against defendant on the merits. 27 A. 671, *Henshaw & Sons v. Flannery & Co.*

19. A jury should be summoned to confirm a default as to damages, even in a suit coupled with an injunction against a wrongful seizure. 30 A. 1, N. R. *Watson v. Bondurant*. See JURY, I. (a).

20. How the agency is sufficiently proved without the procuration, see MANDATE, V. (b), 3), No. 7.

21. The testimony of one witness and the newspapers, is sufficient to prove publication of the tax bill. See NEW ORLEANS, II. (e), 1), No. 6.

22. A judgment by default, thirty days after the first publication of the city tax bills, is sufficient. *Ib.*, No. 7.

23. No default is necessary in tax suits brought by the city of New Orleans. See TAXES, III. (d), 1), No. 5.

24. When the citation is waived, a default may be taken before ten days after the waiver. 30 A. 498, *Evans v. Payne & Harrison*.

25. When the last day falls on a *dies non*, the defendant has the whole of the next day to file his answer. 30 A. 677, *Catherwood & Co. v. Shepard*.

26. A default is not set aside by the filing of a peremptory exception; when the exception is overruled, plaintiff is entitled to confirm his default. 30 A. 155, *State ex rel. Borland v. Judge of the Second Judicial District Court*.

X. OF THE CONFESSION OF JUDGMENT.

1. A married woman, who has confessed judgment, may thereafter show that the debt did not inure to her separate benefit or that of her separate property, and she will be relieved. 23 A. 325, *Duncy, wife, etc. v. M. Cobb & Co.* See No. 7.

2. The amount admitted is not a matter of dispute, and the plaintiff is entitled at any time to a decree for the portion of the claim admitted to be due. 24 A. 17, *Conrad v. Burbank*.

3. A judgment confessed in 1868; by a defendant residing in another parish, is an absolute nullity which any one may urge. 24 A. 277, *Bush & Gord v. Chapman*.

4. Defendant having confessed owing the account sued upon, in a court not having jurisdiction of his person, the confession may be used to obtain judgment before a court of competent jurisdiction. The only prescription after such confession is that of ten years. 29 A. 160, *Payne v. Furlow*.

5. Neither citation nor default is necessary to the validity of a judgment based on a confession of defendant. 29 A. 557, *Marbury v. Pace*.

6. An attorney at law has not, *as such*, authority to confess judgment. He must be specially authorized. 29 A. 600, *Edwards v. Edwards*.

7. A married woman cannot, so as to bind her or her property, confess a judgment for a debt of her husband or of the community. 29 A. 600, *Edwards v. Edwards*; 3 N. S. 498; 2 A. 3, 806; 12 A. 350; 14 A. 165; 15 A. 628. See No. 1.

8. A consent judgment decides nothing. 15 A. 225, *Michie v. Arnat*. See I. No. 5.

9. A married woman who confesses judgment without being authorized to defend the suit, may enjoin the execution and show that the debt was due by the community. 28 A. 840, *Strother v. Hamlet, sheriff*; 758; 23 A. 323.

10. See ESTOPPEL, No. 7.

11. Parol and written evidence are admissible to prove the authority of the president of a corporation to confess judgment when the charter is silent. See EVIDENCE, IX. (a), No. 16.

12. The father and mother cannot confess judgment out of their domicile. See MINORS, III. (a), No. 1.

13. A defendant in a petitory action, who disclaims title and does not deny the allegation of the petition, confesses judgment. See PETITORY AND POSSESSORY ACTIONS, II. (b), No. 1.

14. If the police jury could not issue the warrants, they cannot confess judgment for the same. See POLICE JURY, No. 24.

XI. OF THE NULLITY OF JUDGMENT.

(a) *In general.*

1. A direct action of nullity is the only remedy to correct an error in an award of arbitrators once acquiesced in by the parties. 15 A. 679, *Peniston v. Somers*.

2. A judgment appointing a dative tutor, without bond, is not an absolute nullity, and cannot be attacked collaterally. 25 A. 54, *Succession Firmerger*.

3. A proceeding by rule is not proper to have judgments for taxes annulled and the inscriptions erased. 27 A. 666, *Mrs. Lefranc, ex parte*. See XV. (c), 3), No. 5.

4. A judgment rendered on notes given for slaves is void *ab initio*. A mortgage resulting from its registry will be erased on rule. 25 A. 226, *Consolidated Association v. Blanc*. See (b), Nos. 7, 8, 9.

5. The city of New Orleans being under complete dominion of the military, it was competent for them to give authority to the judge of one district to try cases in another. 18 A. 506, *Lanfear v. Mestier*.

6. An absentee, who held property of the judgment debtor by simulated title, was made co-defendant in an action to have the property subjected to the judgment; if he had no knowledge of the attachment suit he may sue for the nullity of the judgment, and show that no debt existed either for the whole or a part of the sum for which judgment was obtained. C. P. 614; 18 A. 735, *Keith v. Renard & Co.*; 9 L. 79; 10 R. 401; 4 A. 135; 5 A. 400.

7. A court, in 1866, could not render a valid judgment against a defendant who was not a resident of the parish, and such judgment is an absolute nullity. 24 A. 515, *Alter v. Pickett*; 21 A. 258, *State ex rel. v. Watkins*; 550, *State ex rel. v. Head*; 23 A. 257, *Richardson v. Hunter*. See COURTS, II. (g), 1), Nos. 2, 3, 9.

8. A judgment obtained by attachment on property not owned by defendant, and without citation on the latter who resides in another parish in this State, cannot be considered as a personal claim against him. 24 A. 353, *Succession Durand*. See COURTS, II. (g), 1), No. 10.

9. Where the tutor was indebted unto the minors, the judgment homologating his account cannot be annulled by his creditors, but they may reduce the amount if they show that the whole sum allowed is not due. 5 A. 715; 19 A. 191, *Fendler v. Daigre*.

10. A judgment rendered against both partners on a citation served on one only, in a partnership not alleged or shown to be commercial, is an absolute nullity as against the partner not cited. 21 A. 27; 23 A. 421, *Stevenson v. Riser*. See PLEADING, I. (c), 7), No. 4.

11. The discovery, after judgment, of a better defense, will not be a good cause of nullity. C. P. 607; 22 A. 620, *Merchants' Mutual Insurance Company v. Pointer*.

12. An action of nullity does not preclude an appeal from the judgment sought to be annulled. 24 A. 168, *Cockfield v. Tourres*.

13. One entitled to the legal tutorship, may, by timely proceedings, be appointed, but he cannot, on his claim of preference, sue for the nullity of the appointment of another as dative tutor. 26 A. 704, *Markham v. Schardt*.

14. The purchaser of property, with the condition that whatever judgment should be rendered against the vendor in a pending litigation, should be paid by the purchaser as part of the purchase price, does not authorize the purchaser to plead to the consideration of the judgment. 26 A. 566, *Mithoff v. Bohn*.

15. Plaintiff in injunction, who sues for the nullity of a judgment, for want of citation, must prove the want of citation. 28 A. 681, *Stoddart Howell v. City of New Orleans*.

16. MORGAN, J., *dissenting*: There being no evidence of a citation in the record, the injunction should be perpetuated. *Ib.*

17. A judgment obtained against an executor who abandoned his trust to join the Confederate army, and who therefore became *functus officio*, is null. 28 A. 377, *R. O. Hebert v. Jackson, sheriff, et al.*

18. Where the police jury has acquiesced in the judgment, it cannot be annulled at the suit of the tax payers who enjoin the same. 28 A. N. R., *O'Connor et als. v. Favrot et als.* See No. 24.

19. A judgment rendered on a prescribed note, is not null. 29 A. 698, *Gillis v. Carter*.

20. A judgment of the Supreme Court rendered for or against an unrepresented dead person, is an absolute nullity. 29 A. 647, *Edwards v. Whited*. (*This decision contains the rules of the Supreme Court relative to the making proper parties in case of death pending the appeal.*)

21. A judgment obtained against a married woman may be partly annulled for defect of citation on the husband even if, in the petition for an injunction, it be admitted that the citation was properly served. 30 A. 120, *Reardon v. Moriarty*.

22. A judgment rendered in the State courts against a defendant who was cited only through a *curator ad hoc*, and who never appeared in the suit personally or by attorney, will be held invalid and without any binding effect in the courts of the United States. 23 H. 132, *Flowers v. Foreman*.

23. For nullity of judgment decreeing alimony, see ALIMONY, No. 4.

24. Based on citation addressed to the agent. See CITATION, I. No. 15.

25. An acquiescence in the judgment debars an action of nullity. See ESTOPPEL, No. 5.

26. Not the execution. *Ib.* No. 6.

27. Nor payments made by a married woman. *Ib.* No. 7.

28. The judgment attacked in nullity can not be pleaded as *res judicata*. See XV. (a), 1), No. 12.

29. Effect of a voluntary execution of the judgment. See XV. (c), 2), No. 2.

30. A judgment cannot be pleaded as *res judicata* and its nullity averred at the same time. See XV. (e), No. 2.

31. The judgment appointing a tutor can not be annulled because some one else had a better right. See MINORS, I. (b), No. 6.

32. A direct action is necessary. See NULLITY, I. No. 3.

33. An appeal does not interrupt the prescription of the action in nullity. See NULLITY, I. No. 5.

34. The action should be instituted within one year from the discovery of the fraud. See NULLITY I., No. 6.

35. For prescription of the action, see PRESCRIPTION, III. (c), 5).

(b.) *Grounds of nullity; and sufficiency of the allegations and evidence.*

1. If plaintiff has been guilty of laches, his suit for the nullity of the judgment must be dismissed, 18 A. 280, *Millaudon v. Gordon*.

2. A judgment rendered at a time when the city was under military occupation, will not be annulled simply because the defendant was not represented by counsel. It was his duty to be present. 18 A. 507, *Lanfear v. Mestier*.

3. To annul a judgment, a case must be exhibited which would make it against good conscience to execute the judgment, matter of which the injured party could not have availed himself, or was so prevented by fraud or accident. The matter must be such that the party, by the use of reasonable diligence, could not have known before; for, if there be laches or negligence, that destroys the title to relief. 18 A. 507, *Lanfear v. Mestier*; 8 L. 101; 2 L. 180; 15 A. 273.

4. A judgment of non-suit maintaining the plea of *lis pendens*, will not be annulled, where plaintiff, by reason of his negligence, failed to prove that the suit set up was discontinued. 28 A., *Brand v. Stafford*.

5. A petition to annul a judgment and sale thereunder as simulated, should contain allegations that the acts complained of operated to the prejudice of the plaintiff, who is a creditor. 26 A. 711, *Gillis v. Dansby*.

6. Where the record shows no judgment by default, and a judgment *in solido* against the husband and wife, who failed to appear, and nothing shows the wife to have been authorized by the husband or of the court, the judgment will be annulled. 19 A. 147, *Washington v. Hackett*.

7. One in possession of land seized by virtue of a judgment against a previous owner, may enjoin its seizure and set up the slave consideration on which the judgment is based, even if the delays to bring an action in nullity have elapsed. Articles 127 and 128 of the constitution of 1868 must be construed with article 149, Code Practice, therefore the court is bound to maintain the injunction. 23 A. 650, *Smith v. Henderson*. See (a), No. 4.

8. WYLY, J. *dissenting*: The judgment is final and cannot be annulled. *Ib.*

9. A judgment rendered in 1866, affirmed by the Supreme Court in 1869, with damages for a frivolous appeal, rendered on notes given for the price of a slave, should be annulled, even if all the allegations of the petition for nullity were known previous to judgment, and more than a year had elapsed from the rendition of the judgment to the bringing of the suit in nullity. 25 A. 520, *Lindstream v. Ewing*; 21 A. 683, *Ewing v. Root*. See (a), No. 4.

10. Where a case was regularly taken up, plaintiff being represented by an attorney whom the defendants and the judge believed represented plaintiff, a judgment in favor of defendants will not be set aside, when attacked for fraud or ill-practice. 25 A. 462, *Yeatman, executor v. Louisiana State National Bank*.

11. The appearance, without authority, by an attorney in behalf of the defendant, being ratified by his subsequent employment to defend the suit, cannot form the basis of a action in nullity. 25 A. 588, *Mills v. Wansley*.

12. A judgment confessed by the president of a corporation, with the authorization of the board of directors, will not be annulled, if plaintiff was not aware of its insolvency. 26 A. 633, *Killgore v. Nicholson*.

13. Where the proceedings for the emancipation of the minor have been regularly carried on, and no fraud is alleged or shown, the decree cannot be annulled. 28 A., *C. Dupré, wife of Humphreys v. Adolph Dupré et als*.

14. It is a good ground to oppose the homologation of the deliberations of a family meeting, if the members were not unanimous, but not one to annul the judgment. See MINORS, VII. No. 2.

15. The insufficiency of the evidence is not a ground of nullity. See NULLITY, I. No. 7.

16. Where a judgment may be annulled for vices of form, see NULLITY, I. No. 8.

17. When, in other cases, see NULLITY, I. Nos. 9, 10, 11.

18. *Res judicata* cannot be maintained against the action. NULLITY, I. No. 12.

19. The action must be a direct one. *Ib*, No. 13.

20. For other grounds of nullity, see NULLITY, I. No. 14, *et seq*.

(c) *By what court the nullity may be declared; the parties and decree.*

1. In order to annul a judgment, a direct action of nullity must be instituted in the same court which rendered the judgment, but when an action of nullity is made, the basis of another action in another court, the party sued may plead in defense, the nullity arising from the want of proper parties. 15 A. 279, *Clarke v. Hebert*. See XV. (e), No. 1.

2. The court which rendered the judgment, has alone jurisdiction of an action to annul it. 21 A. 165, *Butman v. Forshay*; 2 A. 493.

3. To the action of nullity, none can be parties except those who were parties to the judgment sought to be annulled. 15 A. 273, *Winn v. Dickson*.

4. A judgment cannot be annulled unless all the parties to it are cited. 26 A. 156, *Willis v. Peet*; 23 A. 569, *Bell v. Silbernagel*.

5. A judgment creditor of an insolvent estate may sue to annul other judgments against the same estate. 28 A. 587, *Cavaroc v. Fournet, adm'r*.

6. When sued for the recovery of property, defendants may attack the validity of the will which forms the basis of the action, in a collateral manner. 2 H. 619, *Gaines v. Chew*. See DONATIONS, VI. (e), 1).

7. The parish court cannot annul the judgment of a district court. See COURTS, II. (f).

8. None except the original, can be parties to an action in nullity. 15 A. 273, *Winn v. Dickson*.

9. What defense will be of no avail in the district court. See MORTGAGE, VII. No. 16.

XII. OF JUDGMENT AGAINST CO-OBLIGORS.

1. Where one of the partners composing the defendant partnership is alleged to be unknown, judgment cannot be rendered against the firm, so far as concerns the unknown partner; but if the latter appeared and filed an answer, he is bound by the decree. 15 A. 320, *Grieff v. Kirk*.

2. The judgment dissolving an injunction, and condemning the principal, should also be rendered against the surety on the injunction bond *in solido*. 22 A. 417, *Garcia y Mora v. Avery, sheriff*.

3. The registry of a judgment rendered against two parties, without mentioning "*in solido*," will be construed as a joint obligation; reference to the record is not permissible. 23 A. 133, *Graves v. Hunter*. See REGISTRY, II. (a), 1), No. 6; (c), No. 11.

4. Where several persons are sued *in solido*, and judgment, is rendered against only one, he cannot complain. 28 A. 403, *Richard Francis v. Marie Louise Martin*.

5. One of the co-obligors, who pays the judgment may issue immediate execution against the others for their part of the debt. See PAYMENT, II. (b), 1), No. 8.

6. And so with a second indorser as regards the first. See PAYMENT, II. (b), 2), No. 5.

XIII. OF PERSONAL JUDGMENTS IN COURTS OTHER THAN THOSE OF THE STATE.

1. A decree rendered by the vice chancery court of Mississippi, upon default, and without notice or citation, or appearance of the defendant, is absolutely void. 15 A. 2, *Morris v. Bailey*.

2. No recovery can be had here on a judgment rendered in the State of Mississippi, when the judgment is barred by the statute of limitation in that State. 15 A. 281, *Mandeville v. Huston*. See acts of 1846.

3. To give effect to a judgment rendered in another State, the whole record must be produced. 18 A. 681, *Hockaday v. Skeggs*.

4. Under the constitution of the United States, a judgment which is conclusive against the defendant in any State of the union, must be so in Louisiana. 23 A. 80, *McLaren & Co. v. Kehler*; 18 A. 682.

5. The court will presume the judgment of another State, duly certified, to be valid. 24 A. 222, *Graydon v. Justus*.

6. If a judgment of another State, which is the foundation of a suit matured to judgment in our court, be reversed by an appeal taken from it, the judgment here obtained should be also set aside, and money paid forcibly under execution issued thereunder should be reimbursed. 25 A. 668, *Howard, Preston & Barnett v. Simmons*. See PAYMENT, I.

7. WYLY, J., *dissenting*: The plaintiffs in injunction have not demanded the nullity of the judgment here. *Ib.*

8. If one has obtained a judgment against an administrator in one State, he cannot institute suit upon this judgment against another administrator of the same succession in a different State. The judgment against the first administrator is *res inter alias acta* as regards the second administrator and the property confided to his care. 6 H. 44, *Stacy v. Thrasher*.

9. A statute of New York provides, that, "where joint debtors are sued, and one is brought into court on process, he shall answer the plaintiff; and if judgment shall pass for plaintiff, he shall have judgment and execution, not only against the party brought into court, but also against the other joint debtors named in the original process, in the same manner as if they had all been taken and brought into court by such process," *Held*: That a suit could not be maintained in Louisiana upon a judgment recovered under the provisions of this statute, so far as related to those defendants who were not served, or who did not appear in the court of New York. 11 H. 165, *D'Arcy v. Ketchum*.

10. There is no privity between administrators deriving their commissions to act from different political sovereignties; but executors stand upon a different footing, and a judgment against an executor in one State is *prima facie* evidence of the debt in a suit against another executor of the same testator in a different State. 13 H. 458, *Hill v. Tucker*.

11. A denial, that plaintiff obtained a valid judgment, is not sufficient to compel plaintiff to offer the statutes of that State in evidence. See PLEADING, V. (b), 5), B. No. 8.

12. When prescription in this State is interrupted by a foreign judgment, see PLEADING, IV. (c), 1), No. 1.

XIV. OF JUDGMENTS IN REM; AND OF COURTS OF ADMIRALTY.

1. Judgments *in rem* may exist without a judgment in personam, and *vice versa*. 22 A. 470, *Ellison v. Iler*.

2. It matters not, that a judgment *in rem* had been obtained against a piece of real estate not affected by the mortgage or privilege; and the creditor may proceed against the one on which the burden rests, without appealing or suing for the nullity of the first judgment. *Ib.*

3. A judgment settling the status of a person, is one *in rem*. See XV. (a), 2), No. 2.

4. Proceedings *in rem*, as in case of an unknown owner, are null, if the owner be present. See PLEADING, I. (c), 9), No. 13.

5. See COURTS, II. (a), Nos. 15, 16, 17; (b), No. 5.

XV. OF RES JUDICATA.

(a) *Identity of the parties and their capacity.*

1) In general.

1. A possessory action being compromised, and possession given to intervenor, on a consent judgment, in a suit where the plaintiff was no party, cannot, as to him, be held to be *res judicata*. 16 A. 136, *Peyton v. Enos*.

2. Where the judgment of separation has been rendered contradictorily, and the husband's assignee was a party to the proceedings, and bound by them, so also is the assignee's vendee at judicial sale of a judgment, against the husband. 16 A. 319, *Spencer v. Rist*.

3. The parties claimed the money due on the life insurance of the deceased; the chancery court, in Hartford, decreed it to one of two claimants who had appeared; a third, the curator of the deceased in this State, brought suit for

the same insurance; the plea of *res judicata* ought not to have been maintained, as the plaintiff was no party to the suit, but payment of the money was a good defense. 22 A. 617, *George Wood, curator, v. Phoenix Mutual Life Insurance Company*.

4. The judgment of separation, which forms the basis of a *dation en paiement*, may be pleaded as *res judicata* against a creditor, who attempted, but failed to seize the property so given in payment. 23 A. 550, *Denville v. Hays*.

5. A judgment cannot be *res judicata* between a plaintiff and a third person, no party to the suit, and the latter, in possession of the property which has been decreed to belong to plaintiff, has a right to collect the rents until his title be decreed null. 24 A. 111, *Peters v. Spitzfaden*.

6. The injunction obtained by the Louisiana National Bank, to prevent the city from receiving anything else than cash in payment of licenses, etc., has no effect as to those not parties to the proceedings. 27 A. 493, *State ex rel. Lubie v. Administrator Finance, etc.*

7. The pendency of an injunction against the auditor, to which relator is not a party, can be of no effect as to him. 28 A. 47, *State ex rel. Mentz v. Clinton*.

8. The plea of prescription having been overruled, when raised by the defendant, in relation to property in litigation, the judgment becomes *res judicata* as to subsequent purchasers of this property. 25 A. 559, *Pipes v. Norsworthy*.

9. Creditors of the father can properly appeal and contest any claim the heirs of the mother may have on the property of the father; any judgment obtained by the heirs against the father, is not conclusive against the creditors if they are not parties thereto. 28 A. 442, *Thezan v. Thezan*.

10. Although physically different, the parties may be legally identical, and the plea of *res judicata* will hold, as where the warrantor had judgment in his favor, and, subsequently, the defendant's vendor sues him for the same cause of action. 28 A., N. R., *Taylor v. Carroll*; O. B. 45, fo. 64.

11. Two questions must be answered to ascertain the validity of the plea of *res judicata*: What does the plaintiff ask? On what cause does he base his demand? 29 A. 772, *White v. Gaines*.

12. A judgment which is attacked by an action of nullity, within one year of its rendition, cannot be pleaded as *res judicata* to the suit for nullity. 29 A. 599, *Edwards v. Edwards*. See (c), 3), No. 1.

13. Where the whole subject of a controversy has been legally submitted to the tribunals of Louisiana, and decided by them, it cannot be litigated again in the courts of the United States. 22 H. 352, *Jeter v. Hewitt*.

14. A judgment of a Spanish tribunal in Louisiana, rendered whilst that country, though ceded, was *de facto* in the possession of Spain, is binding upon the parties thereto. 8 P. 308, *Keene v. McDonough*.

15. In order that a judgment may constitute a bar to another suit, it must be rendered in a proceeding between the same parties or their privies, and the point of controversy must be the same in both cases, and determined on its merits. If the first suit was dismissed for defect of pleadings, or parties, or a misconception of the form of proceeding, or the want of jurisdiction, or was disposed of on any ground which did not go to the merits of the action, the judgment rendered will prove no bar to another suit. 4 Wall. 232, *Hughes v. United States*.

16. Binding force of the probate of a will on those not parties. See DONATIONS, VI, (e), 1), No. 1.

17. And on those who are parties. See DONATIONS, No. 3.

18. When a judgment acts as an estoppel. See ESTOPPEL, No. 46.

19. The judgment rendered on a petition for an injunction filed by third opponents, who claim the property seized, will be a perpetual bar against the plaintiff in execution, even if her answer be a general denial, coupled with a disclaimer of having ordered the seizure of the property claimed by third opponents. 30 A. 576, *Ledoux v. Burton*.

20. See PLEADING, VI, (c), 2).

2) Estates under administration; heirs and ayans cause.

1. Where the ancestor could not enquire into the validity of proceedings,

which became *res judicata*, as to him, substituting his creditors to his rights in the succession of his mother, who disposed of all her property in favor of the ancestorship, his children are also concluded by the judgment. 16 A. 300, *Gardner v. Montague*.

2. A judgment settling the *status* is not a judgment *inter partes*, but in *rem*, and is evidence of the facts adjudicated, against the world. 26 A. 113, *Caballero v. Maduel, executor*.

3. A judgment rendered contradictorily with the tutrix, will be *res judicata* as to the curator of the minor, who was afterwards interdicted. 26 A. 419, *Succession Sarniquet*.

4. Plaintiff having recovered judgment, to be paid in due course of the administration of the minor's property, cannot sue again on the same claim. 28 A. 898, *Sexton v. McMahon, tutor*.

5. See for tutor's accounts, MINORS, III. (f), 1); 4).

6. A creditor, duly notified, is bound by the judgment homologating the account. See SUCCESSION, VIII. (f), 5, A. No. 1.

3) Sureties.

1. A judgment against the principal is *prima facie* evidence against the surety. 19 A. 458, *Simpson v. Lewis*.

2. The judgment passing on the legality of the writ of arrest, and on the sufficiency of the bond, is binding on the surety for the release of defendant from arrest. 28 A. 885, *Gottschalk v. Meyer*.

3. The judgment which makes no mention of the injunction issued in the suit, cannot be pleaded as *res judicata* to an action for damages on the injunction bond. 28 A. 816, *Sheppard v. Scheene*; 5 L. 87; 9 A. 303; 11 A. 92, 524.

4. The judgment against the principal and also the intervenor, declaring that no fraud is shown between plaintiff and defendant, will not bar the sureties, who were no parties, from setting up such fraud. 30 A. 521, *Carroll & Co. v. Hamilton*.

5. The plea of *res judicata* will not bar the sureties on a bond given to release a sequestration, from showing that the writ wrongfully issued either for want of proper forms, or of a privileged claim, and that the property sequestered did not belong to their principal, when they allege and prove, as they have a right to do, that the judgment against their principal is fraudulent and rendered with his consent. 30 A. 521, *Carroll & Co. v. Hamilton*.

6. The judgment dismissing a rule taken by defendant to set aside a provisional seizure for rent, on the ground that the property seized is exempt, is not *res judicata* as to the surety on a forthcoming bond given to release the seizure. When sued, the surety may set up the same objection. 30 A. 158, *Stewart v. Lacoume*.

7. See PLEADING, VI. (c), 2).

(b) Identity of the thing and cause of action.

1. The dismissal of a suit to be recognized as the owner of two certain pews in a church, cannot be pleaded as *res judicata*, against a subsequent action for the use of said two pews. 16 A. 442, *Cantrelle v. Roman Catholic Congregation of St. James*.

2. A judgment unappealed from, deciding that the name on the citation is truly that of the defendant, with a slight error in the surname, will form *res judicata* to an action in nullity based on the want of citation. 24 A. 174, *Gottlieb Medhart v. Hunterheimer*.

3. The exception of *res judicata* cannot be maintained against one who, for the first time, brings a suit to obtain the relief he prays for. 25 A. 446, *Succession Milton Taylor*.

4. Where the motion to dismiss is refused because the wife was authorized to institute the suit, and afterwards appellant argues that the wife was not properly authorized to institute the suit, the first judgment settles the point. 26 A. 542, *Deblanc v. Levasseur*.

5. The plea of *res judicata* should be maintained where the first suit was to compel the police jury to issue the bonds provided by ordinance as compensation to plaintiff for the destruction of his property by a mob, and a second suit to obtain a judgment in money for the amount of the ordinance. 26 A. 321, *Brady v. Parish of Ascension*.

6. A judgment ordering an intervention to be dismissed, will form the basis of *res judicata* in a direct action by the same plaintiff for the same cause of action. 27 A. 284, *Fluker v. Herbert*; Not approved, 30 A. 729, *Logan v. Herbert*.

7. The claim of a creditor of a succession, established by judgment against the executor, after *contestatio litis*, cannot afterwards be examined at the suit of the heirs, but must be classed as a liquidated debt of the succession. 28 A. 322 *Ncal v. Faggert et. als*; 35 A. 36; 14 A. 231.

8. Where a question was properly involved in a former case, and might have been then raised, and determined, the neglect of a party to avail himself of it will not justify another litigation concerning the same right which was at issue in the previous suit. 18 H. 418, *Stockton v. Ford*.

9. A plea of *res judicata* based on a judgment recognizing plaintiff as the owner of the land in suit, will not defeat a suit in damages brought by the same plaintiff, for the wrongful use of a sequestration sued out in another case by the defendant against the plaintiff in the original suit. 30 A. 359, *Thoms v. Sewell et. al.*

(c) *Judgments of homologation in probate and insolvent proceedings.*

1) In general.

1. A judgment of non-suit dismissing a claim against an insolvent estate cannot support the plea of *res judicata*. 15 A. 130, *Allinet v. His Creditors*.

2. Irregularities in the proceedings ordering a will to be executed, and relative nullities in the title, cannot be enquired into collaterally. 21 A. 419, *Armstrong v. Davis*.

3. A judgment decreeing a partition, and ordering heirs to be put in possession, cannot be treated as an absolute nullity, nor attacked collaterally. 24 A. 270, *Fowler v. Succession of Gordon*.

4. The same principle is applicable to judgments homologating the account of the executor, and discharging him. *Ib.*

5. An act of partition, which is not homologated, cannot form the basis of *res judicata*. 24 A. 488, *Russ v. Woodham*.

6. Where a judgment, fixing the amount due plaintiff in an action of partition, is final, the plea of *res judicata* will be maintained on an appeal from a judgment homologating the partition, and which presents the same question. 21 A. 228, *Gay vs. Marrioneaux*.

7. An opposition to an account cannot be filed if the case on another opposition had been argued and submitted. 22 A. 332, *Succession Hardesty*.

8. Where the account has been homologated without opposition, and no evidence has been reduced in writing to prove the items, the case will be remanded for the purpose of reducing the evidence to writing. 21 A. 511, *Succession Ross*; 16 L. 197, 201; 17 L. 115; 3 A. 554; 4 A. 517.

9. Proof of the correctness of the account should be made, to obtain its homologation, although no opposition be filed thereto. 29 A. 327, *Succession Cloney*.

• 10. A tableau cannot be homologated without proof of the items. 27 A. 667, *Succession Haggerty*; 27 A. 131, *Succession Darville*; 21 A. 511; 28 A. 154, *Succession Bellocq*; 29 A. 521, *Succession Planchet*; 712, *Succession Bofenschen*; 30 A. 270, *Succession Dougart*. See SUCCESSION, VIII. (f), 4), No. 12.

11. Where property has been adjudicated, upon the death of the husband to the wife, as the surviving spouse in community, on the advice of a family meeting, homologated by the decree of a court of competent jurisdiction, and where the child of the deceased was a party to the proceedings, and represented in the mode pointed out by law, such adjudication is conclusive upon the child

as a party to the proceedings, until it shall be reversed or annulled, either by appeal or by direct action of nullity. 15 A. 501, *Holmes v. Dabbs*.

12. The judgment homologating the account, liquidating the commission of the executor, cannot be pleaded as *res judicata* to a suit on a note given by the universal legatee in payment of such commission. 27 A. 624, *Wells v. Alexander*.

13. The plea is good as to items contained in the provisional account, appearing on the final account. See 3), No. 6.

14. Two judgments cannot be rendered, the one dismissing an opposition to an account, and the other homologating the account; only one judgment can be rendered for both purposes. 29 A. 522, *Succession Planchet*.

15. If a creditor who is a citizen of one State voluntarily makes himself a party to proceedings under the insolvent law of another State, and his debtor obtains a discharge in such proceeding, the debt is released. 3 P. 411, *Clay v. Smith*.

16. Where a will is duly probated by a State court of competent jurisdiction, the probate is conclusive of the validity of the contents of the will in the courts of the United States. 6 Wall. 642, *Gaines v. New Orleans*.

17. A probate of a later will, necessarily annuls the probate of an earlier will of the same testator, and this without an express judgment of nullity. 6 Wall. 642, *Gaines v. New Orleans*.

2) Parties concluded by the judgment; of citation and notice.

1. Where the tableau of distribution has been homologated contradictorily with the heirs, they are only entitled to the residuum, and the judgment of homologation concludes them. 19 A. 488, *Succession Mrs Bachemin*.

2. The liquidator who voluntarily executes the judgment dismissing him from his trust, by turning over the assets, cannot question the judgment afterwards. It is *res judicata*. 20 A. 285, *Canal and Banking Company v. Lizardi*.

3. The warrantor against whom judgment was rendered in favor of the defendant, not having appealed, the judgment becomes *res judicata* as to him, although the judgment against the defendant was modified on his appeal. 19 A. 456, *Simpson v. Lewis*. See APPEAL, VII. (c).

4. A judgment in favor of the drawer, dismissing the endorsee's petition, will not be *res judicata* in an action brought by the payee on the same note. 20 A. 396, *Wells v. Coyle*.

5. The plea of *res judicata* cannot be maintained where plaintiff sues defendant as partner of the firm who were indorsers, and the judgment set up, as the basis of the plea, was between other parties and for another cause of action, involving the question of partnership. 21 A. 358, *Slocomb v. Lizardi*.

6. The minor is not concluded by the homologation of the tutor's account, rendered contradictorily with the under tutor. See MINORS, III. (f), 4), No. 3.

6. An account homologated, so far as not opposed, necessarily approves the same so far as creditors who have not opposed the same. 18 A. 59, *Succession Egana*.

7. An opposition should not be filed after the homologation of the account so far as not opposed. 27 A. 329, *Succession Brown*; 23 A. 528; 20 A. 359; 1 L. 371; 22 A. 332; 3 A. 383.

8. A judgment homologating an account after three days and before the expiration of the ten days granted by the notice issued by the clerk to opponent, is a nullity, and the opposition thereto may be filed within the delay allowed, without having said judgment annulled. 2 A. 492; 20 A. 68, 75; 25 A. 332, *Succession Hogan*; 23 A. 298, *Succession of Cordeviollé*.

9. A judgment homologating the account, so far as not opposed, will not bar a supplemental opposition specifying the items opposed, when the first opposition previous to judgment, opposed the items generally. 26 A. 610, *Succession Cabrol*.

10. ON REHEARING: One who assumes the payment of a mortgage note is

not bound by the decision rendered after his transfer in a suit against the original mortgager, and to which he is no party. 28 A. N. R., *Taylor v. Carroll*.

11. See SUCCESSION, VIII. (f), 4).

3) Matters concluded by the judgment.

1. The order for executory process is not *res judicata*, as to an action for the nullity of the order and of the proceedings thereunder. 19 A. 158, *Humphreys v. Browne*. See (a), 1), No. 12.

2. The judgment on the oppositions to the liquidator's account, being final, on a rule to show cause why the funds should not be paid, the liquidator cannot urge defenses he might have pleaded before judgment. 21 A. 156, *State v. Clinton and Port Hudson Railroad Co.*

3. A judgment rendered without objection, on an opposition, and deciding the issue raised in a subsequent action, forms *res judicata*, although the issue could have been raised only in a direct action. 24 A. 104, *Bodetchel v. Frelinghuysen*.

4. A judgment dismissing the opposition of a privileged creditor, to the regularity of the proceeding for a respite, is not *res judicata*, as to the question of privilege. 24 A. 360, *Huppenbauer v. Durlin*.

5. The plea of *res judicata* should be maintained against a rule taken to erase and cancel tax judgments and their registries, on the ground that the property taxed is exempt; the tax judgments decided the question. 28 A. N. R., *City of New Orleans v. George W. Campbell*.

6. An account duly homologated, after opposition thereto, will be *res judicata* as to the same items placed on the definitive account. 27 A. 587, *Succession Hasley*. See 1), from No. 7.

7. A judgment of the admiralty court rendered for debts due by a boat, cannot be pleaded as *res judicata*, to a suit based on an indemnity bond, to secure plaintiff, who was defendant in the admiralty court, against such claims as were made. 28 A. N. R., *Lawson v. Kouns & Moran*.

8. The plea of *res judicata*, should be maintained when the identity of defendant was passed upon in a suit to revive the judgment, and sought again to be raised in an injunction against a seizure of his property. 28 A. 893, *Verneuil v. Harper, sheriff*.

9. Judgment was rendered by the Circuit Court of the United States, for Louisiana, on a vendor's privilege and mortgage, declaring it to be the first lien and privilege on the land, and the marshal sold the property clear of all prior liens, and the mortgagee purchased, and paid into court for the benefit of subsequent liens, the surplus of his bid, beyond the amount of his own debt. This judgment and sale were set up by way of defense, to a suit brought in the State court by another mortgagee who claimed priority to the first mortgage, and who had not been made a party to the suit in the Circuit Court. The State court held that the plaintiff was not bound by the former judgment, on the question of priority, not being a party to the suit. The case was brought to the Supreme Court of the United States, by writ of error, and this court held that the State court did not refuse to accord due force and effect to the judgment; that such a judgment in the State courts would not be conclusive on the point in question, and the judgment of the Circuit Court could not have any greater force or effect than judgments in State courts. 21 Wall. 130, *Dupasseur v. Rochereau*.

10. A creditor of a succession claimed title to a part of the proceeds of a life insurance policy of the deceased, on the ground that the policy had been pledged to him to secure a debt due him from the testator, but his claim was rejected by the court, on the ground that there had been no delivery of the pledge; *Held*: That this decision was no bar to a bill in equity, to enforce a specific performance of the contract, to deliver the pledge and for a decree for so much of the proceeds of the policy as might be necessary to pay the complainant's claim. 2 Woods, 160, *Myers & Levy v. Executors of D'Meza*.

(d) *Form of proceeding and finality of judgment.*

1. A certificate of division of opinion of the judges in the Circuit Court of the United States, accompanied by a statement of facts to serve as the basis for

an appeal to the Supreme Court of the United States, is not a final judgment which will support the plea of *res judicata*. 15 A. 379, *Anderson v. Valentine*.

2. The overruling of an exception before issue joined, is not *res judicata*, on the matters at issue; in the meantime the court may revise interlocutory decrees rendered in the course of the proceedings. 15 A. 38, *Levy v. Wise*.

3. The decision on a rule, of the same questions presented by a new suit, will be held as *res judicata*, between the same parties. 29 A. 291, *Osborn v. Legras*.

4. A decree of the first alcalde of New Orleans, while the city was under the dominion of Spain, ordering the probate of a will, cannot be impeached collaterally. 18 H. 470, *Fonvergne v. City of New Orleans*.

5. The judgment of a justice of the peace, cannot be pleaded as *res judicata*, to a petitory action. 28 A. 793, *Walmsley v. Robinson*.

6. The mere dismissal of a rule must be considered as a judgment of *non-suit*, and cannot be pleaded in bar to a second rule based on the same grounds of action. 16 A. 195, *Succession Andrew*.

7. A judgment of non-suit cannot support the plea of *res judicata*. 15 A. 130, *Allinet v. His Creditors*.

8. The reasoning and the opinion of a court, upon a subject on the evidence before it, does not have the force and effect of the thing adjudged, unless the subject matter be definitely disposed of by the decree of the court. 17 A. 104, *Davis v. Millaudon*; 5 A. 200; 4 A. 206; 15 L. 485; 6 Wheaton, 109.

9. The plea of *res judicata*, will be maintained when the rights of the litigants have been passed upon, although under the form of an intervention. 22 162, *J. R. Shelton v. B. M. G. Brown*.

10. A judgment dismissing the action on the ground that plaintiff did not appear to prosecute the same, cannot be pleaded as *res judicata*. It is not essential that the words as of non-suit should have been added. 23 A. 101, *Succession of Conrad Forster*.

11. Judgment having been rendered, but not signed, on defendant's exception, dismissing plaintiff's action, a new action was brought to which the plea of *res judicata* was opposed; Held: That the plea should have been maintained. 23 A. 619, *Consolidated Association of the Planters v. Mason*.

12. Where the same question presented by a suspensive appeal from a judgment maintaining the plea of *res judicata*, is pending before the court in a devolutive appeal, it will be useless to maintain the plea. 24 A. 186, *Newell v. Buckner*.

13. A reconventional demand not passed upon by the court in New York, and which does not form *res judicata* there, cannot be pleaded as such, here. 24 A. 397, *Glass v. Wheelles*.

(e) *Its interpretation and effect; and other matters.*

1. A judgment appointing a tutor, rendered by a court of competent jurisdiction, cannot be attacked directly or collaterally, before any other court than the one by which it was rendered. 15 A. 27, *Succession Garrison*.

2. A judgment cannot be pleaded as *res judicata*, and its nullity averred at the same time. 19 A. 457, *Simpson v. Lewis*.

3. The dissolution of an injunction obtained to prevent the sale of property; does not form *res judicata* as to its ownership. 20 A. 85, *Peters v. Fralinghouse*.

4. The effect, as regards creditors, of the judgment annulling the sale made by their debtor as fraudulent, is the same, whether pronounced in a direct revocatory action, or in an injunction suit arising out of the seizure of the property by one of the creditors. 15 A. 531, *Ross v. Pritchard*.

5. Isolated expressions, intimating doubts in regard to the issue, cannot control the decretal force of a final judgment, which is *res judicata* whenever rendered between the same parties, acting in the same capacity, and for the same cause of action. 24 A. 34, *Succession McDonough*.

6. An entry in the minutes showing what disposition had been made of a part of the case, may be made subsequent to the discontinuance of the suit; and said entry may form the basis of the plea of *res judicata*. 26 A. 236, *Hardy v. Stevenson*. 25 A. 115; 28 A. N. R. *State v. Williams*.

7. The judgment having become final, the consideration of the obligation cannot be enquired into. 28 A. 99, *Howard v. Waggaman*.

8. The sale of the judgment debtor's property under the judgment, extinguishes the judgment so far as the property sold is concerned. 29 A. 315, *Adams & Co. v. Daunis*.

9. Effect of an answer by one who is not a party and who is condemned. See ESTOPPEL, No. 41.

XVI. HOW REVIVED AND OBJECTIONS THERETO.

1. Whether the judgment sought to be revived was rendered on insufficient evidence or not, is a question foreign to the issue in an action to revive. 21 A. 630; 23 A. 173, *Dogre vs. Moreau and Wife*. See No. 14.

2. To revive a judgment the citation must be served on the *defendant* or his *representative*. A citation on the widow of the defendant, personally, and as *tutrix*, is not valid. 23 A. 180, *Hopegood vs. Dawson*. See Nos. 12, 13.

3. The object of the proceeding is merely to keep in force the judgment, by interrupting prescription, the verity of the obligation sued on is *res judicata*. R. S. 1870, §2813; 23 A. 437, *Carondelet Canal Navigation Company v. Widow de St. Romes*.

4. The court which rendered the judgment is the proper tribunal to revive it, even if the defendant resides in another parish. 23 A. 594, *Watts v. Hendry*.

5. Any person interested may ask the revival of a judgment. *Ib.*

6. A twelve months bond taken by virtue of the execution of the judgment, when the same remains unpaid, does not novate the judgment, which remains still in force. *Ib.*

7. Drafts taken by the judgment debtor in satisfaction of the judgment when paid, if disposed of, vacates and extinguishes the judgment, which cannot be revived. 24 A. 199, *Woolfolk v. Degelos et. als.*

8. Two judgments in favor of the same plaintiff and against the same defendant may be revived by the same petition. 25 A. 141, *Carroll, Hoy & Co. v. Seippal*.

9. The institution of a suit for the amount due by the judgment debtor, in another court, does not interrupt the prescription of the first judgment, and the second suit should be dismissed when the ten years since the rendition of the judgment have elapsed. 27 A. 51, *Samory v. Montgomery*.

10. Suit for a revival must be brought before the court, which rendered the judgment, although the defendant be dead, and citation be issued against his succession. 28 A. 896, *New Orleans Canal and Banking Co v. John R. Pike*.

11. In a suit to revive, the certified copy of the judgment from the mortgage office, without showing the loss of the original, is not sufficient. 21 A. 639, *Dogre v. Moreau and Wife*.

12. Citation on the discharged bankrupt to revive the judgment, is null, and does not interrupt prescription. 27 A. 251, *Alter v. McCullen*; 25 A. 554, *Kennedy v. Rust*; 25 A. 600, *Brigham v. Norsworthy*. See No. 2.

13. To revive a judgment against a discharged bankrupt, the citation must be served on the assignee. 27 A. 242, *Alber v. Nelson & Co.* See No. 2.

14. In a suit to revive a judgment, no plea nor evidence will be entertained to assail its validity. 29 A. 69, *Nelson & McStea v. Rotchford, Brown & Co.*; 23 A. 173, 437; R. S. 2813. See Nos. 1, 19.

15. A judgment of separation, and for a sum of money, is null, when revived twelve years after its rendition. See MARRIAGE, XIII. (b), 2), No. 11.

16. A judgment rendered without citation, or appearance of, the defendant, cannot be revived. 30 A. 363, *Laurent v. Beelman*.

17. A judgment signed in chambers cannot be revived. 30 A. 363, *Laurent v. Beelman*.

18. A judgment of revival does not validate a judgment absolutely null. 29 A. 69, *McStea v. Rotchford, Brown & Co.*; 30 A. 499, *Evans v. Payne & Harrison*.

19. A judgment rendered on the confession of the agent of a partnership,

who knew that said partnership was already dissolved, by the death of one of the members, cannot be revived. 30 A. 692, *Conery v. Roitchford, Brown & Co.*

20. MANNING, C. J., *dissenting*: The proceeding for revival is to interrupt prescription, no other issue should be raised. *Id.*

21. Judgments rendered previous to 1868, how revived, 1876, p. 128.

22. A defendant may waive citation for a revival, and prescription is interrupted. 30 A. 727, *Logan v. Herbert*.

JUDICIAL.

1. Judicial conventions. See JUDGMENT, X. OBLIGATIONS.
2. Judicial mortgages. See MORTGAGE, V.
3. Judicial sales. See SALE, X.
4. Judicial, as distinct from legislative power. See CONSTITUTION.
5. Judicial admissions and sureties. See EVIDENCE, XII. (j). SURETYSHIP, I. (c).

JUDICIAL DISTRICTS.

1. Change of. See CONSTITUTION, II. (c), 1), No. 21.
2. Limits of, and terms of the Second Judicial District, 1876, p. 86; 1877, E. S., 124. Third Judicial District, 1872, 94; 1873, 55; 1877, E. S., 202. Fourth Judicial District, 1874, 52; 1878, 66. Sixth Judicial District for St. Helena, 1877, 70; 1878, 86. Eighth Judicial District for Calcasieu, 1876, 52; 1878, 31. Ninth Judicial District, 1870, 83; 1871, 165; 1876, 105. Tenth Judicial District, 1871, 152. Eleventh Judicial District, 1873, 52. Twelfth Judicial District, 1874, 51; Winn, 1870, p. 75. Thirteenth Judicial District, 1874, 227. Fourteenth Judicial District, 1870, 39; 1871, 85; 1872, 141. Fifteenth Judicial District, 1871, 153; 1874, 53. Sixteenth Judicial District, 1871, 153; 1872, 99; Lafayette, 1873, 55. Seventeenth Judicial District, 1874, 57; Red River and Sabine, 1872, p. 36; Sabine, 1878, p. 86. Eighteenth Judicial District, 1871, p. 58.

JUDICIAL SEQUESTRATOR.

See SEQUESTRATION, II. (e); I. No. 1.

JURISDICTION.

See COURTS, II.

JURY.

I. OF THE RIGHT TO A TRIAL BY JURY.

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| (a) <i>In general.</i> | (c) <i>Affidavit; on what issues and in what proceedings a jury can be claimed.</i> |
| (b) <i>Time of application; power of court, ex officio, to order; and payment of jury fee.</i> | (d) <i>Effect and waiver of the prayer.</i> |

II. OF THE COMPOSITION OF THE JURY AND THE PROCEEDINGS BEFORE IT.

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| (a) <i>In general.</i> | (c) <i>Qualifications of juror; challenges to the poll; impanneling, completing, and attending the jury.</i> |
| (b) <i>Drawing and summoning jurors; the array; and challenges thereto.</i> | |

III. OF THE CHARGE.

IV. OF THE VERDICT.

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| (a) <i>In general.</i> | (c) <i>Requisites and interpretation of the verdict; its effect and avoidance.</i> |
| (b) <i>Form, rendition and recording of verdict.</i> | |

I. OF THE RIGHT TO A TRIAL BY JURY.

(a) *In general.*

1. Where a suit was brought for defamation of character, and defendant failing to answer, a judgment by default was made final without the intervention of a jury, on *ex parte* affidavits, sworn to before the clerk, some days previous to the trial; *Held*: That a jury ought to have been impaneled to assess the damages; the witnesses ought to have been examined in open court, on the trial, or their depositions taken according to law, should have been offered in evidence. 15 A. 303, *Schewer v. Klein*. See JUDGMENT, IX. No. 19.

2. An injunction against executory proceedings should not be tried by a jury, except under the exceptions contained in article 494, C. P. 26 A. 31, *McCracken v. Wells*; 16 A. 361, *Amacker v. Smith, Harris & Co.* See Nos. 10, 11.

3. Suits against successions, being probate proceedings, cannot be submitted to a jury. 18 A. 140, *Devall v. Succession Watterston*; C. P. 1036, 924, § 13, 983. See SUCCESSIONS, X.

4. Proceedings on oppositions to the homologation of meeting of creditors, in a succession, must be tried without a jury. 10 A. 81, *Guion v. Creditors Succession Guion*.

5. The provisions of the constitution of the United States, relative to trials by jury, applies only to Federal courts. 26 A. 377, *State v. Carro*.

6. The garnishee has a right to submit a rule to cross his answers to a jury. 26 A. 74, *Denouvion v. McNight*.

7. In a contest for office, under act No. 156, of 1868, the defendant has a right to a trial by jury. 21 A. 550, *State ex rel. v. Head*; 23 A. 606, *State ex rel. v. Gilmore*. See No. 16.

8. Under the intrusion act, defendant is entitled to trial by special jury, but he must pray for the same before the case is fixed. 28 A. 49, *State ex rel. Dumas v. Carey*. See No. 16; (b), Nos. 1, 2, 3.

9. A suit for taxes is a summary proceeding, and is not to be tried by a jury. 27 A. 704, *City v. Cassidy*; 19 A. 82; C. P. 756, 759.

10. When the principal issue is a question of fraud in the execution of the mortgage, the judge should grant a trial by jury, when prayed for by plaintiff in injunction against the executory process, changed into *via ordinaria* by the answer. 28 A. 543, *Cormier v. Soye*. See No. 2.

WYLY, J., *dissenting*: The suit was upon a promissory note, and it is not alleged that it was obtained through fraud, error, or want of consideration. *Ib.*

12. When a jury has been ordered, in the absence of plaintiff from the trial, defendant cannot insist on a trial without the jury. 28 A. 815, *Warfield v. Hamlett, sheriff*.

13. When plaintiff and defendant agree to have their case, involving questions of bookkeeping, tried before a special jury of merchants, the court cannot refuse their request. 28 A. 674, *W. P. Kellogg, governor v. Charles Clinton*.

14. The legislature may provide that when the jury does not agree in a case for damages, instituted by a colored man, by reason of discrimination between whites and blacks in places of public resort, that the judge shall decide the case. 27 A. 16, *Sauvinet v. Walker*. See acts 1871, p. 57.

15. A trial by jury, in cases pending before the State courts, is not a privilege or immunity of national citizenship which the States are, by the fourteenth amendment of the constitution of the United States, forbidden to abridge. 92 U. S. (Otto's), 90, *Walker v. Sauvinet*.

16. In a suit brought under the intrusion act, defendant is entitled to a jury. See INTRUSION IN OFFICE, No. 8.

17. See CRIMINAL LAW, XIII.

(b) *Time of application; power of court, ex-officio, to order; and payment of jury fee.*

1. A trial by jury must be granted when prayed for before the case is set

for trial, in a suit for the value of a house. 18 A. 121, *Simpson v. Richardson*. See (a), No. 8.

2. The prayer for a jury being made after the case has been continued by preference, cannot be allowed. 28 A. 731, *Wheless & Pratt v. F. M. Fisk*.

3. MORGAN and HOWELL, JJ., *dissenting*: The case was continued to be called by preference; the application was made after the continuance, and before the calling, and was therefore in time; the case was not fixed. *Id.*

4. In an action to expropriate land for a railroad or other work of public utility, under the act of 1855, the plaintiffs are not bound to pay the jurors for their attendance. 15 A. 507, *Vicksburg Railroad v. Hart*.

(c) *Affidavit; on what issues and in what proceedings a jury can be claimed.*

1. It is sufficient for a party, sued on a promissory note, to obtain a trial by jury, to swear that all the allegations in his answer are true, where want or failure of consideration are substantially set forth in the answer. 15 A. 536, *Frellsen v. McDonald*.

2. To entitle the defendant, in an action on a promissory note, to a trial by jury, the affidavit must comply strictly with the requirements of the statute. 18 A. 532, *Williams, administrator v. Boozman*.

3. To entitle defendant to a trial by jury, on a suit based on a promissory note, he must swear to his answer, which sets forth want of consideration. 18 A. 129, *Letten v. Durbridge*.

4. To obtain a trial by jury on a promissory note, the defendant must swear that he "expects to prove that the note has been obtained through error." 18 A. 533, *Williams, administrator v. Boozman*.

5. To obtain a trial by jury in a suit on a written lease, defendant must make oath to the truth of the allegations of his answer. 18 A. 260, *Gallot v. McCluskey et al.*

6. There is no issue for a jury to try, where the defendant, who pleads compensation, prays for the same. 22 A. 442, *Ashley v. Scholars*.

7. Defendant has no right to submit his reconventional demand to a jury, when the principal action must be tried without a jury. 26 A. 669, *Pool v. Alexander*.

(d) *Effect and waiver of the prayer.*

1. A garnishee who excepts to the rule to cross his answers, on the ground that he is entitled to a jury, and does not pray for one, waives his right thereto. 26 A. 86, *Foulouze v. Gaines*.

2. Where no bill of exception is taken by plaintiff to the trial without a jury, the court will presume that the trial by jury was waived, although plaintiff was absent from court. 26 A. 541, *Huppenbauer v. Durlin*.

3. If it appears, from the record, that the counsel for all parties were present at the trial of a cause, and that no objection was made to the trial of the case by the court, it will be presumed that the jury was waived. 12 Wall., 275, *Kearney v. Case*.

II. OF THE COMPOSITION OF THE JURY AND THE PROCEEDINGS BEFORE IT.

(a) *In general.*

1. A jury formed before the recorder's court, under a special statute, does not fall under the constitutional clause in respect to an impartial trial by a jury of the vicinage, and any number of jurors may compose the jury that the legislature may deem proper to fix. 15 A. 190, *State v. Gutierrez*.

2. Litigants cannot require a juror, who has been excused by the judge, to be present. 20 A. 458, *Wm. Golding v. Steamer Castro*.

3. Sections 2125 and 2153, Revised Statutes, must be construed together; the special jurors must therefore be qualified voters. 27 A. 86, *Golding v. Petit*.

4. The clerk of a municipal court is exempt from jury duty. 28 A. 65, *State v. A. Newton*.

5. Acts 1873, p. 165; Orleans excepted, 1877, p. 55; jury commissioners for the Superior Criminal Court, 1877, p. 72; in second judicial district, 1877. E. S., p. 184; duty of jurors to attend, their fees, 1878, p. 84; for the fourteenth judicial district, 1872, p. 141.

6. For other special jury law, see the names of the parish for which they have been enacted.

(b) *Drawing and summoning of jurors, the array and challenges thereto.*

1. The jury should be drawn from all the voters, and not a *portion*; therefore the drawing made from a box containing the remnants of the names, after successive drawings therefrom, is not in accordance with law. R. S. sec. 442: 24 A. 259, *Compton v. Legras*.

2. A deputy clerk, a deputy sheriff, and the parish judge, may draw the jury. 25 A. 473, *State v. Jean Gay, fils el als*.

3. Where the jury was drawn by the judge, clerk, recorder and sheriff, all the necessary officers being there, the presence of the recorder does not vitiate the panel. 27 A. 197, *Hunt v. Mayo*.

4. In the organization of juries, it is not necessary for the sheriff to re-fill the box every December; the box must be exhausted before being re-filled. 29 A. 30, *Gettwerth v. Teutonia Insurance Co*.

5. See CRIMINAL LAW, XIII. (e), 1).

(c) *Qualifications of jurors; challenges to the poll; impanneling, completing and attending the jury.*

1. The challenge of a juror, because he cannot read and write, is not good, where it is not alleged that any injury is suffered. 26 A. 736, *Citizens' Bank v. Strauss*.

2. Each party, in a contested election case, is entitled to ten peremptory challenges. 27 A. 509, *Burton v. Hicks*; R. S. 1429.

3. Ignorance is no legal cause to challenge a juror. 28 A. 84, *State v. Lewis*; 23 A. 14; 25 A. 442. (*In these cases the jurors were held incompetent because they could not understand the language in which the witnesses testified.*)

4. Criminal and coroners' juries, to receive no fees, 1874, p. 117.

III. OF THE CHARGE.

1. Where the charge of the district judge to the jury is such as to mislead the jury upon the facts, the verdict will be set aside, and judgment rendered according to the evidence. 16 A. 44, *Moller v. Gauche*.

2. No testimony being excluded, the whole case goes before the appellate court, which will not pass on a bill of exception to the refusal of the judge to charge the jury as requested. 23 A. 75, *Ayland v. Rice*; 21 A. 330; 22 A. 603.

3. The jury are the judges of the law and facts; there is no error to add to the above in charging the jury that the discrepancy between the account sworn to and the proof on the trial, is evidence of the intention of the insured to defraud the insurance company and a forfeiture of the policy and its benefits. 28 A. 689, *Marx Israel v. Teutonia Insurance Company*.

4. If there be no evidence to support facts assumed in a prayer for a charge to the jury, it is the duty of the judge to reject the prayer. 20 Wall. 159, *Insurance Company v. Baring*.

5. The judge should charge that possession after the sale is a presumption of fraud. See OBLIGATIONS, VII. (b) 2), c. § 3, No. 1.

IV. OF THE VERDICT.

(a) *In general.*

1. If no evidence be given of particular damages, the jury are not therefore bound to find nominal damages only. 15 A. 337, *Burkett v. Lanata*.

2. If plaintiff's case be fully made out, the jury must not disregard the evidence. 19 A. 74, *McWilliams v. Corporation of Plaquemines*.

3. In questions of fact the verdict of the jury is entitled to great weight, and will not be disturbed unless manifestly erroneous. 20 A. 455, *Golding v. Steamer America*; 458, *Same v. Steamer Castro*; 22 A. 31, *Fisher v. Hyland*; 6 L. 31, 492.

4. When the judge of the lower court is satisfied that the verdict of a jury is wrong, it is his duty to grant a new trial, and not deprive the party of a trial by jury by rendering an improper judgment, with the view of having it reversed on appeal. 25 A. 114, *Adams v. Webster*; 25 A. 374, *Halliday v. Lanata*.

5. The jury may be locked up during Sunday. See *MANDAMUS*, I. (a), 2), No. 18.

(b) *Form, rendition and recording of the verdict.*

1. A substantial compliance with article 522, C. P., such as "we agree to give to, instead of "verdict for," is sufficient on the part of the jury. 17 A. 166, *Wichtrecht v. Fasnacht*.

2. A verdict rendered on Sunday, in presence of the judge, and of the parties, and reiterated on Monday in open court, is valid. 29 A. 213, *Cooper v. Capel*.

3. A verdict against each partner for his share, is not a departure from the petition, which claims a judgment *in solido* against ordinary partners. See *PLEADING*, V. (a), 5), No. 6.

(c) *Requisite and interpretation of the verdict; its effect and avoidance.*

1. The appreciation of the circumstances, showing complicity on the part of the vendee, in the fraud practiced by his vendor, is a matter peculiarly within the province of the jury; and where the record of conviction of fraud and simulation in a contract of sale, discloses the fact that the property remained in the possession of the vendor after the sale, the Supreme Court will not disturb the verdict of the jury. 15 A. 616, *Carrollton Bank v. Cleveland*.

2. Where suit was instituted for damages, alleged to have been sustained by the plaintiff, in consequence of the closing of the ditches on his plantation by the building of a railroad, and no evidence was given on the trial from which an estimate of the damages could be formed, and the jury found a verdict for the plaintiff, the court remanded the case for a new trial. 15 A. 717, *Trudeau v. Jackson*.

3. Where excessive damages are awarded by a jury for an injury received, they will be reduced on appeal. 15 A. 703, *Benegam v. Plassan*.

4. Where irrelevant testimony is admitted, which does not justify the verdict of the jury, it will be set aside, and the case remanded for a new trial. 16 A. 94, *Walpole v. Renfro*.

5. Where the evidence shows a *prima facie* case for plaintiff, who seeks to recover from an insurance company the value of property insured, the defendant must show, by clear evidence, the exaggeration of the loss, to disturb the verdict of the jury. 16 A. 415, *Guma & Co. vs. Hope Insurance Company*.

6. The verdict of a jury, and consequent judgment thereupon, will not be disturbed, except for good reasons. 17 A. 50, *Olivier v. Randolph*.

7. The verdict of the jury being in favor of defendant, and the evidence not establishing the same satisfactorily, the case should be remanded for a new trial. 18 A. 19, *Stievell v. Burdell*.

8. If the verdict of the jury be not supported by the evidence, it will be annulled. 19 A. 124, *Crawford v. Chapman*.

9. Questions of fraud, and weight of testimony, are peculiarly within the province of the jury, and their verdict will not be disturbed, unless it be manifestly erroneous. 21 A. 182, *Brown v. Sadler*.

10. The provision of the constitution of the United States that, "no fact tried by a jury shall be otherwise examined in any court of the United States, otherwise than according to the course of the common law," applies to verdicts found in the State courts as well as to those found in the courts of the United States. 10 Wall. 22, *McKee v. Rains*.

11. For new trials relative to jury cases, see *NEW TRIAL*, III. (a).

JURY COMMISSIONERS.

1. The law which authorizes certain district judges to select jury commissioners, whose duty is to select juries, is constitutional. 30 A. 560, *State v. Anderson*.

2. For the parish of Orleans, see acts 1874, No. 124; 1877, No. 138, p. 209; 1878, No. 24, E. S., p. 280.

JUSTICES OF THE PEACE.

1. In the trial of slaves, justices of the peace do not act as jurors only, but as judges; and, under the provisions of the statute, they are competent, after a mis-trial, to sit again in the case, until the prosecution be at an end. 15 A. 114, *State v. Bill*.

2. Where two parties entered into an agreement by which one of them leased to the other a certain lot of ground, upon which were two houses, at a rent of one hundred and twenty-five dollars per month, and upon the death of the lessee the two houses becoming the property of two distinct persons, one of them sought to eject the lessee by suit, before a justice of the peace; *Held*: That such a lease could not be divided for the purpose of giving jurisdiction to the justice's court. 15 A. 660, *State vs. Third Justice of the Peace*.

3. The act of 1855, "relative to landlords and tenants," gives jurisdiction of the actions therein specified to justices of the peace, whenever the monthly rent of the premises leased does not exceed one hundred dollars. 15 A. 660, *State v. Third Justice of the Peace*.

4. A constable being vested with no judicial power, has no right to take the property from one party and deliver it to another upon his own motion. 23 A. 512, *Crane, Breed & Co. v. Quinn*.

5. The jurisdiction of justices of the peace for the parish of Orleans is conferred by section 2074, p. 414, Ray's Revised Statutes; and no mention is made therein of criminal matters; they are therefore without criminal jurisdiction. 25 A. 60, *State ex rel. Sadler v. Landry*; 40 *State ex rel. Plattsmier v. Landry*.

6. The Fourth District Court for the parish of Orleans, is without jurisdiction to restrain defendant from instituting suits against plaintiff, before the justices of the peace. 26 A. 341, *Spalding v. Rosewood*.

7. A *fi. fa.* issued by a justice of the peace, should be returned within thirty days, and a copy retained by the constable. A writing on the face by the justice, "this *fi. fa.* is renewed," is of no effect. 27 A. 678, *McNeil v. Kramer, et als.* See EXECUTION, V. (f).

8. A constable of the city of Jefferson, after its annexation to the city of New Orleans, in March, 1870, could perform no official act in the last named city; he could make no sale of property situated beyond the limits of the parish of which he was a constable. 28 A. 75, *Graff v. Moylan*.

9. For appeal from writ of prohibition issued by the Third District Court to a justice of the peace, see APPEAL, I. (h), No. 3.

10. The mayor of New Orleans, when acting as a magistrate or justice of the peace, is invested with concurrent criminal jurisdiction with the recorders. NEW ORLEANS, II. (g), 1), No. 3.

11. Although the bond of a constable has not been accepted by the recorder and board of aldermen, as required by law, if the appointment was made by the military authorities, it is presumed that they approved and accepted the bond. 22 A. 167, *Heath v. Schrempf & Frederick*.

12. A license tax below one hundred dollars is properly brought before a justice of the peace. 26 A. 151, *Howell v. McVea*.

13. Additional justice, parish of Orleans, 1871, p. 193; 1877, E. S., p. 99; criminal jurisdiction to the fifth justice, in Orleans, 1874, p. 60; 1878, p. 36. criminal jurisdiction to the seventh, 1874, p. 229; salary to the fifth, 1875, p. 88; costs in criminal cases, except in Orleans, 1877, E. S. p. 8; how elected. 1877, E. S., p. 87; jurisdiction of tax suits and licenses, 1877, E. S., p. 128; jurisdiction in Orleans restricted to their wards, 1878, p. 35; when an attachment may issue before a justice of the peace, 1877, E. S., p. 178.

KENNERVILLE.

Road to New Orleans, 1874, p. 97.

LAFOURCHE.

Taxes for draining, 1877, p. 27; repealed, 1877, E. S., p. 181; Bayou Lafourche, memorial, 1878, p. 59.

LAND.

1. For the public lands, their administration and alienation under the colonial, Federal and State governments, see PUBLIC LANDS.

2. For other matters, see ACCESSION. ATTACHMENT, VI. (c). BOUNDARY. EVIDENCE, XIV. SALE, I. (e); III. (b), 2); (c), 3), B; VI. (b). EXECUTION. OFFENSES AND QUASI OFFENSES, II. (b). PETITORY AND POSSESSORY ACTIONS. POSSESSION, II. REGISTRY. ROADS AND LEVEES. SERVITUDES, II. THINGS.

LANDLORD.

See LEASE, I. PRIVILEGE, III. (a). PROVISIONAL SEIZURE.

LANGUAGE.

1. Jurors who do not understand the language in which the witnesses testify, are incompetent. See JURY, II. (c), No. 3.

LAW AND FACT.

See APPEAL, IX. (b). CRIMINAL LAW, XVI. (c). EVIDENCE, VI. XVI. (d), 2); XX. JURY, IV. (a).

LAWS.

I. OF THEIR ENACTMENT AND PROMULGATION.

(a) *Enactment.*

(b) *Promulgation.*

II. OF THEIR INTERPRETATION AND EFFECT.

(a) *In general.*

(b) *English and French texts.*

(c) *Retrospective operation of laws.*

(d) *Interpretation which saves the whole law; laws in pari materia; and signification of terms.*

(e) *Spirit and object of the law; its reasonable interpretation; how far the intent controls the letter; and remedial laws.*

(f) *Laws derogating from common right or advancing public interest.*

(g) *Prohibitory and directory laws.*

(h) *Penal laws.*

(i) *Judicial and common interpretation; and foreign jurisprudence.*

(j) *Custom.*

III. OF THEIR REPEAL AND AMENDMENT.

(a) *In general.*

(b) *Constitutional prohibition against the amendment of laws by reference to their titles.*

(c) *Revisory legislation of 1855 and 1870.*

IV. OF REAL AND PERSONAL STATUTES; AND EFFECT OF FOREIGN LAWS.

V. OF THE SPANISH LAW.

VI. OF THE CIVIL LAW.

VII. OF THE COMMERCIAL LAW.

VIII. OF THE COMMON LAW.

IX. OF MARTIAL LAW.

X. OF CRIMINAL LAW.

I. OF THEIR ENACTMENT AND PROMULGATION.

(a) *Enactment.*

1. The governor may approve an act after the adjournment of the legislature. It is only when he disapproves that he is required to return the bill, and for this he is allowed five days; and if the legislature adjourn at the expiration of the five days, he is then allowed until the first day of the next general assembly to deliberate. 22 A. 549, *State ex rel. Belden v. Fagan*; 22 A. 238, *Hart, Arbour & Co. v. Beauregard, tax collector*.

2. Article 42, of the constitution of 1868, refers to four-fifths of a quorum or members present. 21 A. 103, *Frellsen v. Mahan*.

3. The fact, whether a law has regularly passed through all the stages necessary for its passage as a law, up to promulgation, does not belong to judicial enquiry. 25 A. 569, *Whited, tax collector v. Lewis*; 23 A. 743, *La. Lottery Co. v. Richoux*.

4. The title providing for the incorporation of a town and the government thereof, is sufficient to cover a grant of power to levy taxes and enforce their collection, with penalties. 26 A. 675, *Slack v. Ray*. See No. 7.

5. "A joint resolution in relation to the New Orleans, Mobile and Chattanooga Railroad Co., a corporation of the State of Alabama," is a sufficient title to a grant of servitude along the banks of the river in front of New Orleans, free from any charges. 27 A. 415, *City v. N. O., M. & C. R. R. Co.*

6. WYLY, J., *dissenting*: The title is not sufficient, the resolution is unconstitutional. *Ib.*

7. The act to incorporate the city of Shreveport, define its limits, and provide for its better police and municipal government, is a sufficient title to cover the levy and collection of taxes, judicially. 26 A. 708, *City of Shreveport v. Jones*. See No. 4.

8. The act of the legislature relative to slaves, approved March 19, 1857, does not contravene art. 115, of the constitution, which declares that every act of the legislature shall embrace but one object, and that shall be expressed in the title. 15 A. 297, *State v. Henry*.

9. Act No. 68, of 1870, relative to the Third District Court and its jurisdiction, does not contain its object in its title. See COURTS, II. (e), No. 10.

10. Act No. 141, of 1868, relative to parish courts, does not contain its object in its title. See COURTS, II. (f), No. 1.

11. Section 4, of act No. 94, of 1868, is not covered by the title of the act. See MONROE, No. 2.

12. The title of the act incorporating the city of New Orleans, in 1870, is sufficient. See NEW ORLEANS, I. (b), No. 2.

13. Also those of acts No. 71, of 1874, and No. 45, of 1876. See NEW ORLEANS, I. (b), Nos. 3, 4, 5.

(b) *Promulgation.*

1. The date of the approval of the act is the date of its promulgation. 23 A. 689, *Thomas & Co. v. Scott*.

2. The failure of the secretary of state to add a note that the law became a law without the signature of the governor, and how it so happened, does not destroy the law or prevent its having effect. 25 A. 572, *Whited, tax collector, v. Lewis*.

3. The promulgation of an act signed by the chief clerk of the house of representatives, and certifying that the act is a true copy of the original, duly presented to the governor, who failed to return the same to the house in which it originated, is not valid. 29 A. 223, *State ex rel. Mercier v. Judge of the Superior District Court*.

4. ON REHEARING: Act No. 20, of 1877, authorizes such a promulgation, which is valid. *Ib.*

5. Acts Nos. 96, 97 and 98, of 1870, known as the Code of Practice, the Civil Code, and the Revised Statute, were sufficiently published by being distributed in bound volumes. 30 A. 657, *State ex rel. Rills v. Barrow*.

6. To be promulgated only in the official gazette. 1875, p. 102. Laws how promulgated in certain cases. 1877, No. 20.

II. OF THEIR INTERPRETATION AND EFFECT.

(a) *In general.*

1. The act of 1868, No. 27, establishing a general system of appointment and confirmation, will not be repealed by a special law ordering the appointment to certain offices; both must be construed together, and effect must be given to both. 23 A. 140, *State ex rel. George v. Tucker*. See (d), No. 2; III. (a), No. 3.

2. The legislature cannot impair the obligation of a contract entered into by a former legislature. 6 Cranch, 87; 4 Wheaton, 518; 12 L. 352; 6 R. 115; 11 R. 414; Constitution U. S., arts. 1, 10.

3. Act No. 95, of 1869, prescribing that the tacit mortgages and privileges of married women should be recorded before the 1st of January, 1870, does not impair the obligation of contracts; it modifies the remedy. 24 A. 25, *Succession Nelson*. See (e), No. 1.

4. By the (two acts No. 17,) of 1875, appropriations greater than the revenue have been made; by a fair construction, the necessary expenses of the year must be paid first; a part only of the act might be unconstitutional. 28 A. 201, *State of Louisiana v. Charles Clinton*.

5. The judiciary is to interpret laws. See CONSTITUTION, II. (e), 1), No. 1.

(b) *English and French texts.*

1. The constitution of 1868, article 109, requires that "the laws, public records, and the judicial and legislative proceedings of the State, shall be promulgated and preserved in the English language, and no law shall require judicial process to be issued in any other than the English language. See acts 1874, p. 113.

2. It is a matter of notoriety that the Code of Practice was originally written in French, the latter text should prevail. 9 A. 12; 22 A. 581, *State ex. rel. Southern Bank v. Judge Eighth District Court*.

(c) *Retrospective operation of laws.*

1. There is nothing in the act of March 2, 1860, in conflict with article 8 of the Civil Code, that a law provides only for the future. The latter is therefore unrepealed and in force upon the subject matter of the act. 15 A. 395, *Weaver v. Maillot*.

2. The act cannot govern the decision of a case which is based upon a contract made prior to the passage of the act. *Ib.*

3. A law authorizing the future imposition of a tax according to a past assessment, is not retroactive. 21 A. 104, *Frellsen v. Mahan*; 10 A. 677, see TAXES, II. (b), 3), No. 14.

4. The ratification by the legislature of the issuance of certain bonds by a municipal corporation, in payment of certain improvements beneficial to its citizens, is not retroactive legislation. 95 U. S. (Otto's) 644, *New Orleans v. Clark*.

5. For remedial laws, see CONSTITUTION, II. (c), 3), c.

6. A law exempting from a license already levied, is not retroactive. See CONSTITUTION, II. (c), 3), A, No. 2.

7. A law cannot affect a contract already made. See CONSTITUTION, II. (c), 3), A, No. 3.

8. The act of March 10, 1866, has reference to all ejectment suits, whether instituted before its enactment. See TRIAL, No. 2.

(d) *Interpretation which saves the whole law; laws in pari materia and signification of terms.*

1. The ordinance of the common council of the city of New Orleans, approved March 25, 1857, levying a tax on the capital of banks, was subsequent to the act of the 19th of March, 1857, exempting free banks from taxa-

tion, in conflict with that act and is therefore void. The statute of the 19th March, 1857, applies only to the future. It is from and after the passage of this act that the capital of free banks shall be exempt from taxation. "A law can only prescribe for the future; it can have no retrospective operation, nor can it impair the obligation of contracts." Article 8, C. C.; 15 A. 89, *New Orleans v. Southern Bank*.

2. Subsequent do not repeal prior laws, by containing different provisions; they must be contrary. 20 A. 140, *Bond v. Heistand*. 5 N. S. 528, 575; 6 L. 135; 16 A. 379; 10 M. 172; 9 A. 64; 12 A. 498, 805; C. C. (23); 2 A. 919; 3 A. 399; 15 A. 329, 383; see (a) No. 1; III. (a) No. 3.

3. A law should be so construed that no clause, sentence or word, shall be superfluous or insignificant. 21. A. 407, *Staes v. Gastinel*.

4. "Mercantile business" refers to buying and selling articles of merchandise as an employment, with a view of realizing the profits which come from skillful purchase, barter, speculation and sale. 22 A. 523, *Graham & Henderson v. Hendricks, Sr.*

(e) *Spirit and object of the law; its reasonable interpretation; how far the intent controls the letter; and remedial laws.*

1. Statutes pertaining to the remedy are merely such as relate to the course and form of proceeding, but do not affect the substance of a judgment when pronounced. 15 A. 150, *Morton v. Valentine*. See No. 4.

2. The words of a law are generally to be understood in their most known and usual signification, without attending so much to the strictness of grammatical construction, as to their general popular use. 17 A. 156, *State ex rel. Bienvenu v. Wrotnoski et al.*

3. Where the words of a law are dubious; their meaning may be sought by examining the context with which the ambiguous words, phrases and sentences may be compared, to ascertain their true meaning. This rule is also applicable to contracts. 17 A. 190, *Commercial Bank v. City of New Orleans*.

4. Act No. 95 of 1869, prescribing that the tacit mortgages and privileges of married women should be recorded before the first of January, 1872, does not impair the obligation of contracts; it modified the remedy. 24 A. 25, *Succession Nelson*.

5. Judges have nothing to do with the policy of particular acts passed by the legislature. 24 A. 242, *Marks, adm'r, v. Donaldsonville*; 15 A. 399.

6. It is a rule of law that where a revising statute, or one enacted for another, omits provisions contained in the original act, the parts omitted cannot be kept in force by construction, but are annulled. 11 Wall. 493, *Stewart v. Kohn*.

7. The legislature possesses the power to determine, by law, the manner in which estates of infants shall be preserved, and to say what kind of security shall be given by those who are interested with their management; and, if so, as a necessary consequence, it has the power of altering the law on the subject, whenever, in its judgment, the interest of the minor and the public good requires that this should be done. 9 Wall. 295, *Lobrano v. Nelligan*.

8. The immovable property of the father, who is the natural tutor of his minor children, is legally mortgaged as security for the faithful discharge of the functions of his office; but the legislature may provide, after the tutor has entered upon his duties, that another kind of security may be substituted for that of the legal mortgage; such an enactment would not violate the obligation of any contract. *Ib.*

9. The act of 1868, must be followed literally, therefore an appeal bond, exceeding one-half the judgment, is good for a suspensive appeal. 22 A. 607, *Denton v. Reading*; 22 A. 626.

10. In construing the second paragraph, of article 575 C. P., the court has no authority to substitute the word *no*, in place of *an*, after the word, "when-ever an answer, etc." 29 A. N. R., *Angèle de Sentmanat v. Nelvil Soulé*. See JUDGMENT, VII.

(f) *Laws derogating from common rights or advancing public interest.*

1. The act of 1857, authorizing front proprietors on Bayou Têche to erect wharves and warehouses on the banks of the Têche, is not unconstitutional; it does not confer unlimited power upon the municipal authorities to transfer the public property to the exclusive use and control of individuals; the erection of wharves and warehouses therein authorized must be subservient to commerce, otherwise the privilege is abused, and the courts will grant the public the adequate remedy. 15 A. 577, *Stevens v. Walker*.

2. Where a party, with the sanction of the mayor and common council of the town of Franklin, erected a wharf and warehouses upon the banks of Bayou Têche, in front of a public square; *Held*: That such improvements were authorized by the said act. *Ib*.

(g) *Prohibitory and directory laws.*

1. The act of the legislature, requiring the city council to pass an ordinance levying a special railroad tax in the month of January, of each year, is merely directory as to the time, and such ordinance is valid, although passed at a later period. 15 A. 107, *New Orleans v. Mechanics' and Traders' Bank*.

2. Laws relative to estimates of expenses, as basis of taxation by parishes, are prohibitory. See CONSTITUTION, II. (c), 4).

(h) *Penal laws.*

1. *Ex post facto* laws embrace only such as impose or affect penalties or forfeitures. 4 Wall. 172, *Locke v. New Orleans*.

(i) *Judicial and common interpretation; and foreign jurisprudence.*

See (j), No. 4; IV. Nos. 1, 2, 3, 4.

(j) *Custom.*

1. A custom is without force in opposition to a positive law. 15 A. 436, *Cranwell v. Ship Fanny Fosdick*.

2. Where a custom is pleaded in bar of plaintiff's claim against the carrier, it must be shown to have been known by the plaintiffs. 21 A. 679, *Pitre v. Offut*.

3. When the custom or usage is not known to those who, from business and connections, have the best means of knowing it, this ignorance is positive testimony of its non-existence. 18 A. 1, *Lewis & O'Neil v. Ship Success*.

4. There is no usage in New York whereby the seller is bound to insure goods shipped to the vendee, in New Orleans, who is bound for the whole price, although the goods are lost. 25 A. 453, *Hanan v. Bowles*.

5. Duration of a lease when not specified. See EVIDENCE, VII. No. 23.

6. Defendant must prove the custom he sets up. See EVIDENCE, VIII. No. 18.

III. OF THEIR REPEAL AND AMENDMENT.

(a) *In general.*

1. Act No. 80 of 1870 does not repeal the ordinance of the city of Shreveport, passed December 30th, 1869, imposing a tax of \$250 on bankers. 22 A. 519, *Shreveport v. Johnson*.

2. Repeal by implication is not favored. 24 A. 156, *Durand v. Dubuclet*.

3. A particular is not repealed by a general law, unless they be so repugnant that both cannot stand under any circumstance. 20 A. 140, *Bond v. Hiestand*; see II. (a), No. 1; (d), No. 2.

(b) *Constitutional prohibition against the amendment of laws by reference to their titles.*

See article 115 of the constitution of 1868.

(c) *Revisory legislation of 1855 and 1870.*

1. The revisory legislation, as contained in the Revised Statutes of 1870,

did not abrogate the former criminal laws of this State, but continued them in existence, in a different shape. 22 A. 273, *State v. Brewer*; 23 A. 327, *State v. McCart*.

2. Precedence of acts of 1870, 1870, p. 80; compensation for revision, 1870, p. 131.

3. Amended or repealed sections of the Revised Statutes of 1870:

Articles.	Amended or Repealed.	Articles.	Amended or Repealed.
114.....	1877, p. 71	1253.....	1877, E. S., p. 193
187.....	1872, p. 63	1254.....	" "
246.....	1877, p. 31	1255.....	" "
313.....	1877, p. 60	1256.....	" "
351.....	1877, p. 15	1257.....	" "
359.....	1873, p. 123; 1877, p. 19	1258.....	" "
360.....	1873, p. 123; 1877, p. 19	1259.....	" "
361.....	1873, p. 123; 1877, p. 19	1260.....	" "
474.....	1878, p. 42	1261.....	" "
668.....	1877, E. S., p. 67	1262.....	" "
677.....	1878, p. 83	1263.....	" "
787.....	1878, p. 46	1264.....	" "
925.....	1875, p. 49	1265.....	" "
926.....	" "	1266.....	" "
927.....	" "	1267.....	" "
1021.....	1876, p. 150	1268.....	" "
1172.....	1876, p. 150	1269.....	" "
1178.....	1874, p. 81	1270.....	" "
1179.....	" "	1322.....	1877, p. 8
1217.....	1877, E. S., p. 193	1419.....	1877, p. 26
1218.....	" "	1421.....	1877, p. 26
1219.....	" "	1500.....	1878, p. 47
1220.....	" "	1560.....	1876, p. 1
1221.....	" "	1561.....	1876, p. 1
1222.....	" "	1761.....	1875, p. 109
1223.....	" "	1915.....	1872, p. 122
1224.....	" "	1929.....	1877, p. 70
1225.....	" "	2180.....	1873, p. 105
1226.....	" "	2187.....	1873, p. 105
1227.....	" "	2188.....	1873, p. 105
1228.....	" "	2217.....	1877, E. S., p. 4
1229.....	" "	2229.....	1877, E. S., p. 4
1230.....	" "	2366.....	1870, p. 107
1231.....	" "	2391.....	" "
1232.....	" "	2628.....	1877, E. S., p. 87
1233.....	" "	2629.....	" "
1234.....	" "	2630.....	" "
1235.....	" "	2667.....	1878, p. 47
1236.....	" "	2708.....	1877, E. S., p. 103
1237.....	" "	2747.....	1877, E. S., p. 87
1238.....	" "	2748.....	" "
1239.....	" "	2749.....	" "
1240.....	" "	2760.....	1874, p. 81
1241.....	" "	2761.....	1874, p. 81
1242.....	" "	3410.....	1876, p. 50
1243.....	" "	3451.....	1877, p. 33
1244.....	" "	3452.....	1877, p. 31
1245.....	" "	3453.....	1877, p. 31
1246.....	" "	3684.....	1877, E. S., p. 125
1247.....	" "	3719.....	1878, p. 47
1248.....	" "	3757.....	1877, p. 33
1249.....	" "	3758.....	" "
1250.....	" "	3759.....	" "
1251.....	" "	3773.....	1877, p. 51
1252.....	" "		

IV. OF REAL AND PERSONAL STATUTES AND EFFECT OF FOREIGN LAWS.

1. Laws of other States, when not offered in evidence, are presumed to be like our own. 24 A. 387, *Hébert v. Winn*.

2. Foreign laws must be proved as facts, and, in the absence of such proof, the rights of parties who claim, and the effect and validity of instruments executed under the laws of another State, must be determined by our own, which will be presumed the same. 17 A. 73, *Syme v. Stewart*; 8 A. 124; 14 A. 391; 9 Rob. 151.

3. Where a title is claimed to be valid under the laws of another State, where it was acquired, those laws must be produced in evidence or proved, otherwise the validity of the title will be made to depend upon our own laws. 15 A. 491, *Atkinson v. Atkinson*.

4. When a statute of another State has once been recognized as law in this State, by a decision of the courts here, judicial cognizance will hereafter be taken of the statute, unless it be proven that the law has been changed. 21 A. 594, *Graham et al. v. Thompson Williams*.

5. As personal property has no *situs*, article 483, of the Civil Code, which declares that persons who reside out of the State, cannot dispose of the property which they possess here in a manner different from its laws, will not apply to such personal property as at the death of the testator abroad, happens to be within our territorial limits. 15 A. 154, *Perin v. McMicken*. See No. 6.

6. It is a well settled doctrine of international jurisprudence, that personal property has no locality, and that the law of the owner's domicile is to determine the validity of the transfer or alienation thereof, unless there is some positive law or custom of the country, where it is found to the contrary. 3 H. 483, *Black v. Zacharie*. See SALE, I. (a), No. 1.

V. OF THE SPANISH LAW.

1. The court will take judicial cognizance of the laws of Spain, because they were in force after the transfer of Louisiana to the United States. 17 A. 228, *Pecquet v. Pecquet*; 11 H. 663, *United States v. Turner*; 5 A. 63; 9 R. 151.

2. The regulations of O'Reilly, were not in force in upper Louisiana. 10 P. 340, *Mackey v. United States*.

VI. OF THE CIVIL LAW.

The civil law descends to us from the Roman law, modified of its harshness by the wisdom of French legislators, and by the repeated changes and amendments which the Civil Code has undergone since 1808.

The written law is certain, and its text may always be consulted. It has withstood for nearly a century the efforts of the common law by which it is not only surrounded, but also mixed, inasmuch as the rules of equity govern, and are paramount in all cases brought on the equity side of the United States court in our State. However, it is so closely allied to equity, that the two systems do not clash. The practice of our State courts, is really the equity practice reduced to its simplest expression; the bill or petition is cut down to a matter of statement of the complaint and the prayer. The demurrer, plea and answer, are found under the names of exception and answer. The replication is not permitted. The whole evidence is considered by the court, which finds the facts and the law. The appeal carries the whole case for review. All unnecessary delays, not being computed, a case may in two or three months, be commenced and terminated by a final judgment of the Supreme Court.

VII. OF THE COMMERCIAL LAW.

See BILLS AND NOTES, IV. (e).

VIII. OF THE COMMON LAW.

1. Right to mortgage a crop in Mississippi. See MORTGAGE, II. No. 5.

2. The legal owner of property in Louisiana, subject to a trust, may mortgage it. See MORTGAGE, III. (d), No. 1.

3. At common law, all contracts not under seal, are contracts by parol. See OBLIGATIONS, VI. (b), 1), No. 1.

4. A respite is unknown to the common law. See RESPITE, No. 3.

5. The dissolving condition implied in all sales for non-payment of the price, is unknown to the common law. See SALE, VI. (c), No. 23.

IX. OF MARTIAL LAW AND MILITARY ORDERS.

1. The military prohibition of the foreclosure of mortgages, general orders No. 15, was removed by general orders No. 113, headquarters department of the gulf, series of 1864, quoted in full in 18 A. 656, *Graham v. Taylor*. 21 A. 32, *Citizens' Bank v. Divey*.

2. Hearsay, is admissible to prove the military orders of the Confederacy. See EVIDENCE, X. (a), No. 1.

3. See MILITARY AUTHORITY. CONSTITUTION, II. (c), 3), A., No. 1; (e), 1), No. 5.

X. OF CRIMINAL LAW.

. . See that title.

LEASE.

I. OF THE LEASE OF THINGS.

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| <p>(a) <i>In general; its requisites, interpretation and renewal.</i></p> <p>(b) <i>Obligations and rights of the lessor.</i></p> <p>1) In general.</p> <p>2) Defects in the thing leased; repairs, reconstructions and improvements.</p> | <p>(c) <i>Obligations and rights of the lessee.</i></p> <p>1) In general.</p> <p>2) Slaves and movables.</p> <p>(d) <i>Assignment and sub-lease.</i></p> <p>(e) <i>Dissolution of the lease.</i></p> |
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II. OF THE LEASE OF LABOR.

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| <p>(a) <i>Contractors and workmen by the job.</i></p> <p>1) In general.</p> <p>2) Performance of the work; the plan; deviation therefrom; cancellation of contract and indemnification of contractor.</p> <p>3) Rights and proceedings of materialmen and parties employed by the contractor against the proprietor.</p> | <p>(b) <i>Carriers and watermen.</i></p> <p>(c) <i>Servants and other lessors of labor.</i></p> <p>1) In general.</p> <p>2) Lessors' discharge from service; his consequent rights; and forfeiture of wages.</p> |
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J. OF THE LEASE OF THINGS.

(a) *In general; its requisites, interpretation, and renewal.*

1. The majority of a Masonic Lodge having incorporated themselves into another body, proposed to lease for a nominal sum the property and effects of the first corporation, and at a meeting where plaintiffs, who did not belong to the second corporation, were present, passed a resolution leasing the same, and thereby excluded plaintiffs from the enjoyment of the property; *Held*: That the defendants, being agents of both corporations, could not make a valid contract. C. C. 429; *Story on Agency* Nos. 16, 9, 10, 210; 11 A. 411; 13 A. 20; 16 A. 15, *Knabe v. Ternot*.

2. Where there is neither price fixed by the parties, nor one left to the award of a third person named and determined, the agreement wants an essential ingredient to constitute a contract of lease. C. C. 2640; 17 A. 23, *Haughery v. Lee*.

3. A fixed price is essential to a contract of lease. 20 A. 268, *Gleason & McManus v. Sheriff et. als.*; 17 A. 22; 19 A. 101.

4. Ownership in the lessor is not essential to make a lease valid. C. C. 2652; 17 A. 154, *Sientes v. Odier & Co.*; 10 L. 362; 8 R. 213; 11 L. 173.

5. The lessee cannot contest the title of the lessor, although the latter may

be a sheriff, who took possession of the property by virtue of a writ of *fi. fa.* 23 A. 586, *Phelps v. Taylor*; 17 A. 154; 10 L. 362; 8 R. 213; 11 L. 173; see (c), 1), Nos. 3, 23.

6. Plaintiff, who fails to prove the contract of lease, but shows possession, will recover a reasonable rent for the time of occupation. 21 A. 743, *Silverstein v. Stern*.

7. One of the co-proprietors abandoned the plantation; the other cultivated one-half; the former sued the latter for rent; *Held*: That he had no cause of action. 23 A. 150, *Becnel v. Becnel*.

8. A verbal contract of lease may be proved by parol. 18 A. 90, *McDonald v. Stewart*. See Nos. 11, 15.

9. A contract of lease, which is entered into and closed verbally, but which is to be put in writing afterwards, is not annulled by the refusal of the lessee to sign and he will nevertheless be held liable for the rent. 24 A. 421, *Marie Mathilde v. Levy & Scheuer*.

10. If the contract is to be final only when signed, plaintiff's claim must be dismissed. 24 A. 434, *Wolf v. Mitchell, Craig & Company*.

11. A lease and sub-lease may be verbal. 25 A. 229, *Weatherly v. Baker*. See *supra*, No. 8; *infra*, No. 15.

12. One who rents from his adversary, acknowledges title in the latter. 26 A. 189, *Johnson v. Dunbar, administrator*. See EXECUTION, V. (d), 10), No. 2.

13. No action lies to recover the rent of a house to be used as a brothel. 22 A. 54, *Kathman Kate Townsend*.

14. The lease to a prostitute of a house situated within the limits of the district where the keeping of houses of prostitution are allowed by the city, is valid. 24 A. 625, *Lyman v. Kate Townsend*.

15. Article 2653, Civil Code, was amended by act No. 42 of 1865, and re-enacted as it originally stood. See Nos. 8, 11.

16. Jurisdiction of justices' court to recover possession of leased premises. See JUSTICE OF THE PEACE, Nos. 2, 3.

17. Until the condition of the lease happen, no rent can be exacted. See OBLIGATIONS, VIII. (a), No. 2.

18. Under a general denial defendant may prove that his lessor gave him permission to remove. See PLEADING, V. (b), 5), c. No. 1.

19. The transfer of a suit to annul the sale of a lease, is not the transfer of the lease. See SALE, VIII. (c), No. 1.

18. Where the parties contemplate a written lease, and before signature, the lessee takes possession, but on discovering the untenable condition of the premises, he refuses to sign the lease, the contract is not complete, and the lessee may, on giving the fifteen days legal notice, remove from the premises. 30 A. 316, *Avendaño v. Arthur & Co.*

19. The following clause in a lease is vague and indefinite: "If neither party to this lease does not give written notice at least one month previous to the first of October, 1872, of their intention not to renew the same, then this lease will be considered as continued in full force as if renewed yearly;" it should be construed against the lessor. A notice given by the lessee on the second of September, the first being a Sunday, that he would vacate, without stating when, will be sufficient. 30 A. 256, *Murrell v. Lion*.

20. When a lease is a sale, 1877, E. S., p. 102.

(b) Obligations and rights of the lessor.

1) In general.

1. The lessor of several stalls in his livery stable, to a person who provides his own provender, is not liable for the loss of horses which may be stolen. 16 A. 248, *Bery v. Marix*.

2. The lessor must pay the taxes, and other dues imposed on the thing leased. 18 A. 513, *Connell v. Female Orphan Asylum*; 23 A. 445, *State v. Campbell*.

3. No damage should be allowed to a lessee against his landlord, by reason of a suit in ejectment brought and dismissed. 19 A. 110, *Knox v. Booth*.

4. Where the owner leases the property, and delivers possession to a second tenant, after having received part of the price of a lease agreed upon with a first tenant, without notice to the first, he will be liable for all damages suffered by the first lessee. 20 A. 73, *Grace v Haas*.

5. Where the lessee abandons the premises, he becomes, from that moment, responsible for the whole amount of the rent due on the lease, and the lessor may rent the premises for the benefit of the lessee. The sureties on the lease are not released by the acceptance of the keys, and failure to provisionally seize. 20 A. 540, *Ledoux v. Jones*; 2 A. 188; 6 A. 74, 75, 76. See No. 9, (c), 1), No. 13.

6. In order to recover damages from the lessor, who did not deliver the property at the time agreed on, he must be put in default, and the lessee must not take possession of the property. 21 A. 714, *Westermeyer v. Street*.

7. Because the lessor, for several months, voluntarily abated the monthly installments, at the request of the lessee, no obligation arose thereby, compelling him likewise to do so in the future. 23 A. 383, *Shiff v. Ezekiel*.

8. The lessor is not liable for damages occasioned by the lessee, who makes another use of the building, than the one for which it was leased. 27 A. 125, *Muller v. Stone et als*.

9. The lessor who accepted the keys tendered by the lessee, informing the latter that the building would be rented for his benefit, does not waive his claim for rent. 27 A. 364, *Langsdorf v. Legardeur*. See No. 5.

10. It is necessary to obtain the consent of the surety of the lessees who deliver possession of the leased premises, before the lessor can enter into a new lease, otherwise the surety is released. 23 A. 438, *Denouvion, tutrix v. Hogdson & Lythe*.

11. Certain premises in Louisiana, belonging to a citizen of that State, were, during his absence therefrom, seized as abandoned property by the military authorities of the United States, who compelled the lessee, then in possession, to enter into a new lease, and to pay to them the rent thereafter due; *Held*: That the owner could not recover from the lessee the rent, for the period during which he had paid it to the military authorities. 92 Otto, 111, *Harrison v. Myer, executor*.

12. If the lessee fails to pay the taxes, as agreed upon, the lessor, on paying them, becomes legally subrogated to the rights of the State and city. See PAYMENT, II. (b), 2), No. 2.

2) Defects in the thing leased ; repairs, reconstructions, and improvements.

1. The lessor has no right to make alterations in the thing during the continuance of the lease. 17 A. 178, *Kaiser v. New Orleans*.

2. The lessee may remove the improvements and additions, provided he leaves the thing leased in the state in which he received it. He cannot be compelled to accept for his improvements an equivalent in money, unless they be made with lime and cement. The lessor, on the other hand, is not bound to keep and pay for them, if he choose otherwise. 18 A. 614, *Pecoul v. Augé*.

3. The placing by a tenant, without the written consent of the lessor, of a partition across the hall of the rented building, so as to be readily removed without injury, is a change that the lessee cannot make under the clause, that he shall make no alteration without the written consent of the lessor. 19 A. 26, *Kuneman v. Olympe Boisse*.

4. The lessee of a lot, to be used for a stable, has the right to remove temporarily the stone pavement. 20 A. 366, *Bryan v. French*.

5. The lessee, when sued for rent, cannot plead in reconvention the damage done to his furniture by want of repair to the house. If the lessor refused or failed to make the necessary repairs, the lessee might himself have caused them to be made, and deduct the cost from the rent, on proving that the repairs were indispensable, and that the price paid by him was just and reasonable. 22 A. 292, *Pesant v. Heartt*; 23 A. 59, *Diggs v. Maury*; C. C. (2663), (2664).

6. The lessee has no right to make repairs before notifying the landlord according to law; if he does, he cannot recover the value of such repairs. 29 A. 156, *Larguier v. White*.

(c) *Obligations and rights of the lessee.*

1) *In general.*

1. A party purchasing an unexpired lease, in the absence of proof to the contrary, is presumed to have purchased it, on condition of taking the premises in the situation they were at the time of the sale; and he has no claim upon his vendor for expenses incurred in restoring the premises to their original condition at the expiration of the lease. 15 A. 50, *Blache v. Aleix*.

2. Plaintiff is entitled to recover the damages sustained by him in consequence of defendant's violation of the contract of lease, in retaining possession of the property after expiration of the lease. 16 A. 244, *D'Armand v. Pullin*.

3. A lessee in undisturbed possession, sued for rent, cannot contest the lessor's title. 17 A. 154, *Sientes v. Odier & Co*; 10 L. 362; 8 R. 213; 11 L. 173. See No. 23; (a), No. 6.

4. If the thing be totally destroyed, the lease is at an end; if the thing be destroyed in part or taken during a part of the time for purposes of public utility, the lessee may demand either the dissolution of the lease or a diminution of the price. In neither case has he a claim for damages. 17 A. 321, *Foucher v. Choppin*. See No. 10.

5. The obligation of the lessee to pay his rent was not extinguished by the war. 18 A. 256, *Lacroix v. Coeler*.

6. If the tenant continues in the occupation of the leased premises after expiration of the lease, without any agreement, the lease is continued by tacit reconduction. 18 A. 267, *Classen & Co v. Carroll*; 20 A. 190, *Armstrong v. Bach*.

7. The lessee who accepts the lease from the wife, cannot show that the conditions were changed by the husband. 18 A. 474, *Wolls v. Collins & Truxillo*.

8. When the property leased is encumbered with a servitude, the lessee must allow its exercise. 19 A. 324, *Taylor v. Mohan*.

9. When the lease contains the privilege to renew, the lessor cannot avoid a renewal when duly notified by the lessee of his intention to renew. 20 A. 327, *Lieutaud v. Janneaud & Cathalogne*.

10. The destruction of a portion of the property leased entitles the lessee to a revocation of the lease or a reduction of rent *pro tanto*; not to both. 21 A. 21, *Penn v. Kearny, Blois & Co*; 26 A. 544, *Higgins and Maurer v. Wilner*. See No. 4.

11. A crevasse will not exonerate the lessee from paying his rent; this is not an unusual and unforeseen event. 21 A. 535, *Masson v. Murray*; 16 A. 162, *Vinsen v. Graves*.

12. The United States authorities, having prevented, by the force of war, the lessees from having free access to the premises leased; *Held*: That this amounted, in law, to an eviction from the premises, and released the tenants from paying rent. C. C. (2667); 22 A. 356, *Bowditch v. Heaton*.

13. It is necessary to obtain the consent of the surety of the lessees, who deliver possession of the leased premises, before the lessor can enter into a new lease, otherwise the surety is released. C. C. 2675, 2676, 2677, 2679, and 3030; 5 R. 213; 23 A. 438, *Denouvion, tutrix, v. Hodgson & Lytle*; 4 R. 28; 3 R. 52; 5 A. 760; see (b), 1), Nos. 5, 9.

14. The lessee cannot make repairs, at the expense of the lessor, without first putting him in default. 21 A. 220, *Favrot v. Mettler*.

15. A lessee is not justified in refusing to pay his rent because the house was not put in good repair, as per contract. The proper course is to put the lessor in default, then cause the repairs to be made, and deduct the same out of the rent. 26 A. 384, *Winn v. Spearing*; 28 A. 903, *Welham v. Lingan*; see PLEADING, VIII. (b), 2), No. 3.

16. The lessee has no right to make material alterations in the leased

premises, without express permission of his lessor. 26 A. 402, *Denechaud v. Trisconi*.

17. The lessee, who works a steam engine, which vibrates the foundation of the neighboring buildings, is liable for the damages thus occasioned. 27 A. 124, *Muller v. Stone et als.*

18. The lessee cannot be released by setting up that the premises, which were leased, in writing, for a club room, were used as a gambling house, although the agent, who transacted the business, knew it. 27 A. 314, *Commagère v. Brown*.

19. Where the difference was established in the lease during the time the lessees would be deprived of a portion of the leased premises, and that part was destroyed, the lessee will be bound to pay the difference agreed upon in the lease for the part used. 28 A. N. R., *Samuel Fasnatch v. J. L. Childress et als.*

20. A lessee is bound to repair all damages caused by him to the leased premises, or pay for the damages thus occasioned. 28 A. 688, *Rufus Waples v. City of New Orleans*.

21. A lessee, who fails to give the notice required by article 2686, of his intention to remove, is bound for the rent, after having vacated the premises, until he give such notice. *Ib.*

22. The lessee cannot question the title of his lessor. See (a), No. 5.

23. One who is permitted to occupy a building for a certain time, becomes a trespasser when he refuses to surrender the keys. See OFFENSES AND QUASI OFFENSES, I. No. 1.

24. An action for rent is prescribed by three years. See PRESCRIPTION, III. (e), No. 15.

25. When the lease is expired, the lessee, who is sued for damages for property burned by him, may contest his lessor's title. 30 A. 487, *Burbank v. Harris*. See No. 3; (a), No. 5.

2) 'Slaves and movables.

1. Where the lessee violates his contract of hire, by sending the slaves in another direction, and the property hired is thereby lost, he will be responsible for the loss. 20 A. 559, *Murphy v. Kaufman*.

(d) Assignment and sub-lease.

1. The judicial sale of a lease, imposes upon the purchaser, the obligation of paying the price to the vendor, and that of paying the rent to the lessor, whether these conditions be advertised or not. 17 A. 174, *Brinton v. Datas*.

2. The goods of a sub-lessee, on the leased premises, are only liable to seizure for the rent past due. C. C. (2676); 22 A. 182, *Sanarens v. True*.

3. If the sub-lessee is not indebted to the lessee for rent, at the time of the provisional seizure, the lessor has no right of pledge on his effects. C. C. (2676); 23 A. 387, *Arent v. Bone*; 25 A. 229, *Weatherly v. Baker*.

4. The clause whereby the lessee binds himself not to sub-lease, in a private unrecorded contract, is inoperative as to a sub-lease made in violation thereof, to a third party. *Ib.*, C. C. (2696).

5. If the lessee sub-lets in violation of the lease, the lessor may have the lease dissolved. The lessee must restore the pavement removed, or pay damages. 20 A. 366, *Bryan v. French*.

6. The lessee has the right of sub-lease, unless the contrary be stipulated. 25 A. 229, *Weatherly v. Baker*.

7. The sub-lessee's effects are not liable for the rent, when he owes nothing to the lessee. 28 A. 234, *Campbell v. Fowler*.

8. The purchaser of an unexpired lease, has no claim against his vendor for repairs. See (c), 1), No. 1.

9. For lessor's privilege, see PRIVILEGE, III. (a).

(e) Dissolution of the lease.

1. Plaintiff, who sues for a dissolution of the lease, for non-payment of rent, must tender to the lessee all the rent notes, to become due for the balance of the lease. 18 A. 475, *Wells v. Collins & Truxillo*.

2. Where, by the terms of the lease, the lessee covenants to allow to be placed in the premises, no goods which would cause a forfeiture of the insurance, if such goods are allowed on the premises with the consent of the lessee, the lease may be annulled. Default is unnecessary in such a case of actual breach. 18 A. 701, *McNeil v. Knapp et als.*

3. In an action of ejectment, where no money is claimed, it is the amount of the lease which gives the court jurisdiction. 36 A. 47, *Ellis et al. v. Silverstein.*

4. No damages can be recovered by the lessee against his landlord, who recovers possession under an ejectment suit, by reason of failure of the lessee to pay his rent. 26 A. 502, *Thayer v. Waples.*

5. When a tenant denies the title of his landlord, the relation between them is severed, and the right of entry under the law by the landlord is complete. 26 A. 502, *Thayer v. Waples.*

6. The lessee of the new canal, under acts No. 12, of 1866, No. 118, of 1867, and 82, of 1870, substantially complied with the terms of the lease as modified by these laws, and the lease should not be annulled. 28 A. 460, *State v. Richard Taylor.* See acts 1870, E. S., p. 195.

7. LUDELING, C. J. and TALIAFERRO, J. *dissenting*: The lessee has not complied with the requirements of the lease, only nine basins have been dug instead of sixteen. *Id.*

8. A lease is dissolved by the adjudication in bankruptcy of the lessee, and no rent can be proved afterwards as a debt against the estate, neither can the assignee claim to occupy the leased premises without paying the rent. 2 Woods, 220, *in re Commercial Bulletin Company.*

9. Expiration of lease when not specified, see EVIDENCE, VII. No. 23.

II. OF THE LEASE OF LABOR.

(a) *Contractors and workmen by the job.*

1) In general.

1. See BUILDERS AND BUILDINGS. QUASI CONTRACTS, I. No. 2.

2. Sailors not to be employed, 1874, p. 123.

2) Performance of the work; the plan; deviation therefrom; cancellation of contract and indemnification of contractor.

See BUILDERS AND BUILDINGS.

3) Rights and proceedings of material men and parties employed by the contractor against the proprietor.

See BUILDERS AND BUILDINGS. EXECUTION, V. (a), 4), No. 5. PRIVILEGE, III. (f).

(b) *Carriers and Watermen.*

1. See COMMON CARRIERS. SHIPPING.

2. Privilege for freight. See PRIVILEGE, II. (c), 1).

(c) *Servants and other lessors of labor.*

1) In general.

1. Laborers, who hire themselves out to serve on plantations, or to work in manufactories, cannot leave the person who has hired them, nor can they be sent away by the proprietor, until the time has expired during which they had agreed to serve, unless good and just cause can be assigned. C. C. (2719). In the latter case, an action for breach of contract, according to articles C. C. (1920) (1924) is the only remedy. 16 A. 112, *Word v. Winter.*

2. The abandonment of service, even for a day, gives the employer the right to dispense with the employee's further services. 16 A. 120, *Ford v. Dauks.*

3. Plaintiff, being employed as superintendent of the Metairie Race Course, at a fixed salary, and left in charge, during the war, when all the officers of

the association left the State, is entitled to his salary until the grounds were in full and absolute control of the U. S. military forces. 19 A. 298, *Vowell v. Metairie Association*.

4. The plaintiff, having abandoned the crop without the consent and against the remonstrances of his employer, forfeited his contract, and was not entitled to recover for his services. 23 A. 318, *Bartelle v. Lallande*.

5. An overseer cannot have his services replaced by another; the cause of his employment was his particular skill. 28 A. 230, *Peter v. Penn*.

6. A claimant, for services rendered to the deceased, cannot be defeated by a plea that she was his concubine. 23 A. 295, *Succession Pereuilhet*.

7. A housekeeper who renders valuable services in attending to her boarder, but who fails to present an account, is not debarred from setting up her claim after his death. 30 A. 246, *Gaines v. Succession Del Campo*.

8. Mechanics and laborers, how to proceed for their wages, 1873, p. 163; how and when tried, 1874, p. 59.

2) Lessor's discharge from service; his consequent rights; and forfeiture of wages.

1. Article (2720) Civil Code, accords to the laborer the whole salary contracted for, when he is discharged by his employer without sufficient cause, before the expiration of his time of service; but this is, as to the unexpired time, by way of penalty or damages. The privilege granted by article (3184) is for a specific object, in the words of the article, for "the appointment of salaries of the overseer for the year last past, and so much as is due of the current year. 15 A. 665, *Scarborough v. Stinton*.

2. A pilot who voluntarily leaves the boat before the expiration of his term of service, on learning that his wages would be stopped whilst the boat lay at the point of destination, has no claim against the boat, beyond the time actually employed. 19 A. 178, *Patterson v. Haslep*.

3. Article 2749 (2720) Civil Code, does not apply to a case where the laborer never was in the service of the plaintiff, although a contract had been made with him. By the refusal of defendant to carry out his contract, he became liable only for the actual damages suffered by plaintiff. 16 A. 19, *Trefethen et als. v. Locke et als*.

4. If the plaintiff be employed as clerk, by the year, and defendant had no good cause to discharge him, before the expiration of his term, he is entitled to recover the whole of his year's salary. 23 A. 495, *Bormann v. Thiete. Matz & Co.*; 26 A. 369, *Taylor v. Kehlor, Updike & Co.*; C. C. 2749.

5. An overseer employed for the year, and discharged without serious reasons of complaint before the expiration of the year, may recover his salary for the whole year. 22 A. 113, *Jones v. Jackson*.

6. If a merchant who employed a clerk to work in the notion business, opens, instead thereof, a dry goods business, and the clerk thereupon should refuse to work with him, he does not make himself liable for the salary by discharging the clerk. 24 A. 441, *Levy v. Freidlander*.

7. The occasion of plaintiff's discharge as overseer, being a quarrel commenced by defendant, he should not be permitted to discharge his employee without paying him for the whole term of his employment. 25 A. 308, *Leche v. Claverie*.

8. A merchant has good reason to discharge a clerk, if the latter, who is a bookkeeper, makes a sale on credit, and fails to enter the same on the books, and there appears a want of correspondence in some of the entries in the different books, many erasures in the day book and blotter, and a discrepancy in the cash on hand, and the amount entered in the cash book. 24 A. 481, *Griffin v. Haynes*.

9. If the employer should send away his apprentice without cause, he shall be bound to pay him the wages stipulated for the term of service agreed upon. 28 A. 145, *Hand, tutor v. West*.

10. The discharged clerk who receives the amount tendered him in full, without objection, waives his right to claim the whole year's salary. 26 A. 353, *Tanner v. Cambon*.

11. When the plaintiff was employed as clerk by the year, by the agent.

subject to the approval of his principal, who is misinformed of the nature of the agreement, but, on learning it, does not reject it immediately, but, subsequently, discharges plaintiff, the latter should recover his whole year's salary. 26 A. 455, *Stagg v. Belden*.

MORGAN, J., *dissenting*: The contract never having been ratified, the defendant is not liable. *Ib.*

13. It is a good cause for the discharge of an employee, if he be unable to perform his duties, even by reason of sickness. 28 A. 230, *Jeter v. Penn.*

14. The hire of a slave cannot be recovered, even if the services have been performed. See OBLIGATIONS, III. (c), 1), No. 4. MARRIAGE, VI. No. 5.

LEGISLATURE.

See CONSTITUTION, II. (a), 1).

LEGITIMACY.

1. The subsequent marriage, in Havana, of a person of color to a white man, who were by law prohibited from intermarrying, and had been living in a state of concubinage here, being valid by the laws of Spain, where they intended to make their domicile, will be recognized as valid here, and the children previously born in Louisiana being legitimated will have the right to inherit here. 24 A. 575, *Succession Caballero*; 26 A. 113, *Caballero v. Maduel, executor*.

2. WYLY, J., *dissenting*: The marriage being repugnant to our laws, was utterly without effect in this State. The legitimation of the children was not a necessary consequence and did not result from the marriage, because they were incapable of legitimation by the law of their domicile of birth. *Ib.*

3. Marriage between slaves, to produce its civil effects as to the children, should have existed at the time of the emancipation. 25 A. 617, *Pierre v. Fontenette*.

TALIAFERRO, J., *dissenting*: The marriage was valid, and by the emancipation all the rights produced thereby became effective. *Ib.*; 6 M. 559.

4. Illegitimate children, may be legitimated in other modes than by the marriage of their parents and the acknowledgment made by an act passed before a notary and two witnesses. C. C. 193, 198, 209; 26 A. 95, 98, *Hart v. Hoss & Elder*.

5. Children born from a colored woman living in concubinage with a white man who subsequently marries her and causes the children to be baptised and inscribed as his children, are thereby legitimated, and will inherit the succession of the father in preference to his lawful collateral relations. 26 A. 96, *Hart v. Hoss & Elder*.

6. MORGAN and WYLY, J. J., *dissenting*: Such children cannot be legitimated. *Ib.*

7. Article 198, Civil Code, requires both parents to make an acknowledgment before a notary and two witnesses, of their children, in order that their marriage shall have the effect of legitimating such children born prior to the marriage. The acknowledgment by one only is not sufficient. 28 A. 3, *Talbot v. Hunt, ex.*

8. Where the white woman believed her husband to be a white man, at the time of marriage, but subsequently discovered that he was a man of color, the children born even after such discovery, are legitimate. 28 A. N. R., *Succession Lacroix on question of heirship*.

LUDELING, C. J., *concurring*: This case is governed by the code of 1825; but the disabilities were removed by the civil rights bill, under which the husband and wife continued to live together. *Ib.*

MORGAN and WYLY, J. J., *dissenting*: The marriage was contracted in violation of a prohibitory law, and is an absolute nullity. *Ib.*; 15 A. 343; 10 A. 411.

9. Several children being acknowledged in the same act, one cannot affirm his legitimacy and contest that of the others. See ESTOPPEL, No. 21.

10. See MARRIAGE, I. (a); IV.

11. It is not necessary that the bastard child, born in this State, of a slave

mother, should have been acknowledged by her to enable her to inherit from her said child. 30 A. —, *Neel v. Hibard*.

12. How to legitimate, 1870, p. 96.

LEGITIMATE CHILDREN.

See PARENT AND CHILD, I.

LESION.

See OBLIGATIONS, III. (b), 4). SALE, VI. (b).

LETTER.

For letter of credit, see BILLS AND NOTES, V. (c).

LEVEES.

1. An order of seizure and sale for levee taxes may be directed to the tax collector, although he may be the agent of the board of levee commissioners. 16 A. 440, *Templeton v. Morgan*.

2. In levee tax sales by the collector, he should advertise the sale to be made at the court house of the parish, although it should be out of the levee district, and the sale should be made on the first Saturday of the month. *Ib*.

3. The board of levee commissioners being sworn public officers, not having appointed an inspector for a certain portion of levees, and not having contracted for or authorized certain works made by plaintiff in reconvention, the court will presume that the portion of levees worked upon, was excluded from the system of levees adopted by them, and that the work done was for the individual benefit of defendant. Hence the latter is not entitled to compensation therefor. *Ib*.

4. Crevasses in the district do not release the owner from the levee tax; there is, in such cases, a greater necessity for its payment. *Ib*.

5. The contractor has no right to take dirt on the plantation side to build the levee, and in the absence of any legislation, the matter will be governed by the general law, (1829, p. 78). 16 A. 231, *Watson v. Marshall*.

6. Where it is shown that defendant did all he possibly could to avoid a crevasse, even under the twenty-fifth section of act of 1829, p. 91, no cause of action for damages against him can be maintained. 26 A. 433, *Leblanc v. Pittman*.

7. To bind the joint proprietors for the building of a levee, the adjudication and performance of the work, must be made in strict conformity to law. 19 A. 127, *O'Connor v. Stewart*.

8. If the work be necessary and useful to the joint proprietors, the contractor may recover on a *quantum meruit*. *Ib*; 2. N. S. 455; 5 L. 45; 6 A. 177; 9 A. 67.

9. One who did work on the levee district composed of the parishes of Carroll, Madison and Catahoula (acts 1852, p. 237), without the consent or authority of the inspector or the board of commissioners, cannot recover compensation for such work. 20 A. 201, *Board of Levee Commissioners v. Harris*.

10. The building of the levees is the proper subject for legislation, and a general tax may be levied to build and maintain them. 26 A. 564, *State v. Clinton et al.*; 22 A. 58, *Tardos v. Jefferson*.

11. The Louisiana Levee Company is not liable for crevasses occurring before the report of the board of engineers. 27 A. 134, *Louque v. Louisiana Levee Company*. See CORPORATIONS, X. (r).

12. For levee bonds issued by the State, see BONDS, Nos. 2, 7, 9.

13. The police jury should have been put in default for not constructing the levee. See OBLIGATIONS, VIII. (a), 2), No. 2.

14. The levee tax is constitutional. See TAXES, II. (b), 1), No. 5.

15. Levees in Pointe Coupee, 1860, p. 11, Nos. 10, 11: a crime to cut levees, 1875, p. 49; asking congress to take charge, 1876, p. 15; 1877, p. 9; 1878, p. 29; special levee district on Grosse Tête, 1876, p. 120: repealed in

part, 1877, E. S., p. 191; special levee district on Fordoche, 1877, E. S., p. 72; balance of three mill tax, 1878, p. 35; consultation with Arkansas, 1878, p. 57; levee districts, 1878, p. 218.

See ROADS.

LEVEE COMMISSIONERS.

1. See MANDAMUS, I. (b), Nos. 43, 44, 45, 46. PLEADING, I. (c), 9, No. 3.
2. Created by act 1878, p. 218.

* LIBEL AND SLANDER.

1. In a civil action for damages, on account of libelous and slanderous charges, the defendant is allowed to plead in justification, the truth of the slanderous, defamatory, or libelous words or matter; but if a party is instrumental in giving evidence to a report of such a nature, he cannot screen himself by proof that there was such a rumor or report, or that the charges originated elsewhere. All persons concerned in the publication, are guilty to the same extent. 15 A. 492, *Cade v. Redditt*.

2. Injuries to the feelings, and to one's social standing, are not susceptible of a precise admeasurement. Still in a very limited class of cases, such injuries are recognized as a legitimate ground of action. 23 A. 280, *Dufort v. Labadie*.

3. It is not incumbent upon the plaintiff to show malice, which the law implies, on the part of the publisher, nor to prove injury if the charges are false. 25 A. 170, *Perret v. New Orleans Times*.

4. A reparation by recantation, can only be considered in estimating the amount of damages. *Ib.*

5. A newspaper which publishes a false accusation of embezzlement, giving to it an air of authenticity, becomes liable in damages for the libel. 27 A. 214, *Cass v. New Orleans Times*.

6. The law implies malice if a false accusation be published in a newspaper. 27 A. 219, *Cass v. New Orleans Times*.

7. In an action of libel, proof of damages, is not necessary to recover. 27 A. 219, *Cass v. New Orleans Times*; 3 A. 69; 11 A. 206; 25 A. 174, *Perret v. N. O. Times*.

8. A corporation may be sued for libel. 27 A. 367, *Vinas v. Merchants' Mutual Insurance Company*.

9. A cause of action arises if one maliciously, and without probable cause, files an affidavit in support of a motion for a new trial, charging plaintiff with having corruptly and knowingly perjured himself. 28 A. 435, *P. M. Kelley v. J. B. Lafitte*.

10. Where a party called another a rogue, in the hearing of bystanders, in a moment of irritation, and in reference to his unwillingness to settle a debt due him, and no injury resulted from such transient expression of angry feeling; *Held*: That such a case of defamation is not actionable. 15 A. 48, *Artieta v. Artieta*.

11. Malicious slander will be punished by damages. 17 A. 64, *Mohrman v. Ohse*.

12. The charge of perjurer, swindler and thief, although no damage be proven, amounts to a presumption of damage. 19 A. 194, *Mallerich v. Mertz*; 14 L. 198; 10 A. 231.

13. Malicious slander will be punished by the infliction of damages, commensurate with the character of the language used. 19 A. 322, *Bonnin v. Elliott*; 17 A. 64, *Mohrman v. Oshe*.

14. In an action for slander, the verdict of the jury being set aside, the case will be remanded for further proceedings. 21 A. 50, *Coussirat v. Olivier*.

15. In an action for slander, plaintiff must prove the language used, and the malicious intent. 21 A. 308, *Toye v. McMahon*.

16. A witness who is compelled to answer questions propounded to him, cannot be held liable for slander, or for the injury done by his testimony. 21 A. 376, *Terry v. Fellowes et als.*

17. No action lies for allegations which assail the character of plaintiff, set

up by defendant in his answer, when it appears that there were reasonable grounds to believe that the allegations were true. 29 A. 66, *Wallis v. New Orleans and Carrollton Railroad Company*.

18. The charge of adultery, made without malice by the wife who seeks a divorce, is not public defamation. See MARRIAGE, III. No. 2.

19. A plea of justification and a general denial are inconsistent. See PLEADING, II. (a), Nos. 16, 17.

20. See CRIMINAL LAW, IX. (hh).

LIBRARIAN.

State librarian, 1873, p. 105.

LICENSE.

1. The city ordinance imposing a tax of twenty-five dollars on each printing office doing job work, does not refer exclusively to printing offices publishing a newspaper and doing job work conjointly, but to any printing office doing job work. 15 A. 614, *New Orleans v. Clark*.

2. The city has a right to exact a license from the lessees of her public markets. 18 A. 725, *City v. Crappel*.

3. A license cannot be imposed for acts done before the passage of the law. 19 A. 305, *Capella v. Carradine*.

4. A peddler, in a watercraft or otherwise, may be compelled to pay a license in the parish where he peddles. 19 A. 304, *Capella v. Carradine*. See No. 22.

5. The city of New Orleans has no right to levy a license on manufacturers. 11 A. 733, *City v. Mascaro*; 21 A. 1, *City v. Lusse & Rhulman*; 23 A. 726, *Honold v. City*.

6. Since the enactment of act No. 73 of 1872, section No. 16, persons selling articles manufactured by them are liable for a license. 28 A. 722, *City of New Orleans v. Geo. W. Dunbar & Son*.

7. A license may be imposed on attorneys at law. 21 A. 201, *State v. King*.

8. The revenue act for 1869, does not provide for a pro-rata license, and a party must pay the whole license, although carrying on the business during part of the year, nor is this contrary to the uniformity established by the constitution. 22 A. 238, *Hurt, Arbour & Co. v. Beauregard, tax collector*.

9. Whether the pickery be used for the exclusive benefit of its proprietor or not, it is liable for the license imposed by act 1869, p. 148, § 3. 23 A. 263, *State v. Hammar*.

10. A license ordinance graduated on the amount of business done, is unconstitutional. The occupation may be taxed. 20 A. 373, *Parish of Orleans v. Cochran*.

11. Act of April 4, 1865, levying such a tax has never been held to be unconstitutional. 25 A. 627, *State ex rel. Blackmore v. Graham, adm'r*; 8 Wallace, 124. See No. 31; TAXES, II. (b), 2), A. No. 3.

12. Sections 20, 21, 22 and 23, of act No. 114, of 1869, levying a license for every dray, wagon, truck, etc., is unconstitutional, the license should be the same for all persons who engage in the business, without reference to the amount of capital invested. 23 A. 664, *State v. Axiom*; 449; 726; 28 A., *Cullinane v. City*; 24 A. 112; 26 A. 140.

13. A license calculated upon the income of the insurance company, is unconstitutional. To be equal and uniform, it must be the same upon all who engage in the particular profession. 23 A. 449, *City v. Home Mutual Insurance Co.*

14. A license cannot be imposed by the city on notaries public; they are State officers. 23 A. 710, *City v. Bienvenu*.

15. A corporation which is vested with the right to impose a license, has the right to enforce its payment by legal proceedings. 24 A. 27, *Amite City v. Clements*.

16. Insurance companies can only be held liable to pay one license, although

they may have several agencies. 24 A. 112, *Merchants' Mutual Insurance Company, et als v. Blandin*.

17. Before retailing liquor, a license should be procured, whether the town or parish can or cannot issue any; else the seller is amenable to the penalty of section 910, of the Revised Statutes of 1870. 24 A. 475, *State v. Kuhn*.

18. A law which exempts from a licence already levied, but not collected, is not retroactive. 25 A. 571, *Whited, collector v. Lewis*.

19. A tax of eighty-five dollars, on persons selling liquor on land, and of fifty dollars, on vendors on steamboats, is equal and uniform; therefore, section 1, of act No. 14, of 1872, is constitutional. 25 A. 576, *Kaliski v. Grady*; 586, *Jones v. Grady*.

20. A merchant is both a wholesale and retail dealer, when he sells articles by the package or by the pound indifferently, and, in such case, he must pay a wholesale license. 25 A. 591, *Flournoy & Millsaps v. Grady*.

21. Under paragraph No. 15, section No. 3, of act No. 42, of 1871, and paragraph 15, of act No. 14, of 1872, the insurance companies are only exempted of other license taxes than one thousand dollars and one per cent. upon the premiums earned by the agencies. This does not exempt them from taxation on property, capital, etc. 25 A. 650, *City v. Salamander Insurance Company*; 27 A. 526, *Same v. Germania Insurance Company*; *ib.* 520, *Same v. People's Insurance Company*. See 1874, p. 96.

22. The police jury may impose a license on a peddler carrying and selling his goods in a steamer. 26 A. 642, *Steamer Stella Block v. Parish of Richland*. See No. 4, and delegation of power to levy licenses; TAXES, II. (b), 2), B.

23. One paying a retail license may still be compelled to pay a bar room license, a druggist's license, etc. 28 A. 765, *State v. Willis Holmes*.

24. The license ordinance of the city of New Orleans, for 1866, imposing a license tax of "one-hundred dollars for each and every warehouse," was intended to be levied upon the particular calling, and not upon the warehouse itself. 21 A. 301, *Hodgson v. City of New Orleans*.

25. The act of 1855, authorizing the imposition of a license tax of one thousand dollars on each insurance company not chartered by the State, and five hundred dollars on each insurance company chartered by the laws of the State, is equal and uniform. 21 A. 434, *State v. Fosdick*; 10 A. 402.

26. Act No. 73, of 1873, approved April 26th, being a special law, has priority over the act which provides a general revenue; therefore the city of New Orleans has the right to impose a license tax on the insurance companies. 27 A. 656, *City v. Globe Mutual Insurance Company*.

27. The proviso in the revenue act of 1870, that no insurance company whose license tax shall be one thousand dollars, shall be liable to any other assessment throughout the State, applies only to the State, and does not prohibit the city from levying other assessments on such companies. 1 Woods, 85, *Insurance Company v. New Orleans*.

28. A junk dealer is one who buys and sells old iron, old rags, old books, old tin pots, ropes, tin cans, anything that can be bought and sold. A license may be imposed by the city of New Orleans on junk shops, as a class. 29 A. 283, *City v. Kaufman*.

29. The license imposed by the third section of act No. 14, of 1872, does not apply to lumber yards, wherein the result of a saw mill's operations are piled, but such lumber yards as are places of public storage, for hire. 28 A. 636, *State v. Walker*.

30. Each partner is bound for the whole license. 22 A. 238, *Hart, Arbour & Co. v. Beauregard, tax collector*.

31. The act of 1871, which provides that the tax levied, under act of April 4, 1865, on the amount of business done, should be refunded, is null and void. 25 A. 625, *State ex rel. Blackmore v. Graham, auditor*.

32. A law imposing a higher tax upon a foreign than a domestic corporation, doing business within the State, does not violate the State constitution, which declares that taxation shall be equal and uniform. 1 Woods, 85, *Insurance Company v. New Orleans*.

33. Corporations are not citizens of the several States, in such a sense as to bring them within the protection of that clause of the constitution of the United States, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States." *Ib.*; 13 Peters, 586; 8 Wall. 177.

34. A license of one thousand dollars on all coffee houses or beer saloons, where theatricals, etc., are performed, and a lesser amount on ordinary coffee houses, is equal and uniform. 30 A. 682, *State v. Becker*.

35. Taxes on occupations and exhibitions. See NEW ORLEANS, (e), 3).

36. Power of the legislature to impose licenses. See CONSTITUTION, II. (c), 1), No. 12; for same power of police jury, see POLICE JURY, No. 21.

37. Thirty days granted to pay licenses, 1870, p. 40; blank licenses, 1877, p. 31; cotton gins, presses, etc., 1872, No. 14; 1877, E. S., p. 108; who are wholesale and retail dealers, 1877, E. S., p. 108; 1878, p. 156; injunction for non-payment of license, 1877, E. S., p. 121.

LIEN.

1. An admiralty lien does not arise in a contract for materials and supplies furnished to a vessel in *her home port*, and in respect to such contracts it is competent for the States, under the decisions of the U. S. Supreme Court, to create such liens as their legislatures may deem just and expedient, not amounting to a rejection of commerce, and to enact rules and regulations prescribing the mode of their enforcement. Contracts for ship building are held out to be maritime contracts. 22 A. 624, (*and authorities there cited*). *Southern Dry Dock Company v. Gibson, Rodney & Dowty*.

2. See SHIPPING, IV. (a). PRIVILEGE, III. (c), 2), A. MORTGAGE. REGISTRY, II. ADMIRALTY LIEN.

LIEUTENANT GOVERNOR.

When to replace governor, see CONSTITUTION, II. (d), No. 8.

LIMITATION.

1. See PRESCRIPTION.

2. Limitation of State debt, see CONSTITUTION, II. (c), 1), Nos. 3 to 8, 15, 18.

LINCOLN.

Parish of, 1873, p. 67; recorder's extracts, 1874, p. 232; succession and minors records, 1877, E. S., p. 68; territory taken from Lincoln and added to Jackson, 1877, p. 31; tax to build a jail, 1877, p. 53.

LITIGIOUS RIGHTS.

See SALE, VIII. (d).

LIVERY STABLE.

See PRIVILEGE, III. (i), No. 1.

LIVINGSTON.

Act incorporating Ponchatoula, amended 1870, E. S., p. 111.; court house, 1871, p. 38; locating court house, 1872, p. 138; repealed 1875, p. 105, to provide for burnt records, 1877, No. 13; election to locate the court house, 1877, E. S., p. 18.

LOAN.

I. OF COMMODATUM.

II. OF MUTUUM.

III. OF LOAN ON INTEREST.

- (a) *In general.*
 (b) *Usury.*

- 1) *In general.*
 2) What constitutes usury; and divisibility of usurious stipulations.

I. OF COMMODATUM.

1. The written agreement of a debtor to return bonds of the same description and amount at a certain time, with interest, is not a promissory note. 30 A. 714, *Blouin v. Liquidators Hart & Hebert*.

II. OF MUTUUM.

A loan for consumption of movable property, to be consumed by the borrower and to be returned, of the same kind, quality and quantity, to the lender; as a loan of corn, wine, or money.

III. OF LOAN ON INTEREST.

(a) *In general.*

1. A charge of eight per cent. interest on the account current of a merchant, cannot be recovered without proof in writing of an agreement to pay it. 15 A. 457, *Byrne v. Grayson*; 25 A. 600.

2. When a note bears interest from maturity, interest begins from the day of payment specified, without allowing for days of grace. 16 A. 252, *Letchford v. Starns*; 14 A. 269, *Weems v. Ventress*.

3. Conventional interest will not be allowed, unless expressly stipulated in the contract. 17 A. 145, *Stephens v. Beard*. See INTEREST, No. 1.

4. Conventional interest must be fixed in writing. 21 A. 279, *Lee v. Goodrich*.

5. In the absence of any agreement to pay eight per cent. interest, the obligee can only recover five. 23 A. 201, *Stewart, Hyde, & Co. v. Buard & Danguet*.

6. A note drawn in another State, but made payable in Louisiana, should be made to bear interest according to the laws of Louisiana. 23 A. 369, *Howard et al. v. Brawnard*.

7. For interest due on accounts, see INTEREST, No. 1.

8. Parol is inadmissible to prove an agreement to pay eight per cent. interest. 25 A. 600, *Gerspach v. Mullin*.

(b) *Usury.*1) *In general.*

1. The penalty attached by the act of 1855, to the charging of usurious interest, is a forfeiture of the entire interest contracted for. 15 A. 329, *Crane v. Beatty*.

2. Money paid for usurious interest, cannot be recovered in a court of justice. 16 A. 218, *Spurtin v. Milliken*; 4 R. 493; 1 A. 265, (*but see C. C. 2924*); 2), No. 7.

3. To constitute usury, there must be a loan of money; in the *bona fide* sale or discount of a promissory note made by a factor, there is no loan of money and there can consequently be no usury. 15 A. 457, *Byrne v. Grayson*.

4. The decision in the case of *Martin Crane v. W. Beatty*, p. 321, affirmed to the effect that the provision of the act of March 20, 1856, cannot be extended so as to authorize and legalize transactions between debtors and creditors wherein usurious interest is added to the sum really due, as a consideration for an extension of time or an indulgence to the creditors. 15 A. 537, *Campbell v. Hilliard*. See 2), No. 6.

5. In such cases, the penalty prescribed by the act of 1855, regulating interest will be applied, and the forfeiture of all interest will be decreed. *Ib.*

6. Usurious interest of other notes included with the principal in making a note, cannot be recovered. 17 A. 327, *Weaver v. Kearney*.

7. A factor who charges twelve per cent. and his commission, in addition, forfeits all interest under the law. 23 A. 249, *Payne v. Spiller, adm'r.* See INTEREST.

2) What constitutes usury; and divisibility of usurious stipulations.

1. The statutes in force at the date of the note, must govern, and the amount included in the note which consists of usurious interest and two and a half per cent. commission for advancing, should be deducted therefrom. 16 A. 240. *Payne & Harrison v. Waterston.*

2. The addition of usurious interest forfeited the entire interest, and the law in force at the date of the note decides the controversy. 16 A. 240, *Payne & Harrison v. Waterston.* (Act of 1844).

3. Where a certain per cent. is charged for money advanced, and conventional interest is also stipulated, the contract is usurious, and the principal only can be recovered. *Ib.* 3 L. 393 re-affirmed.

4. The usurious payments having been expressly imputed by the parties to the interest, cannot be recovered back nor imputed to the capital, one year after this payment. 26 A. 31, *McCracken v. Wells.*

5. The taking of the highest conventional interest in advance upon loans in the ordinary course of business, is not usurious. 8 Wh. 338, *Fleckner v. Bank of the United States.*

6. Usury cannot be set up against a note given in consideration of an extension of time. 26 A. 477, *Willis v. Chaffe.* See 1), No. 4.

7. Usury not being pleaded, the payments of interest at the rate of twenty per cent., must be considered as executed contracts. 28 A. 606, *Boagni v. Pickett.* See 1), No. 2.

8. Necessity of an allegation of fraud. See ESTOPPEL, No. 30.

9. Usury not presumed. See EVIDENCE, III. (a), No. 2.

10. See INTEREST.

LOSS.

See BILLS AND NOTES, XVI. DEPOSIT, III. DONATIONS, VI. (e), 1). EVIDENCE, IX. (a). INSURANCE, I. (g). LEASE, I. (c), 2). LOAN, I. SHERIFF, II. (b), 2), B. SHIPPING, VII.

LOUISIANA.

See PUBLIC LANDS. CONSTITUTION, II. (b). NEW ORLEANS. I. II. (b).

LOTTERY.

1. The Louisiana Lottery Company have the exclusive privilege to sell lottery tickets in this State. 23 A. 743, *Louisiana State Lottery Company v. Richoux*; 1868, p. 24; fines, 1874, pp. 47, 48.

LOUISIANA LEVEE COMPANY.

See CORPORATIONS, X. LEVEES, No. 11.

MADISON PARISH.

See POLICE JURY, Nos. 29, 42; court house, 1868, p. 79.

MAISON ROUGE GRANT.

See PUBLIC LANDS, III. (d). SALE, III. (a), No. 1.

MALICIOUS PROSECUTION.

1. Damages will not be allowed against a party for asserting a right in a court of justice by the compulsory process allowed by law, beyond the damages actually sustained, unless the circumstances of the case disclosed a want of probable cause for the action, and malice in the resort to compulsory process. 15 A. 16, *Carter v. Tufts.*

2. In an action for malicious prosecution, the specific allegation of want of probable cause, is not essential or sacramental. Where the allegations of the petition amply indicate a want of probable cause, they contain all the necessary elements to prosecute the action. 15 A. 337, *Burkett v. Lanata.*

3. The question of probable cause is composed of law and fact, it being the duty of the jury to determine whether the circumstances alleged are true, and of the court to determine whether they amount to probable cause. *Ib.*

4. To maintain an action for a malicious prosecution, the plaintiff must prove: that he has been prosecuted by the defendant, either criminally or in a civil suit, and the prosecution is at an end; that it was instituted maliciously and without probable cause; that he has thereby sustained damage. 15 A. 421, *Blass v. Gregor*.

5. Malice is a principal ingredient in a malicious prosecution, and its proof is indispensable, as a prerequisite to a recovery. *Ib.*

6. The proof of malice need not be direct; it may be inferred from circumstances; and the want of probable cause is presumptive evidence of malice, subject, however, like all presumptions, to be rebutted. 15 A. 421, *Blass v. Gregor*.

7. In an action for damages arising *ex delicto*, the single fact that the defendant was acquitted, in a criminal prosecution, for the offense, notwithstanding the plaintiff gave his testimony against him, unsupported by any other evidence of justification, cannot benefit the defendant where there is other evidence sufficient to support the demand for damages. 15 A. 543, *Beausoleil v. Brown*.

8. An action for damages, on account of a malicious prosecution, cannot be sustained, except on proof of malice in the defendant, and of want of probable cause for the prosecution of which plaintiff complains. 15 A. 605, *Laville v. Biguenaud*.

9. Actions of this sort have never been favored; a clear case must be made out, of a perversion of the forms of justice to the satisfaction of private malice, and the wilful oppression of the innocent, in order to sustain them. 15 A. 605, *Laville v. Biguenaud*.

10. In an action for damages for a malicious prosecution, where the evidence shows that the defendant acted from motives of private interest, and without probable cause to support the prosecution, his action, under the advice of counsel, will not exempt him from liability. 15 A. 672, *Glascock v. Bridges*.

11. To recover damages for malicious prosecution, plaintiff must prove: first, that he has been prosecuted by the defendant, either criminally or in a civil suit, and that the prosecution is at an end; second, that it was instituted maliciously, and without probable cause; and both these must concur; third, that he thereby sustained damage. 16 A. 3, *Murphy v. Redler*.

12. Probable cause does not depend upon the actual state of the case in point of fact, but upon the honest and reasonable belief of the party prosecuting. *Ib.*

13. Malice and want of probable cause must in all cases concur, in order to make out a case of malicious prosecution. 16 A. 252, *Robertson v. Sprig*.

14. In an action for vindictive damages for an unfounded and malicious suit, both malice and want of probable cause must be alleged and proved. 20 A. 66, *Dickinson v. Maynard*.

15. Where the court below knew the parties and their circumstances, the damages given for a malicious prosecution, will not be disturbed. 20 A. 338, *Hayes v. Hayman*.

16. Damages for a suit cannot be recovered unless malice be shown. See OFFENSES AND QUASI OFFENSES, II. (f), No. 3.

MANDAMUS.

I. WHEN A MANDAMUS WILL LIE.

(a) *To officers of inferior courts.*

1) In general.

2) To obtain a trial on some judicial action in matters prior to the rendition of judgment.

3) To obtain judgment, or some judicial action, in matters subsequent thereto.

4) To officers of courts, acting non-judicially.

(b) *To other persons.*

II. OF THE PROCEEDINGS.

I. WHEN A MANDAMUS WILL LIE.

(a) *To officers of inferior courts.*

1) In general.

1. A mandamus will lie where there is a clear abuse of discretion tending to thwart justice and frustrate the right of appeal. 7 A. 126.

2. Also to compel a judge to try a case. 4 R. 227.

3. To compel the issuance of execution in certain cases. 11 L. 368.

4. Also to comply with a mandate of the Supreme Court. 6 R. 92.

5. A mandamus will be refused, to compel a lower judge to grant a suspensive appeal, in a case where he suspended the sheriff from office, and when the lower judge is not at fault in refusing the appeal, it not appearing that there was a monied interest above five hundred dollars. 22 A. 49, *State ex. rel. Schwab v. Judge Second Judicial District Court*. *Per contra*, see APPEAL, I. (j), No. 6.

2) To obtain a trial or some judicial action in matters prior to the rendition of judgment.

1. A mandamus lies to compel the judge to act, when delay would produce injury and injustice. 4 R. 48.

2. A mandamus lies to compel the judges of the lower court to appoint an under tutor and convoke a family meeting. 14 L. 483; 7 A. 184.

3. A mandamus cannot be granted to compel the lower judge to render a certain decision; it is only where he refuses to render a decision that the writ should issue. 15 A. 113, *State ex rel. v. Judge Second District Court*; 13 A. 483.

4. A mandamus cannot issue to compel the lower judge to decide in a certain manner. The Supreme Court has only appellate jurisdiction. 17 A. 328, *State ex rel. Gonegal v. Judge Third District Court*.

5. A mandamus will not lie to force the judge to allow an appeal on a judgment refusing a mandamus to compel a justice of the peace to issue a commission to take testimony. The remedy is by appeal to the district court, and ultimately to this court, when the amount gives such appellate jurisdiction. 16 A. 186, *State ex rel. Loyau v. Third District Court of New Orleans*. See APPEAL, I. (h), No. 3.

6. A mandamus will lie to compel the judge of the court of probates, to order the execution and registry of the nuncupative testament by public act, although the estate has been fully administered and the assets turned over to the legal heir. 17 A. 189, *State ex rel. Remendo v. Judge Second District Court*.

7. A mandamus lies to compel the district judge to sign a bill of exceptions. C. P. 900; 17 A. 287, *State v. Judge Fourth District Court*.

8. A mandamus will not be issued to compel a lower judge to allow a litigant to bond property which has been sequestered. The jurisdiction of the Supreme Court is only appellate. 17 A. 288, *State v. Judge Fourth Judicial District Court*.

9. The judge has the discretion to refuse to dissolve an injunction on bond, and no mandamus lies to compel him so to do. 23 A. 766, *State v. Judge Superior District Court*.

10. A mandamus does not lie, to compel the judge *a quo* to reduce the amount of the bond fixed by him, to set aside a judicial sequestration. 26 A. 116, *State ex rel. Benton v. Judge Superior District Court, parish of Orleans*.

11. When a suit is improperly transferred from one court to the other, the remedy is not by mandamus, but by appeal. 26 A. 146, *Bruslé v. Hamilton*; 21 A. 123, *D'Meza v. Judge Fourth District Court*. See COURTS, IV. (b), No. 12.

12. A mandamus will lie to compel the judge of the lower court to grant a suspensive appeal from a judgment ordering property to be sold, being an interlocutory order, capable of working an irreparable injury. 22 A. 200, *State ex rel. Fassman v. Judge Second District Court*.

13. A mandamus will lie to compel a judge to grant a suspensive appeal, from an order to remove a case under act of congress, March 2d, 1867.

23 A. 29, *State ex rel. Coons v. Judge Thirteenth Judicial District*. APPEAL, I. (j), 13.

14. A mandamus will not lie to compel the judge to grant an appeal on a judgment decreeing the garnishee under an attachment to have property in his hands, liable for any judgment which may be rendered against the defendant. Such judgment is an interlocutory order. 23 A. 213, *State v. Judge Sixth District Court*.

15. A contested election case may be fixed for trial, before issue joined, and the plaintiff, who does not pray for a jury in his original petition, cannot complain of the order of the judge calling a jury, have the jury discharged, and then by a supplemental petition, ask for trial by jury, and obtain a continuance, for the attendance of the jury; in such a case a mandamus will lie to compel the district judge to fix the case on a day specified. 25 A. 150, *State ex rel. Pintado v. Judge of the Fifteenth Judicial District*.

16. WYLY, J., *dissenting*: This court has no authority to fix a case for trial in the district court; a mandamus can only issue in aid of appellate jurisdiction. The law does not require the district judge to fix a particular day, and this court ought not to go further. In 22 A. 54, this court said, that, if on the day of trial the defendant files his answer, praying for trial by jury, and a speedy trial is desired, and a regular term is not in session, the judge shall appoint a special term to summon a jury, and under that decision plaintiff has as much right as defendant, and may at any time before issue joined, amend his pleadings, and pray for a jury. *Ib.*

17. There is no law whereby a defendant, who pleads to the merits and reconvenes, can be compelled to give security for costs, and a mandamus will lie to compel the judge to try the case without such security. 25 A. 227, *State ex rel. Wilson v. Judge Sixth District Court*.

18. A mandamus will not lie to compel the judge to sign a bill excepting to the locking up of the jury, during Sunday, when the judge adjourned from Saturday night to Monday. 26 A. 67, *State ex rel. v. Judge Fourth District Court*.

19. In a proceeding by mandamus to compel the lower judge to grant an appeal, the court cannot pass on the validity of the judgment to be brought on appeal. 28 A., N. R., *State ex rel. Richard v. Parish Judge of St. Charles*.

20. A mandamus will not lie to compel a lawyer, acting as judge *ad hoc*, even after he has taken an oath as such, to try the case, when he declines to act any further. 29 A. 816, *State ex rel. Fuqua, etc. v. Brame, special judge*. See RECUSATION.

21. The courts of the United States cannot use the writ of mandamus as an original and independent remedy, but are limited to its use as a process in the enforcement of rights when jurisdiction has already been acquired for other purposes. 19 Wall. 655, *Heine v. The Levee Commissioners*.

22. For right of appeal, see APPEAL, I. (a), 1), No. 40; (f), 2), Nos. 8, 11; II. (b), No. 5.

23. For bond of appeal, see APPEAL, III. (a), No. 5; (c), No. 26.

24. For the delay affecting appeals occasioned by a mandamus, see APPEAL, III. (a), No. 18.

3) To obtain judgment or some judicial action in matters subsequent thereto.

1. A mandamus will not lie to compel the lower judge to issue execution, where a rule taken for said purpose was dismissed, and the judgment is not appealed from. 19 A. 6, *State ex rel. Lagan & Mackison v. Judge of the Fourth District Court*.

2. A mandamus to compel the judge to fix the amount of the bond for the release of sequestered property, will be refused where the suit has been dismissed. 20 A. 99, *State ex rel. Westbrook v. Farrar, judge*.

3. A mandamus will lie to compel the judge of the lower court to execute the judgment of the appellate court, regardless of an injunction issued by him since the judgment, on grounds which might have been pleaded in the first injunction. 20 A. 521, *State ex rel. v. Judge Second Judicial District Court*. See EXECUTION, I.

4. A mandamus will issue to compel the judge of probates to entertain against the executor for an account, a rule taken by a creditor whose judgment is suspended by appeal; the rule having been dismissed on an exception. 20 A. 580, *State ex rel. Champlain v. Judge of the Second District Court.*

5. When it appears from the papers and documents, that the judgment was rendered by default, without any legal notice of the proceedings by which the judgment was obtained, without service of any notice of judgment, and that an injunction was refused, a mandamus will lie to compel the lower judge to grant a suspensive appeal. 22 A. 90, *State ex rel. Lobdell v. Judge of the Fourth District Court.*

6. A mandamus will not lie to compel a judge to grant a suspensive appeal from a judgment ordering an executor to furnish a new security "or be dismissed from office." 22 A. 116, *State ex rel. Commagère v. Judge Second District Court.*

7. Application for a mandamus to compel the judge to grant a suspensive appeal, should be made before the term of the Supreme Court, when the appeal should have been made returnable. 29 A. 809, *State ex rel. Brown v. Parish Judge of Iberville.*

8. The city of New Orleans has a direct pecuniary interest in the funds in the custody and under the control of her treasurer, and a mandamus will issue, from the Supreme Court, to compel the district judge to grant a suspensive appeal from a judgment against the treasurer in all cases where the amount involved is sufficient to give the appellate court jurisdiction. 22 A. 119, *State ex rel. City v. Judge Sixth District Court.*

9. A judgment signed in vacation being considered as not signed, a mandamus will lie to compel the judge to sign it at the next term of court. 26 A. 119, *State ex rel. Dixon v. Judge Fifth District Court.*

10. A judge may properly sign a judgment which has been rendered by his predecessor, and if he refuse to do so a mandamus may issue to compel him. 8 P. 291, *Insurance Company v. Wilson's Heirs.*

11. When a mandamus will be issued by the Supreme Court to justices' courts. See APPEAL, I. (h), No. 7.

12. A mandamus cannot be issued to compel the lower judge to order the clerk of court and receiver appointed by said court, to forthwith turn over to relator the property received by virtue of a writ of sequestration. 26 A. 121, *State ex rel. Taylor v. Judge Superior District Court.*

13. A mandamus should issue to compel the judge to grant an appeal from a judgment making peremptory a mandamus ordering the defendant to deliver property in his possession. 28 A. N. R., *State ex rel. Woods v. Judge Superior District Court*; O. B. 45, fo. 51.

14. A mandamus should issue to the judge *a quo* to try a case, although he has appointed a liquidator to the partnership, and his judgment has been appealed from. 27 A. 702, *State ex rel. Wood v. Judge Fifth District Court.*

15. A mandamus cannot issue to compel the lower judge to grant an injunction. 28 A. 905, *Beebe v. Judge Sixth District Court.*

16. MORGAN and LEONARD, JJ., *dissenting*: The proper allegations for an injunction being made, it was the duty of the judge to issue the writ, he had no discretion. *Ib.* See APPEAL, I. (b), 2), E. No. 19.

17. The question whether irreparable injury results from the order to bond the injunction, can only be decided on the appeal from the order, and not upon a mandamus to compel the judge to grant the appeal. 28 A. 889, *State ex rel. Dardenne v. Judge Fifth Judicial District Court.*

18. As to execution of judgment, see APPEAL, I. (c), No. 6.

19. A mandamus will issue to compel the judge to try the cause according to law. See JUDGMENT, IX. No. 2.

20. Where an exception filed after default, has been overruled, a mandamus will issue to compel the judge to try the case on plaintiff's motion, to confirm his default on the first day of the next term of his court, but if before that day defendant has filed his answer, the mandamus will be made peremptory, to compel him to hear and determine the suit. 30 A. 156, *State ex rel. Borland v. Judge of the Second Judicial District Court.*

4) To officers of courts acting non-judicially.

1. The district attorney, in case of refusal, may be compelled by mandamus to bring a suit under the intrusion act, to test the right to an office. 21 A. 656, *Hayes v. Thompson*; 23 A. 786, *State ex rel. Rills v. Lynch*; 24 A. 149, *Birhil v. Fisk*. See INTRUSION IN OFFICE.

(b) To other persons.

1. A mandamus should issue to compel the controller of the city of New Orleans to warrant, in accordance with law, on the city treasurer, in favor of the sheriff, for his legal fees, certified and approved by the clerk and judge of the First District Court. 18 A. 196, *Shaw v. Howell*; 14 A. 249; 21 A. 352, *State ex rel. Pinac v. Landry*.

2. A mandamus will not issue to compel the mayor of the city of New Orleans to sign a contract which has been annulled by the commanding general, in 1867, acting by virtue of the reconstruction acts. 20 A. 518, *State ex rel. O'Hara v. Heath, mayor*.

3. The city treasurer cannot be compelled to pay a warrant which has not yet been issued by the controller. 21 A. 352, *State ex rel. Pinac v. Mount, treasurer*.

4. No mandamus will issue to compel the treasurer of the city of New Orleans to deliver bonds bearing ten per cent., under act of September 5, of 1868, in payment of warrants issued by the city controller. 21 A. 370, *State ex rel. Avery v. Mount, treasurer*.

5. A mandamus is the proper remedy to compel the city treasurer to pay the warrants issued by the controller. *Ib.*; 18 A. 195; 21 A. 352. See No. 1.

6. When the defendant is willing to perform what is demanded of him, the writ should not issue. 22 A. 300, *State ex rel. Howard v. Burbank*.

7. The writ should not be issued upon the mere consent of parties; the consent creates a presumption of fraud. 22 A. 379, *State ex rel. Hughes & Dejan v. Burbank*.

8. The writ of mandamus will not lie to compel the chief executive officer of the State to perform any act coming within the range of his duties as governor, and which he has a discretionary power to do. 22 A. 1; 24 A. 351, *State ex rel. Mississippi Valley Transportation Company v. Warmoth*. See CONSTITUTION, II. (e), 2), No. 1.

9. The writ never issues to compel officers to perform an act which they have a discretionary power to do. 21 A. 352; 20 A. 518; 22 A. 603; 23 A. 333; 29 A. N. R., *State ex rel. Mathers, Jr. v. Board of Liquidation*.

10. A mandamus is the proper remedy to compel a municipal officer to perform a ministerial act. 21 A. 352, *State v. ex rel. Pinac Mount Treasurer*.

11. Act of 1870, approved March 16th, providing for the construction of a shell road, in the parish of Jefferson, by the police jury, is not mandatory in its nature, and a mandamus will not issue against the police jury, unless their duty be perfectly clear and their neglect perfectly evident. 22 A. 611, *State ex rel. Bonnabel v. Police Jury Jefferson*.

12. The test as to the right to a mandamus, is to know whether the law confers any discretion or imposes a positive and absolute duty; if in the latter, the mandamus should issue. 23 A. 77, *State ex rel. Burnet v. Warmoth*.

13. The acts of 1870 authorizing the issuance of State bonds for the purpose of taking up the floating debt of the State; and the act approved March 4, 1871, gave the board appointed for this purpose, authority to exchange the bonds for evidences of debt, giving them a discretion to act, and no mandamus will lie to compel them to make a *pro rata* distribution among the creditors of the State. (LUDELING and HOWELL, J. J., *dissenting*). 23 A. 388, *State ex rel. Smith v. Board of Liquidators*.

14. A mandamus cannot be issued against the auditing officers of the city of New Orleans, to compel the payment of money, directly or indirectly, in accordance with act No. 5, of 1870, E. S. 23 A. 791, *State ex rel. De Monasterio v. Shaw, administrator*.

15. A mandamus will not lie, to compel the State treasurer to make a cer-

tain distribution of money, not yet received by him; a judge has no right to prescribe rules for the administration of the State treasury. 24 A. 16, *State ex rel. Hillman v. Dubuclet, Treasurer*.

16. The recorder of mortgages, who may be a creditor of the State, but whose compensation is not otherwise provided, than by section 3172 of the Revised Statutes, cannot obtain redress by a mandamus against the auditor. 25 A. 286, *State ex rel. Recorder v. Clinton*.

17. The owner of certificates of stock, may proceed by mandamus to compel the officers of a corporation to issue new certificates, in lieu of the old ones which have been lost, where there is no special denial of the officer's obligation to issue them. 25 A. 413, *State ex rel. Philips v. New Orleans Gas Light Company*. But see CORPORATIONS, VI. (c), No. 7.

18. The purpose of the mandamus is not to regulate or define the duties of public officers. An allegation that the relator offered certain warrants in payment of an equal amount of license taxes, without specifying for whom, and for what purposes, will not be sufficient to authorize a mandamus. 25 A. 624, *Mossy v. Harris*.

19. A mandamus will not issue to compel the administrator of improvements to furnish grades, lines, etc., to a contractor with the city of Jefferson, annexed to New Orleans, where it appears that the contract is repudiated by the city of New Orleans, as null. 26 A. 322, *State ex rel. Romaine v. Administrator of Improvements of New Orleans*.

20. Where the State treasurer has failed to pay to relator his warrants when he had the money in the treasury, but paid others who had no right of preference, the court cannot mandamus him to pay, because there being no money at the date the mandamus would issue, it would be tantamount to giving a preference to relator over every other creditor of the State. 26 A. 133, *State ex rel. Merle v. Dubuclet*. See CONSTITUTION, II. (d), No. 11.

21. MORGAN, J. dissenting: What was the treasurer's duty then, should be his duty now. *Ib*.

52. The owner of the land may proceed by mandamus to have an improper inscription of a privilege on his property, erased. 26 A. 61, *State ex rel. Deblieux v. Recorder of Mortgages*.

23. The recorder of mortgages may be compelled by mandamus to erase a mortgage. 29 A. 146, *State ex rel. St. Martin v. Police Jury of St. Charles*; 4 R. 54, *State v. Bordelon*; 26 A. 61. See II. No. 3.

24. A proceeding by mandamus is not the proper remedy to cause the erasure of mortgages and municipal taxes which are alleged to have been cancelled by reason of a sale made by the State tax collector of the property on which the mortgages and taxes rest. 29 A. 848, *State ex rel. Fix v. Herron, Recorder of Mortgages*.

25. No mandamus can be granted when there is no proof that, at the time of making the demand for payment, there was money in the city treasury. 27 A. 167, *State ex rel. v. Calhoun*.

26. Section 4 of act No. 69, of 1870, imposing the duty on the auditor to estimate and collect a tax sufficient to pay interest on bonds, has been repealed by acts 3, 4, and 55, of 1874; therefore, no mandamus will lie to compel the auditor to estimate and collect said tax. 27 A. 429, *State ex rel. McCauley v. Clinton*; (carried to U. S. S. C.). See TAXES, I. No. 6.

27. Act No. 3, of 1874, does not make it the ministerial duty of the board of liquidators to exchange the bonds for anything but State bonds, and certain specified warrants; therefore, no mandamus can issue to compel the funding of promissory notes, given by the governor to the Citizen's Bank, for a loan of money to the State. 27 A. 660, *State ex rel. Citizens' Bank v. Board of Liquidators*.

28. The auditor cannot refuse to issue a warrant for a valid claim, for which an appropriation has been made, and which has been audited, on the ground that there is no money actually in the treasury. 28 A. 72, *State ex rel. N. O. Republican Printing Company v. Clinton, auditor*. See OFFICE AND OFFICER, No. 31.

29. A stockholder who shows a just and useful purpose to be effected in the

examination of the books of the company, has a right to a mandamus to compel the directors to exhibit such books and papers to him, or to his duly authorized agent. 28 A. 204, *State ex rel. Martin v. Bienville Oil Works Co.*

30. HOWELL and MORGAN, JJ., *dissenting*: The right is a personal one, not to be exercised by relator's agent. *Ib.*

31. When there is no appropriation against which the auditor may issue his warrants, a mandamus will not lie to compel him to issue such. 28 A. 932, *State ex rel. James Longstreet v. Johnson, auditor, and Dubuclet, treasurer.*

32. The holder of a warrant has no right to a mandamus, to compel the treasurer and auditor to perform their respective duties. If the auditor assumes control over the funds in the hands of the tax collectors, and prevents the payment thereof, in the State treasury, the State, and not its creditors, must seek relief. 28 A. 85, *State ex rel. Bourdon v. Dubuclet and Clinton.*

33. The legislature having failed to make an appropriation, the claim for pension, of a veteran of 1814 and 1815, although valid, for all the time during which he has not been paid, can only be enforced upon the funds of the current year which are not exhausted. 28 A. 515, *State ex rel. Charbonnet v. Johnson, auditor.*

34. A mandamus will not lie against the auditor and treasurer, to compel them to issue their warrant to the engineer, appointed by the State to examine the work performed by the levee company, for his salary, out of the taxes collected for said company. It is not the ministerial duty of such officers to pay the said salary. 28 A. 932, *State ex rel. Longstreet v. State Auditor and Treasurer.*

35. Where funds have been appropriated to pay certain claims under the supervision of a senate committee, and upon proper evidence thereof, and not to exceed the amount appropriated, no mandamus can issue against the chairman of the committee, in the absence of proof that the amount has not been reached. 29 A. N. R., *Klein & Co. v. Herwig.*

36. A mandamus is not the proper remedy to force a police jury to collect a tax and pay the salary and fees of the district attorney, which are not liquidated. 29 A. 146, *State ex rel. St. Martin v. Police Jury of St. Charles.*

37. A mandamus may issue to compel the chief State engineer to approve the warrants drawn by the assistant State engineers, when they have properly fulfilled their duty. 29 A. N. R., *State ex rel. Merchant v. Jeff. Thompson.*

38. No mandamus can issue against the board of liquidation, to compel the funding of even valid bonds or warrants; their power being discretionary. 29 A. 690, *State ex rel. Forstall v. Board of Liquidation.*

39. No mandamus will lie to compel the funding board to fund the bonds declared questionable by act of 1875, p. 110, unless a judgment is first obtained, declaring the bonds legal. 29 A. 264, *State ex rel. Exchange Bank v. Board of Liquidation*; 29 A. N. R., *State ex rel. New York Guaranty, etc., v. Board of Liquidation.*

DEBLANC, J., *dissenting*: The whole question can be decided in one and the same proceeding. *Ib.*

40. A mandamus to levy a tax, cannot be issued against the mayor only, it must be directed to all the members of the council. 29 A. 659, *State ex rel. Kneeland v. Shreveport.*

41. No mandamus can issue to compel the corporation, against which a judgment has been obtained, to levy a tax to pay the judgment, when the contract between the creditor and the corporation was a sale of property, to be paid for out of the sale of bonds, and when the limitation of the rate of taxation by law, contemplated the payment of the bonds in due length of time. 29 A. 659, *State ex rel. Kneeland v. Shreveport.*

42. A proceeding by mandamus is not proper to transfer shares, when the original certificate is not produced according to the terms of the charter. See CORPORATIONS, VI. (c), No. 7.

43. Where the political corporation was abolished by the legislature, but continued in existence for the purpose of settling its indebtedness, and the like, and the term of office of its officers has expired, and no new provision is made for their continuation in office or the election of others, if there be a

judgment against the corporation, a mandamus will not lie to enforce the assessment of taxes for its payment, there being no officers to whom the writ can be directed. 93 U. S. (Otto's), 258, *Barkley v. Levee Commissioners*.

44. The court cannot by mandamus compel a new corporation to perform the duties of an extinct corporation in the levy of taxes for the payment of its debts, especially where their territorial jurisdiction is not the same and the law has not authorized such a levy. *Ib.*

45. Nor can the court order the marshal to levy taxes in such a case, nor in any case except where a specific law authorizes such a proceeding. *Ib.*

46. If officers who are charged with the duty of levying or collecting taxes refuse to perform their functions, the court, in a clear case of failure and at the instance of a party directly interested, can, by the prerogative writ of mandamus, compel them to perform duties which are ministerial, as distinguished from those which are judicial or discretionary. 1 Woods, 246, *Heine v. The Levee Commissioners*.

47. The purpose of the writ of mandamus is to enforce, not to create, legal duties. 2 Woods, 230, *U. S. ex el. Ranger v. New Orleans*.

48. For right of bondholders to compel the levy of a tax, see CONSTITUTION, II. (e), 2), No. 2.

49. For promulgation of laws, see COURTS, I. No. 7.

50. A mandamus is not the proper proceeding to test the right of a notary to hold his office. See INTRUSION IN OFFICE, No. 1.

51. A mandamus cannot be joined to an injunction. See PLEADING, II. (a), No. 18.

52. A mandamus may issue to compel the city of New Orleans to include all judgments against her in her budget, see EXECUTION, I. No. 14.

53. A mandamus cannot issue to compel the administrator of public accounts to issue a warrant for the amount due by the city to employees. A judgment must be obtained in regular course and recorded in the office of said administrator. 30 A. 79, *State ex rel. Strauss v. Brown*.

54. The criminal sheriff cannot proceed by mandamus to compel the city of New Orleans to pay his account, duly approved by the judge, where the claim is contested. He must proceed in the ordinary manner. 30 A. 82, *State ex rel. Houston v. City of New Orleans*.

55. The administrator of commerce cannot be compelled by mandamus to close the private markets. See MARKET, No. 12.

56. A mandamus may issue to compel the board of assessors to enter on their rolls the value put by the arbitrators appointed under act No. 96 of 1877 on property over assessed. 30 A. 261, *State ex rel. City Railroad v. Board of Assessors*.

57. The sheriff has a right, by mandamus, to compel the parish treasurer to register his claim against the parish for services rendered in criminal prosecutions, when the amount is correct on the face of the bill, and is so certified by the clerk and judge, and the claim is presented within sixty days after its approval. 30 A. 517, *State ex rel. Barrow v. Fisher, treasurer*.

58. A mandamus cannot issue from the Supreme Court to compel the district attorney to file certain papers, the clerk to issue proper process, and the sheriff to serve them, even if, by an improper combination, the case cannot be commenced. 30 A. —, *State ex rel. Schwing v. Sheriff of Iberia*.

59. A mandamus will be issued to compel the administrator of public accounts of the city of New Orleans to warrant in favor of a judgment creditor whose judgment is duly registered, when it appears that there are funds sufficient to pay the same in the city treasury, or which should be there, if not misapplied. 30 A. 710, *State ex rel. Carondelet Canal Navigation Company v. Pilsbury, mayor, et al.*

60. A mandamus not to issue against New Orleans, 1870, E. S., p. 10.

II. OF THE PROCEEDINGS.

1. The proceeding by mandamus must be conducted in the name of the State, upon the petition and oath of the party entitled to relief; it cannot be

demanding by way of answer to a suit brought to collect money. 15 A. 147, *Bishop v. Marks*.

2. An application for a mandamus should be made in the name of the State, but this is not absolutely essential. 29 A. 794, *Malain v. Judge Third District Court*.

3. On an application for a mandamus, to compel the recorder of mortgages to erase an inscription, all that is required is, that the parties in interest should have notice of the application, in order that their rights, where they have such, may be protected. 15 A. 334, *Savage v. Holmes*. See I. (b), Nos. 22, 23, 24.

4. A mandamus is the proper way to compel a ministerial officer to perform a purely ministerial act. 15 A. 334, *Savage v. Holmes*.

5. The order to show cause on a certain day fixed by the court, the summary hearing of the grounds of objection and evidence, and the judgment decreeing a peremptory mandamus to issue, are in conformity to articles 841, 842 and 843, of the Code of Practice. 15 A. 334, *Savage v. Holmes*.

6. On the hearing upon the return of the mandamus, at least in cases against other than judicial officers, the relator may either rely upon the insufficiency of the return alone, or he may traverse the same by proof, and thereupon the answer and the proof will be considered together. 15 A. 73, *State v. Lusitanian Society*.

7. But he cannot after having failed in one mode of trial, resort to the other. *Ib.*

8. No application for a re-hearing, lies from a judgment on a writ of mandamus. 18 A. 113, *State v. Judge Fourth District Court*.

9. The answer to a mandamus should contain a full written defense, whether it involves exception or merits. The splitting up of a defense should not be tolerated in practice. 18 A. 195, *Shaw v. Howell*.

10. It is the duty of the judge who desires to refute the allegations of the applicant for a mandamus, that within the legal delays, he furnished a bond with good security, for an amount exceeding by one-half the amount of the judgment appealed from, to state wherein the bond was defective. 21 A. 114, *State ex rel. Johnson v. Judge Fifth District Court*.

11. When the Supreme Court is not in session, *ex necessitate rei*, the chief justice or the senior justice present, should grant the provisional order. 22 A. 582, *State ex rel. Southern Bank v. Judge of the Eighth District Court*.

12. The mandamus, when made peremptory, becomes a final decree or judgment; and no motion to quash or vacate lies to have it set aside. 24 A. 132, *State ex rel. School Directors v. Ctnway, superintendent*.

13. An injunction is not the proper mode of enforcing a mandamus. 26 A. 83, *Citizens' Bank v. Dubuclet*. See CORPORATION, X. (g).

14. A mandamus against the State treasurer, to compel him to pay a warrant issued by the auditor, is not a suit against the State. 26 A. 129, *State ex rel. Merle v. Dubuclet*. See TREASURER, Nos. 1, 2.

15. A writ of mandamus is not the proper remedy to compel a tax collector to pay the amount collected, in the parish treasury. 26 A. 259, *State ex rel. Simmons v. Boullt*.

16. A mandamus is a summary proceeding; it is questionable, whether any intervention can be filed therein. 17 A. 156, *State ex rel. Bienvenu v. Wrotnoski, secretary of State*. See PLEADING, VIII. (d), 2), No. 2.

17. In a proceeding by mandamus to have the judgment against the city recorded in the office of the administrator of public accounts, the latter cannot take a rule on a third party, so as to make him a party to the proceedings. 28 A. 103, *State ex rel. Carondelet Canal and Navigation Company v. Brown, administrator of public accounts*.

18. The judge having made no answer to the writs of mandamus and prohibition, they should be made absolute. 28 A. N. R., *State ex rel. Marin v. Judge Fifth District Court*.

19. The appropriate proceeding on a refusal to pay corporation bonds, is to sue at law and establish the validity of the claim by a judgment. Execution may then issue, and upon a return that no property of the corporation can be found, a mandamus may issue to compel them to raise the amount of the

judgment by taxation; provided always, that the corporation had authority to levy and collect taxes for the payment of that particular debt. 19 Wall. 655, *Heine v. The Levee Commissioners*.

20. In answer to a mandamus, the title of relator, to the office he holds, cannot be enquired into. 29 A. 399, *State ex rel. Jumel v. Johnson*.

21. In a proceeding against the board of liquidators, holders of a series of bonds, distinct from the ones forming the basis of the proceedings, should not be permitted to intervene. 30 A. 449, *Hamlin v. Board of Liquidators*.

22. Several judgment creditors of a parish cannot join themselves in a proceeding by mandamus to compel the levy of a tax to pay their judgments. 30 A. 606, *Favrot et al. v. Parish East Baton Rouge*.

MANDATE.

I. OF ITS CONSTITUTION AND NATURE; INTERPRETATION AND GENERAL EXTENT.

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| (a) <i>In general.</i> | (c) <i>Power to act in matters relative to bills and notes; and suretyship.</i> |
| (b) <i>Power to act in judicial proceedings; adjust claims; collect debts, and grant acquittances.</i> | |

II. OF THE OBLIGATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS.

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|------------------------|---|
| (a) <i>In general.</i> | (b) <i>Agent's acts, beyond or without the principal's authority; and their ratification by the latter.</i> |
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III. OF THE OBLIGATIONS OF THE PRINCIPAL TO THE AGENT.

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|------------------------|---|
| (a) <i>In general.</i> | (b) <i>Agent's remuneration and interest on his advances.</i> |
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IV. OF THE OBLIGATIONS OF THE AGENT TO THIRD PERSONS.

V. OF THE OBLIGATIONS OF THE AGENT TO THE PRINCIPAL.

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|---|---|
| (a) <i>In general.</i> | 7) <i>Principal's rights over his property or its proceeds; their misappropriation by the agent; his duty to account; and liability for profits and interest.</i> |
| (b) <i>Agent's diligence; extent of his liability; obligation to account; and the action mandati directa.</i> | |
| 1) <i>In general.</i> | (c) <i>Employment of sub-agents.</i> |
| 2) <i>Mandate to buy.</i> | (d) <i>Principal's ratification of the agent's acts as regards the latter.</i> |
| 3) <i>Mandate to sell.</i> | (e) <i>Agent's interest when adverse to that of the principal.</i> |
| 4) <i>Collections of claims; and their assignment as collateral security.</i> | |
| 5) <i>Remittance of funds.</i> | |
| 6) <i>Effecting insurance.</i> | |

VI. OF BROKERS AND PUBLIC AGENTS.

VII. OF THE TERMINATION OF THE MANDATE.

I. OF ITS CONSTITUTION AND NATURE; INTERPRETATION AND GENERAL EXTENT.

(a) *In general.*

1. Where a United States marshal offers a reward for the arrest of a fugitive from his custody, he acts as a principal, and although he may have signed with the addition of the words, United States marshal, he cannot avoid liability. 15 A. 385, *Murray v. Kennedy*.

2. The agent of a partnership is not the agent of the partners individually. 18 A. 336, *Johnson's Executor v. Brown*.

3. The mandate may be tacit as well as express. 22 A. 496, *Ball v. Bender*.

4. A power of attorney sufficiently comprehensive to authorize the agent to manage a plantation and disburse the proceeds of the crop, will justify the

factor to pay out the proceeds of the crop on the orders of the agent. 29 A. 679, *Sentell & Co. v. Kennedy*.

5. Members who belong to two corporations, cannot represent both corporations, so as to make a valid contract. See LEASE, I. No. 1.

(b) *Power to act in judicial proceedings; adjust claims; collect debts; and grant acquittances.*

1. The authority given to an agent to collect a debt, carries with it the authority to sue for it, and issue execution upon the judgment obtained. 15 A. 242, *Joyce v. Duplessis*.

2. In a suit between parties, with reference to the title of land and slaves, where the agent of the plaintiff sequestered the property upon his own affidavit, and the defendant moved to dissolve the writ of sequestration, upon the ground that the agent was without authority to take that proceeding; *Held*: That an authorization from the plaintiff to his agent to get possession of the property, although the defendant should object to give it up, cannot be presumed to mean that the agent should take possession by force and violence, but, on the contrary, by process of law, and is sufficient therefore to authorize the agent to make the affidavit and execute the bond in order to obtain the writ of sequestration. 15 A. 574, *Carter v. Lewis*.

3. The mandate must be special, and there must be evidence thereof produced to the court, by affidavit or otherwise, before a writ of sequestration can be obtained by the agent. 17 A. 8, *Lithgow & Co. v. Byrne*.

4. The statutes of the United States provide that the controller of national currency, if he be satisfied that any association has refused to pay its circulating notes, may appoint a receiver, who shall collect debts, claims, etc., belonging to the association—1864, § 50; *Held*: That the power to collect debts embraces the right to use all necessary means to attain the object of the agency. 22 A. 322, *Case, receiver v. Berwin*.

5. The agent cannot have an appeal taken by his principal dismissed. 22 A. 365, *State ex rel Burbank v. Dubuclet, treasurer*.

6. The principal has always the right to intervene and show that the action of the agent is unauthorized. *Ib.*

7. The clause in a procuration: "*citer à comparaitre devant tous juges et tribunaux compétents, traiter et transiger, compromettre, se concilier, obtenir tous jugements etc.*," means to sue and be sued. 24 A. 31, *Miller v. Marmiche and Wife*.

8. The agent of a partnership has no authority to represent the interest of the individual members in a court of justice. 18 A. 336, *Johnson's Executor v. Shepherd Brown*.

9. An agent must disclose his principal. See PLEADING, I. (c), 9), No. 11.

(c) *Power to act in matters relative to bills and notes and suretyship.*

1. The power to indorse bills of exchange and promissory notes must be express and special. 15 A. 37, *Ducongé v. Forgay*. See Nos. 5, 7.

2. An authorization to indorse other promissory notes cannot be inferred from the fact that the party whose name was forged on them did not publicly denounce the forgery which first came to his knowledge; this neglect on his part, to denounce the crime to the public authorities, does not make him responsible for other forgeries of his name which were then unknown to him, or give rise to an action of damages against him under articles (2294) and (2295), of the Civil Code. 15 A. 37, *Ducongé v. Forgay*.

3. The depositor, who, on discovering a forgery of his book keeper, reports to the bank that it is all right, and retains the book keeper in his employ, can not recover from the bank the amount of a second forged check. 23 A. 310, *DeFerriet v. Bank of America*. See QUASI CONTRACTS, I. No. 21.

4. Where a commercial firm, being the holder of certain promissory notes, remitted them before maturity to another firm, to be collected and applied to the extinguishment of a debt existing in favor of the latter firm, from the former, and indorsed them in order to render their collection more easy, it

being understood that the balance remaining after the payment of the debt, was to be paid over to the firm which had remitted the notes; *Held*: That the firm to whom the notes were remitted must be viewed as the agent of the other for collection of the notes, and if the notes were tested and a suit brought on them by this firm, the other, which was the original holders of the notes, never having ceased to be the owner, cannot be held liable as indorsers. 15 A. 486, *Miltenberger v. McGuire*.

5. Under a general power the agent cannot execute promissory notes. 19 A. 327, *Robertson v. Levy and Wife*; C. C. (2966); 2 A. 358. See Nos. 1, 7.

6. A commercial firm having executed a power of attorney to their agent, to draw bills of exchange upon them, and never having given public notice of the revocation of the power, cannot avoid payment by pleading the want of authority in the agent, at the time of drawing the note. 21 A. 342, *Caldwell v. Neil*.

7. It is not necessary that the power to sign a note be in writing, but it must be *express* and *special* as distinguished from *implied* and *general*. 21 A. 477, *Nalle & Co. v. Higginbotham*; 3 R. 201; 2 A. 891; 6 L. 587. See Nos. 1, 5.

8. A party who received a note for collection, and afterwards returned it to the one from whom he received it, cannot be held liable, by a claimant thereto. 21 A. 650, *Satterfield v. Delavalade*.

9. Where the principal orders his agent to buy a mortgage note, having precedence of his own on a plantation, and he does so, and charges said note to the account of his principal, the agent cannot subsequently transfer it to third persons. 22 A. 141, *H. W. Gribble v. Haynes*.

10. Where notes are deposited in a bank for collection, and the bank fails to use due diligence in protesting the same, and securing the liabilities of all parties, the bank is responsible, and her acts are not prescribed by one year, but by ten, being obligations of the agent to the principal. 22 A. 142, *E. Eichleberger v. G. A. Pike*. See No. 16; V. (b), 4), No. 8.

11. One who draws a draft as agent, although he does not so sign, and when the facts are known to the drawee, and furthermore appear on the face of the draft, as when the debit is ordered on the account of the principal, the drawer is not personally liable thereon. 24 A. 145, *Milligan v. Lyle*.

12. The principal cannot be held on a note signed by the agent, without authority. 24 A. 427, *Hills v. Upton et al.*

13. One who signs a promissory note without authority from his principal, binds himself and not the latter. 24 A. 427, *Hills v. Upton*.

14. Where a power of attorney is given to an agent, "to make checks and draw money out of any bank or banks, wherein the same may be deposited by the principal," the fact that a sufficient amount to meet the check was not deposited when the check was drawn, is not a valid defense against a third *bona fide* holder of the check for valuable consideration, and without notice of the prohibition. 25 A. 43, *Crescent City Bank v. Hernandez*.

15. When an agent issues a commercial obligation authorized by the terms of his mandate, the legal presumption is that it was for a valuable consideration which has actually accrued to the benefit of the principal who is therefore bound. 25 A. 43, *Crescent City Bank v. Hernandez*.

16. By failure to protest, the bank becomes liable to the depositor of the note. 28 A. 921, *Blanc v. Mutual National Bank*; 15 L. 414; 6 M. 460; 4 A. 300; see No. 10.

17. The husband, separate in property from his wife, who carries on a hotel, having special authority to employ servants, and settle with them, may bind his wife by signing notes in favor of such servants. See MARRIAGE, VIII. (a), No. 7.

18. The agent may sue in his own name, on a note. See PLEADING, I. (c), 9), No 7; (c), 7), No. 6. PLEDGE, I. (b), No. 3.

19. An agent who accepts a bill of exchange, acting within the scope of his agency, binds his principal, although the latter derived no benefit from the acceptance. 30 A. 587, *Broadway Savings Bank v. Vorster*.

II. OF THE OBLIGATIONS BETWEEN THE PRINCIPAL AND THIRD PERSONS.

(a) *In general.*

1. The neglect to provide the tackle, apparel and furniture required by law for the equipment of a vessel, is the fault of the owner himself, and he is therefore, responsible to the master of a slave, hired on board his boat and lost through his neglect, for the value of such slave. 15 A. 304, *England v. Gripen*.

2. The maxim, "*qui facit per alium, facit per se*," applies with equal force to owners of steamboats, who are liable to third persons, in civil suits, for the frauds, deceptions, concealments, misrepresentations, torts, negligences and other *malfeasances or misfeasances*, and omissions of duty of their agents in the course of their employment, even if they forbade the acts or disapprove of them. In all such cases the rule, *respondeat superior*, applies. 15 A. 321. *Howes v. Steamer Red Chief*.

3. Employers are responsible for the damages occasioned by their servants in the exercise of the functions in which they are employed. C. C. (2399); 17 A. 20, *Choppin v. New Orleans and Chicago Railroad*; 166, *Witchreck v. Fasnatch*.

4. An agent employed by an insurance company, to raise a sunken vessel, and who, for said purpose, incurs expenses, may bind his principal for the same. 20 A. 243, *Wallace & Co. v. Lamson*.

5. The proprietor of a newspaper is responsible in damages, for the acts of his agents, who inserted therein a libel without his knowledge, approbation, and even against his wishes. 25 A. 170, *Perret v. New Orleans Times*. See OFFENSES AND QUASI OFFENSES.

(b) *Agent's acts beyond or without the principal's authority, and their ratification by the latter.*

1. The acts of a principal will not amount to a ratification of a contract, when they are entirely based upon the representations of the agent, who was, himself, deceived as to the real existence of the thing which was the object of the contract. 15 A. 268, *Mummy v. Haggerty*.

2. In an action brought against a party for damages, for an illegal seizure of property, pointed out by a person acting as his agent, judgment will be rendered against him, if, in his answer, he denies only the authority of the agent to issue execution; he must deny the whole agency to relieve himself from responsibility. 15 A. 242, *Joyce v. Duplessis*.

3. There can be no valid ratification when a contract is without object. 15 A. 268, *Mummy v. Haggerty*.

4. A general and special power of attorney, given by a wife to her husband, from whom she is separate in property, is not sufficient to authorize him to bind her as a member of a commercial partnership, where it does not appear that she was ever a public merchant, or interested in any commercial house, nor that she ever took any part whatever in the concern for whose liabilities it is sought to make her responsible. 15 A. 647, *Rolling v. Bordenave*.

5. The principal who ratifies the contract, made with his agent, who exceeded his authority, becomes bound. 18 A. 546, *Littleberry Overby v. Hezekiah Overby*; 29 A. 679, *Sentell & Co. v. Kennedy*.

6. The principal, who ratifies the acts of his agent, cannot afterwards plead the want of authority in the agent, to act. 19 A. 370, *Meyers v. Simmons*.

7. The principal, who adopts the acts of his agent, who disobeyed his instructions, thereby ratifies them. 20 A. 90, *Szymanski v. Plassan*; 3 A. 464; 6 A. 540.

8. A principal who fails to make objection to the acts of his agent, when notified thereof, is bound thereby. 20 A. 215, *Mangam v. Bell*.

9. The transfer of notes belonging to the minor, made by the tutor without legal authority, is not an absolute nullity, and if the transferee establish that the transfer was for the benefit of the minor, this is sufficient. 22 A. 295, *Woodbridge v. Pope*; 1 A. 222; 2 A. 577; 10 A. 210.

10. If the transactions of the agent are repudiated as not authorized; it is the duty of the principal, as soon as he is informed of the facts, to notify the person with whom the transaction was had, of the want of authority in the agent. 22 A. 496, *Ball v. Bender*. See No. 12.

11. The agent is not responsible for his contract when it has been ratified by his principal. 24 A. 342, *Walters v. Cruickshank*.

12. The principal should disavow the acts of his agent so soon as he is informed thereof, and if he allows any length of time to pass, in silence, he will be considered as having ratified the same. 22 A. 496, *Ball v. Bender*; 24 A. 462, *Olver v. Johnson*. See No. 10.

13. By accepting from the agent who has fraudulently disposed of the principal's property, something in compensation for the embezzled proceeds, the principal ratifies the act of the agent, and is estopped from claiming the property. 29 A. 61, *Ogden v. Marchand*.

• III. OF THE OBLIGATIONS OF THE PRINCIPAL TO THE AGENT.

(a) *In general.*

1. Where money has been expended in carrying on another person's business, he is bound to refund the same, although some other party may have held his power of attorney. 15 A. 398, *Didier v. Augé*.

2. An employer is the sole judge of the competency of those whom he chooses to employ, and so long as the employee is on trial, the employer has the right to determine for himself whether he possesses the proper qualifications and habits for his business. 15 A. 656, *Quirk v. Haskins*.

3. A *negotiorum gestor*, who pays a disputed balance, in order to complete the sale, and to receive his commission, cannot recover from the principal the amount so paid. 17 A. 241, *Woodlief & Legendre v. Moncure*.

4. A party receiving an account current, and making no objection to it within a reasonable time, admits its correctness, and by reselling the property to his mandatory, he acquiesces, and is estopped from objecting thereto legally. 18 A. 124, *Munsell v. Payne*.

5. When the principal appoints two joint agents, the acts of only one does not bind the principal. 28 A. 376, *Penn v. Evans*; 4 M. 78; 2 L. 275; 10 A. 621.

(b) *Agent's remuneration, and interest on his advances.*

1. Equity obliges the proprietor, whose business has been well managed, to comply with the engagements contracted by the manager (*negotiorum gestor*), in his name, and to indemnify him in all personal engagements he has contracted in the management of his affairs. 15 A. 143, *Garland v. Scott*.

2. A mandatory acting for himself as well as others, cannot recover on a *quantum meruit*. The procuration is gratuitous, unless there has been a contrary agreement. 16 A. 155, *Wilson v. Wilson*.

3. A mandate being gratuitous, unless the contrary be stipulated, one, acting as agent, on a fixed salary, who under the instructions of his principal, sells stocks, etc., is not entitled to additional compensation. 20 A. 230, *Moreau v. Dumagene*; 10 L. 508; 11 L. 226; 14 A. 317, 681; 12 A. 211; 7 A. 209.

4. When the agent fails to show any specific services rendered to his principal, he cannot recover on an implied contract for compensation. 21 A. 558, *Wood v. McCranie*.

5. When the written appointment of the agent fixes no compensation, none can be recovered; the contract is, by its nature, gratuitous. C. C., (2991); 24 A. 271, *Wells v. Hawley*.

6. A co-proprietor, who collects rent and keeps the premises in repair, must show an agreement, to charge commissions. C. C. (2991); 24 A. 502, *Conrad v. Burbank*.

7. One who undertakes to compromise a seizure, under the revenue acts of the United States, without notifying his vendor of the transaction, and pays a certain sum of money to save the property, cannot afterwards, as *negotiorum*

gestor, recover from the vendor, who was guilty of the fraud, the amount so paid in compromise. 29 A. 93, *Summers & Brannins v. James S. Clark*. See OBLIGATIONS, III. (c), 2), B.

IV. OF THE OBLIGATION OF THE AGENT TO THIRD PERSONS.

1. Where a contract is entered into by one assuming, as agent of another, without having been authorized to make the contract, such pretended agent is, by law, responsible, personally, in the precise terms of the contract. 15 A. 668, *Richie v. Bass*. See No. 5.

2. Where plaintiff deals with an agent, knowing him to be such, and nevertheless, gives credit to the agent, he is bound by his choice. 20 A. 84, *Stehn v. Fasnacht Bros*.

3. An agent, who has acted within the scope of his legitimate authority, cannot be held personally responsible for a contract made by him in such capacity. 20 A. 126, *Delaroderie & Son v. Hart & Pike*; 21 A. 140, *Marz v. Wheelis*; 18 A. 115, *Bienvenu v. Vienne*.

4. A mandatory, who has communicated his authority to the person with whom he contracted, is not answerable to the latter, for anything beyond his mandate. 21 A. 221, *Barry v. Pike*; 25 A. 463, *Rosenthal v. Myers*.

5. An agent, contracting without authority, binds himself. 24 A. 254, *Hewitt v. Roudsbush*. See No. 1.

6. A note signed by the members of "a special committee," to an attorney, to secure the payment of his fees for services to be rendered to the corporation, will bind the drawers, individually. 26 A. 515, *Cooley & Phillips v. Esteban et als*.

7. The cashier of the bank, drawer, being the agent of the depositor, who was the indorser, caused the amount of the note to be charged to the account of the indorser, who objected because he was released, no protest having been made of the note; his book was balanced several times, but nevertheless he did not complain to any other officer of the bank than the cashier, who left the State sometime afterwards. Nineteen months thereafter he sued the bank to recover the amount of the note charged against him; *Held*: That the bank was not liable; that the cashier, as agent, had authority to direct the charge to be made. 28 A. 953, *Bogel v. Teutonia National Bank*.

8. One who acts for another, with the knowledge of the contracting party, cannot be held personally liable; the more so where the contract was to be put in writing, but was never signed. 30 A. 117, *Fredricks, tutrix, v. R. Fasnacht*.

V. OF THE OBLIGATIONS OF THE AGENT TO THE PRINCIPAL.

(a) *In general.*

1. When a factor, acting as the agent of another party, has employed a broker to make a purchase, and such broker, without seeing the merchandise, acknowledges a constructive delivery, on a simple inspection of an entry in the books of the vendor, and as constituted depositary, it is such an act of imprudence as will render the factor liable for any loss that may occur from the bad faith of such vendor. 15 A. 268, *Mummy v. Haggerty*.

2. The pilot, or any other officer of a boat, should not be held responsible to the owners, unless it be clearly shown that he has been guilty of negligence, by which the loss was occasioned, but he cannot escape responsibility where negligence is shown, simply because other persons are also culpable. In such case, he is bound *in solido* with the other negligent parties. 15 A. 308, *Brannan v. Hoel*. See OBLIGATIONS, VIII. (e), No. 12. OFFENSES AND QUASI OFFENSES, II. (e), 1), No. 4. SHIPPING, VI.

3. The right of the owners of a boat to recover from their officers, through whose neglect damages have been occasioned, the amount paid by them on account of such damages, is not prejudiced by the fact that, instead of contesting the demand, they compromised it. 15 A. 308, *Brannan v. Hoel*.

4. An attorney in fact, is bound to discharge the functions of his procura-tion, so long as he continues to hold it, and is responsible to his principal for

the damages that may result from the non-performance of his duty. He is responsible, not only for his unfaithfulness, but also for his fault or neglect. 15 A. 534, *Imboden v. Richardson*.

5. A commission merchant will not be permitted to make a profit out of the contract entered into for the benefit of his principal. 16 A. 241, *Payne & Harrison v. Watterston*; 15 A. 456, *Denson v. Stewart*.

6. The agent is not responsible for the loss of the property under his charge, when such loss occurred by overpowering force. 19 A. 116, *Clark & Thieman v. Norwood*.

7. The agent is liable for any loss occasioned by his failure to follow the instructions of his principal. 20 A. 90, *Szymanski v. Plassan*.

8. An agent cannot be made liable for a note in his hands for collection, the consideration whereof was a slave. 22 A. 474, *Little, liq'r. v. Johnson*. See OBLIGATIONS, III. (c), 1). MINORS, III. (f), 1), No. 6.

9. No suit can be instituted to make agents personally liable for the dereliction of their principals, the more so where it appears that plaintiff himself is one of the principals. 28 A. 13, *Coons v. Cannon et als.*

(b) *Agent's diligence; extent of his liability; obligation to account and the action mandati directa.*

1) In general.

1. Defendant, who sold goods and received Confederate notes, without the consent of his principal, is liable for the proceeds of sale, in lawful money. 19 A. 487, *Thomas v. Thompson & Barnes*. See BILLS AND NOTES, IV. (a). OBLIGATIONS, III. (c), 1). CONFEDERATE CURRENCY. EXECUTION, V. (d). 8), A. No. 10. MANDATE, V. (b), 4), Nos. 2, 3, 6; V. (d), No. 5; (e). PAYMENT, I. No. 7. MINORS, III. (g), 4), No. 1. SALE, I. (d).

2. Power to contract a loan, acknowledge a debt, alienate, mortgage, or do any other act of ownership, must be express and special. C. C. (2965), (2966): 16 L. 17; 9 R. 293; 12 R. 221; 11 A. 46; 22 A. 495, *Ball v. Bender*.

3. A factor who pays the drafts of his principal, in currency, at a discount, when the latter has gold to his credit, should account for the difference. 21 A. 697, *Poindexter v. King*.

4. The authorization of the husband must be express and special, to bind his wife by a promise to pay. See MARRIAGE, VIII. (a), No. 6.

5. Prescription of the action, see PRESCRIPTION, III. (g), 3).

2) Mandate to buy.

1. Where a power of attorney authorizes an agent to sell, but is silent as to the right of acquiring property, a purchase by the agent exceeds his delegated powers, and may be repudiated by the principal. 15 A. 560, *Hyman v. Bailey*.

2. An attorney at law, who purchases, in his name, property for a minor heir, notifying her by letter that he would transfer the same when required, may be compelled by the minor, when of age, to transfer the property. 26 A. 646, *Livingston v. Morgan*.

3) Mandate to sell.

1. Where an agent, authorized to sell for a particular price, sells at a higher price, the surplus will belong to the principal, and the agent is entitled only to his stipulated commission. 15 A. 456, *Denson v. Stewart*.

2. A committee, appointed by a corporation, to contract for the erection of a building, have no power to make a sale of the property and building, to the contractor. 19 A. 303, *Church v. Duru*.

3. The pledgee, with written authority to sell the pledged property, and with verbal authority to sell other articles, delivered to him at the same time as the pledged property, may give a good title to all the property. 20 A. 71. *Clark & Brislin v. Bouvain & Lewis*.

4. A valid pledge may be made by one who, as agent, has the property for sale. 27 A. 150, *Davidson & Hill v. Bodley*.

5. A factor cannot secure his individual creditor, by pledging the planter's cotton consigned to him for sale. 25 A. 313, *Young v. Scott & Cage*. See No. 8; 7), No. 3.

6. The sale, by the agent, of a cargo of fruits, after a sale made by the principal, confers no title. 25 A. 418, *Torre & Co. v. Thiele & Co.*

7. An act of sale executed by an agent, who does not produce his power of attorney, will sufficiently prove the agency, to confirm a default. 25 A. 510, *Gantt vs. Eaton & Barstow*.

8. There is nothing in act No. 150, of 1868, showing any intention to enlarge the power of the factors, so that they might pledge the property confided to them for sale. 25 A. 313, *Young v. Scott*. See No. 5; 7), No. 3.

9. A power of attorney "to represent the principal in his store, to manage the same, and to do and perform any and all acts appertaining to said business," is sufficient to buy and sell. 30 A. 353, *Schmidt & Zeigler v. Sandel et als.*

4) Collection of claims, and their assignment as Collateral security.

1. The defendant, a judgment creditor of the succession, received from the heir an authorization to collect claims due the estate. The monies so received were applied, without knowledge or consent of the heir, to the satisfaction of the agent's claim, and no account rendered thereof, and no credit given upon the judgment. Under these facts, the authorisation to collect should be construed as a mere power of attorney, and the agent made to pay to the heir said collections. 16 A. 176, *Williams, executor v. McHolton*.

2. One holding a draft or note for collection, has no right to receive in payment Confederate money, and must account to his principal, in lawful currency. 18 A. 48, *Strauss v. Bloom*. See 1), No. 1.

3. In a bill of exchange, the word "currency" means lawful money, and the holder for collection who receives Confederate notes, is liable for the amount. 20 A. 368, *Fry v. Dudley & Nelson*. See No. 2.

4. When the agent is indebted personally to the factors, and in his fiduciary capacity, settles an account of his principal with the factors, by directing them to place the balance of the proceeds of his principal's cotton in liquidation of his individual liability to the factors, the latter are discharged. 21 A. 388, *Harris v. Cuddy, Brown & Co.* See MARRIAGE, XI. (b), No. 19.

5. The principal is not bound by the receipt of his agent, when it is shown that the agent has been deceived by false representations of the debtor. The principal may recover from the debtor the balance due after deducting the amount paid to the agent. 22 A. 17, *Bayley et al. v. Bayley*. See EVIDENCE, XV. (d), 1), No. 2.

6. An agent is not responsible for rents collected in Confederate notes, with the approval of the principal. 22 A. 490, *Turner v. Beall*. See 1), No. 1.

7. He who enables one to collect a debt, must bear the loss if the money collected be not turned over to him. 24 A. 465, *Baker v. Kinsworthy & Co.*

8. A promissory note bearing the date of January 28, 1859, payable twelve months thereafter, at the Citizens' Bank, New Orleans, and indorsed by A, the payee, and B, the then owner thereof, who resided in Missouri, was before maturity placed in the branch of the Louisiana State Bank at Baton Rouge, whose cashier indorsed and forwarded it to the mother bank, at New Orleans, for collection. It was duly protested for non-payment by the notary of the mother bank, who mailed notices of protest for the indorsers to the cashier of the branch bank. A, upon whom reliance was principally placed, died, and his executors were qualified before the maturity of the note, but neither they nor B, was served by the branch with notice of protest; Held: That the bank was liable for any loss thereby sustained by the holder of the note. 93 U. S. (Otto's), 96, *Bird et al., executors, v. Louisiana State Bank*. See I. (c), Nos. 10, 16.

9. For agent who received Confederate money, see CONFEDERATE MONEY, Nos. 3, 4. MANDATE, V. (b), 1); No. 1. MINORS, III. (g), 4), No. 1.

10. A bank clerk, who gives a receipt in full, without authority, does not release the debtor. See PAYMENT, IV. No. 1.

5) Remittance of funds.

4. The consignee is discharged by payment of the net proceeds to the administrator, where it appears that the goods shipped by third persons, belonged to the succession. 26 A. 475, *Whetstone v. Rawlins*. See DEPOSIT, III.

6) Effecting insurance.

1. Consignees who fail, contrary to the directions of the consignors, to insure against fire, merchandise received under consignment, are liable, in case of loss by fire, to the consignors for the value of the goods. 29 A. 812, *Gordon & Gomilla v. Wright & Clark*.

7) Principal's rights over his property and its proceeds; their misappropriation by the agent; his duty to account and liability for profits and interest.

1. When no complaint has been made in regard to the manner in which an agent's duties have been performed, he is presumed to have acted within the sphere of his authority. The policy of our law is to discountenance all restraints upon the rights of the owner of property to use and dispose of the same as he shall see fit. 16 A. 120, *Ford v. Bank*.

2. The mandatory is answerable for the interest of any sum of money he has employed to his own use during the time he has so employed it; and also from the day he became a defaulter by delaying to pay it over. 17 A. 246, *Millaudon v. Lesseps*.

3. One who received movable property to be sold, or to remain subject to the order of the shipper, is a factor, and cannot make a *dation en paiement* of this property in satisfaction of his individual debts. 19 A. 300, *Miller v. Schneider & Zuberbier*. See 3), Nos. 5, 8.

4. The agent is bound to account to his principal for all money which came into his hands, as such, whether the amounts be composed of usurious interest or not. 22 A. 599, *Chinn v. Chinn*.

5. If the sheriff, acting as agent of the parties, promises to pay the amount of loss sustained by the failure of a commission merchant to whom the property under seizure was sent, under agreement of parties, he shall be held liable for the amount so lost. 26 A. 250, *E. J. Gay & Co. v. Lejeune, Jr.*

6. A commission merchant cannot make a profit out of a contract entered into for his principal. See (a), No. 5.

(c) Employment of sub-agents.

See MANDATE, VI.

(d) Principal's ratification of the agent's acts as regards the latter.

1. The acquiescence of the principal in the conduct of the agent, is a clear ratification of his action. 17 A. 42, *Featherston v. Graham*.

2. An agent who exceeds his powers is not liable to his principal, when his acts are ratified; he may be a witness. 19 A. 91, *Merritt v. Wright*.

3. Plaintiff, who ratifies the act of his agent in receiving certain payments, contrary to his instructions, is bound thereby. 19 A. 251, *Delaney v. Levi*.

4. A principal who desires to repudiate the act of his agent, should do it promptly; else he will not be heard. 24 A. 460, *Oliver v. Johnson*.

5. A plaintiff sending his merchandize must have expected it to be sold for the currency prevailing at the time in this market, and, when expressly informed of the sale, does not repudiate the sale, cannot recover, if the currency should become of no value. 25 A. 394, *Danklin v. Horrell, Gayle & Co.* See (b), 1), No. 1.

6. Where the vestry ratified the giving of the note by the committee on construction appointed by it, the holder may recover against the corporation. 26 A. 738, *Donelly v. St. John's Episcopal Church*.

7. The defendant took the cotton of plaintiff and being sued on an open account in which figured the cotton, set up the prescription of one year; *Held*: That the plea could not be maintained. The defendant acted as a *negotiorum*

gestor whose acts were afterwards ratified. 23 A. 142, *Norman v. Edwards*. See PRESCRIPTION, III. (c), 3).

8. The principal who ships merchandise to his factor, with instructions to sell immediately and who fails to repudiate within a reasonable time, the acts of the agent when informed that the sale is postponed, ratifies the act. 26 A. 713, *Kehlor, Updike & Co. v. Kimble, Hastings & Co.*

(e) *Agent's interest when adverse to that of the principal.*

1. Defendants having been compelled by General Butler to pay a certain percentage upon the "defense bonds" of the city of New Orleans, payable in Confederate States money, held by them for the benefit of plaintiff, cannot recover the amount so paid, from their principal. 21 A. 705, *Cousin v. Abat, Generès & Co.* See (b), 1), No. 1.

VI. OF BROKERS AND PUBLIC AGENTS.

1. The decision in the case of *Parlange v. Faurès*, 14 A. 444, affirmed to the effect, that when a broker or agent sells a note with a forged indorsement without disclosing the fact of his agency or the name of his principal, he is responsible for the amount, which was paid for the note with legal interest. 15 A. 189, *Sère v. Faurès*.

2. A broker, employed as such, is not answerable for the insolvency of those to whom he procures a sale or a loan, except in case of fraud. 20 A. 563, *Buddecke v. Harris*.

3. Brokers who through their influence and advice, assist a notary in committing a fraud, are liable for the damages suffered. 27 A. 385, *Todd v. Burke et als.*

4. HOWELL and WYLY, JJ., *dissenting*: The brokers are merely intermediary agents and should not be made liable for the frauds of the notary. *Ib.*

5. Brokers acting as such to the knowledge of the parties, are not responsible in damages for the failure of the principals to fulfill their contracts. 28 A. N. B., *Parker v. Girder & McDuff*.

6. A claim for a ship broker's commission is not prescribed by one year. See PRESCRIPTION, III. (c), 1), No. 11.

VII. OF THE TERMINATION OF THE MANDATE.

1. The principal is bound by the acts of his agent made with third persons, after the revocation of the agent's power, unless it appear that the parties with whom the agent dealt had notice of the revocation. 18 A. 535, *Emmet George v. William Sandel*.

2. The agent of a citizen of a northern State, was not released of his agency by the war. 19 A. 486, *Monsseaux v. Urquhart*.

3. The mandate expires by the death of the principal. 20 A. 543, *Bird v. Doyal*.

4. A commission merchant is an agent, and a contract to send the crops to him, for sale, ends by the death of the factor. 22 A. 185, *Shiff v. Succession Lesseps*.

5. If, in the contract appointing the agent, there be no time fixed for the duration of the agency, the principal may, at any time, revoke the power, without being liable in damages towards the agent. 23 A. 395, *Jacobs v. Warfield*.

6. The marriage of the lady, principal, vacated the authority of the agent, who is not then authorized to confess judgment. 27 A. 73, *Dockham v. Potter*.

MANDEVILLE.

See POLICE JURY, No. 2.

MANDEVILLE AND SULPHUR SPRING RAILROAD COMPANY.

1868, p. 203; name amended to New Orleans and North Eastern Railroad Company, 1870, E. S., p. 116.

MANUFACTURERS.

See LICENSE.

MAP.

State map, 1870, E. S., p. 97; 1871, p. 171.

MARKET.

1. All that a farmer has to require of a butcher in the actual occupation of a stall in the market, is a conformity to the ordinances in relation to the mode of keeping the stall, and the punctual payment of the dues imposed by the ordinance. 15 A. 377, *Douat v. Beombay*.

2. There is no warrant given by the eighth section of the market ordinance, for the summary arrest and imprisonment of a person refusing to deliver up a stall upon demand. *Ib.*

3. The compulsion spoken of in the concluding clause of this section, is a compulsion by legal process. *Ib.*

4. The eighth section of the city ordinance, relative to markets, which provides for the ejectment of any person occupying any tables, stands or stalls without the consent of the farmer and collector of the revenues of the market, has reference to the original occupation of the stall, stand or table, by a person not previously in possession, but does not apply to the case of a party who obtained possession under a former collector, and has continued that possession since the lease of the revenues to the farmer who desires to eject him. *Ib.*

5. The good will of a stall or stand in the public market belongs to the party who leases the stall, and will fall in his succession. 21 A. 391, *Succession Journé*.

6. The city of New Orleans has the control of its market, and has therefore a right to order a passage between two stalls closed. 23 A. 722, *Irvine v. Short*.

7. The collection by the city, of certain rates for the lease of a stall in the market, is not a tax, and if the ordinance was in force, when the contract was entered into, plaintiff cannot complain. 26 A. 340, *Barthel v. City*.

8. The arrest of an individual, for taking possession of another's stall in the market, is unlawful, unless ordered by the commissary. See NEW ORLEANS, II. (d), 1).

9. Under act of 1874, No. 31, no private market can be located within less than twelve blocks of a public market. The act is constitutional, and the city has the right to close these private markets, although she has leased the public markets, and given a license to the said private markets. 27 A. 419, *City v. Stafford*.

10. WYLY and HOWELL, JJ., *dissenting*: The city has no interest to close the private markets, having leased the public markets. The title of the act is "to regulate private markets," and gives no clue that they are to be closed. *Ib.*

11. The lessees of the public markets, in the city of Shreveport, who have the exclusive right to collect all market dues within the corporation, cannot enjoin the keepers of private markets from keeping open; but may collect from them market dues. 27 A. 619, *Jacobs v. Levy*.

12. The city may build and lease an addition to a market, without being liable in damages to the lessee of the previous portion. See NEW ORLEANS, II. (c), No. 1.

13. The legislature, in act No. 31, of 1874, making it the duty of the administrator of commerce, to close the private markets established within twelve squares of any public market, placed no means in the power of said administrator to enforce the law. A mandamus cannot issue to compel said administrator to act. 30 A. 237, *State ex rel. Pierre Lacaze v. Charles Cavanac, administrator*.

14. Private markets of New Orleans, acts 1874, p. 65; 1878, p. 152.

MARRIAGE.

MARRIAGE.

I. OF THE VALIDITY AND PROOF OF MARRIAGE.

II. OF SEPARATION FROM BED AND BOARD.

(a) *In general.*(b) *The proceedings.*

III. OF DIVORCE A VINCULO MATRIMONII.

IV. OF PUTATIVE AND SECOND MARRIAGES.

V. OF THE MARRIAGE CONTRACT.

VI. OF THE CONTRACTS BETWEEN HUSBAND AND WIFE.

VII. OF THE WIFE'S CONTRACTS BEFORE AND AFTER MARRIAGE.

VIII. OF CONTRACTS AND OBLIGATIONS DURING MARRIAGE BETWEEN THE WIFE AND THIRD PERSONS.

(a) *In general.*(b) *Wife's general incapacity and authorization to contract.*(c) *Wife's incapacity to bind herself or her property for or with her husband; her renunciation, and the rule that obligations during the community are community obligations.*(d) *Wife's incapacity as affected by the benefit she receives; proof thereof, and her obligations to contribute to marriage charges and household expenses.*

IX. OF THE DOWRY.

(a) *In general; its constitution; distinction between dotal and paraphernal property.*(b) *Administration and inalienability of dotal property.*

X. OF THE MARITAL FORTH.

XI. OF PARAPHERNALIA.

(a) *In general.*(b) *Administration and alienation of paraphernal property.*

XII. OF CONVENTIONAL COMMUNITY.

XIII. OF LEGAL COMMUNITY.

(a) *In General.*(b) *Of what actively composed; distinction between separate and community property.*1) *In general.*2) *Purchases made and perfected during the community.*3) *Inchoate acquisitions before, perfected during, and inchoate acquisitions, perfected after the community.*4) *Property acquired by donation, inheritance, or from a succession, fallen to the wife.*5) *Fruits and revenues of separate property, and improvements thereon.*(c) *Of what passively composed.*(d) *Its administration; alienation of community property, and general nature of the wife's interest.*(e) *Dissolution of the community, and its consequences.*1) *In general.*2) *Mode of dissolution.*3) *Acceptance or renunciation of the community.*4) *Effect upon the title to community property; rights of the parties thereto, and liquidation of the community.*A. *In general.*B. *Presumption of community, and re-
sumption of separate property.*C. *Alienation, or loss of community prop-
erty, and liability therefor.*D. *Survivor's usufruct, legal or testa-
mentary.*E. *Claims between the community and
spouses.*

XIV. OF THE SEPARATION OF PROPERTY.

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| (a) <i>In general.</i> | 1) <i>In general.</i> |
| (b) <i>Right to claim a separation.</i> | 2) <i>Execution and publication of the judgment.</i> |
| (c) <i>Pleadings, evidence, and judgment; validity and effect of the separation.</i> | |

XV. OF THE CONFLICT OF LAWS GOVERNING MARITAL RIGHTS; MARITAL RIGHTS IN OTHER STATES.

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| (a) <i>Conflict between laws of the same State.</i> | A. <i>In general.</i> |
| (b) <i>Conflict between laws of different States; marital rights in other States.</i> | B. <i>Personal capacity of the parties.</i> |
| 1) <i>Validity of the marriage.</i> | D. <i>Questions relative to the community and property acquired after a change of domicile.</i> |
| 2) <i>Effects of the marriage.</i> | E. <i>Wife's choses in action; husband's acquisitions jure mariti.</i> |

I. OF THE VALIDITY AND PROOF OF MARRIAGE.

1. A marriage celebrated between a free white person and a free person of color, in violation of article 95, of the Civil Code, is an absolute nullity. No suit is needed to declare the nullity of such a union, either party may disregard it, and neither can pretend to derive from it any of the consequences of a lawful marriage. Such a marriage may be attacked collaterally, and in every form of action in which it is set up against either of the parties. 15 A. 342, *Succession Minvielle*. See LEGITIMACY.
2. Where a party legally married, before the dissolution of such marriage, contracts another, the latter contract is absolutely null and is not susceptible of confirmation or ratification, whether express or implied. Nor is it necessary that a direct action be instituted for the purpose of setting it aside; its nullity may be demanded by way of exception or defense. 15 A. 519, *Summerling v. Livingston*.
3. A party seeking to recover property from a third person as belonging to the community, should establish the marriage as conclusively as any other fact. 15 A. 410, *McConnell v. New Orleans*.
4. A marriage is not null, because the laws relating to forms and ceremonies have not been observed. It may be proven by every species of evidence, not prohibited by law. 20 A. 97, *Succession Hubee*; 3 L. 33; 2 A. 944; 7 A. 253; 15 A. 253.
5. The condition of the bond furnished under article (105) Civil Code, is, that there exists no legal impediment to the marriage; the legal impediment which would forfeit the condition is one that would cause the nullity of the marriage; that of minority is not covered thereby. 20 A. 378, *State v. Dole & Bell*.
6. The want of a marriage license, and its publicity previous to the ceremony, does not affect the validity of the marriage. 26 A. 94, *Hart v. Hoss & Elder*.
7. The presumption that the marriage has taken place, may be rebutted. See EVIDENCE, III. (a), No. 1.
8. For proof of marriages made in Indiana, see EVIDENCE, IX. (a), No. 2.
9. Parol is admissible to prove the good faith of the parties and the consummation of the marriage. See EVIDENCE IX. (a), No. 3.
10. For effect of marriage, see LEGITIMACY; *infra* IV. No. 3.
11. According to the laws in force in Louisiana while that country was under the dominion of Spain, an actual contract of marriage made before a civil magistrate, and followed by cohabitation and acknowledgment, was valid, and the offspring thereof legitimate. 10 H. 174, *Hallett v. Collins*.

II. OF SEPARATION FROM BED AND BOARD.

(a) *In general.*

1. It is proper, in deciding whether a single act of cruelty on the part of the

husband towards the wife is sufficient to entitle her to a separation from bed and board, to take into consideration the age, habits and mode of life of the parties. 15 A. 593, *Lauber v. Mast*.

2. The dissatisfaction and quarrels between husband and wife, springing from the step-children, and the use of ardent spirits by the husband, who also uses harsh language to his wife when intoxicated, but treats her kindly when sober, is not a sufficient cause for a separation from bed and board, or divorce. 27 A. 594, *Scott v. Scott*.

3. If a reconciliation takes place after the decree, the judgment becomes a nullity. C. C. 152, (149); 22 A. 9, *Succession Liddell*.

4. Divorce for cause of abandonment can only be obtained after the issuance of the summons required by article 145, Civil Code. 28 A. 194, *Merrill v. Flint*.

(b) *The proceedings.*

1. Although a wife fails in an action of separation from bed and board, she is, nevertheless, entitled to alimony during the pendency of the suit. 15 A. 593, *Lauber v. Mast*.

2. A married woman cannot sue her husband for alimony, except incidentally, in a principal demand for separation from bed and board, or divorce. 18 A. 613, *Moore v. Moore*.

3. The husband may plead a reconciliation, as a peremptory exception to his wife's suit for alimony. 18 A. 643, *Holbrook v. Holbrook*.

4. The wife may interpose her claim for maintenance, at any time before a final decree of separation from the appellate court. 22 A. 265, *Malady v. Judge Seventh District Court*.

5. Alimony for the wife and children, pending the suit for separation from bed and board, at the rate of one hundred and twenty-five dollars per month, is reasonable, when the husband's salary and his revenues amount to three thousand seven hundred dollars per annum. 28 A., N. R., *Leona Mathilda Wetmore v. David W. Eames*.

6. Property acquired by the wife, whilst separated from bed and board, does not belong to the community. See III. Nos. 3, 4; XIII. (a), No. 8.

III. OF DIVORCE A VINCULO MATRIMONII.

1. Positive evidence of adultery, is not necessary. The wife is entitled to a divorce when, from the circumstances proven, no other inference can be drawn, than that there was an improper intimacy or illicit connection between the parties. 16 A. 4, *Mehle v. Lapeyrollerie*.

2. The charge of adultery preferred by the wife against the husband, to serve as a basis for a judgment of divorce, does not, of itself, amount to a defamation, upon the failure of the former to sustain the allegation by proof. If the accusation be not wanton or malicious, although unfounded in point of fact, it cannot, with propriety, be said that there was a public defamation. 16 A. 94, *Homes v. Carrier*.

3. A judgment of separation from bed and board, rendered on the written confession of adultery by the defendant, although insufficient to support the judgment, cannot be regarded as an absolute nullity when the parties have acquiesced therein. 18 A. 53, *Succession Weigel*.

4. Not to take care of one's wife and child, is a dereliction of duty, but not such ill treatment as is contemplated by act 1855, p. 376, for a separation from bed and board. A divorce should only be granted when the case comes strictly within the law. 18 A. 414, *Halls v. Cartwright*.

5. When a judgment of separation from bed and board has been rendered, a final divorce can only be obtained by petition and citation, not by rule. 18 A. 454, *Gernon v. Hickey*.

6. The wife is entitled to a divorce, if the husband has been living in adultery with a kept mistress, and lavishing on her the earnings, which should have gone to the community. 23 A. 422, *DePass v. Winter*.

7. Actions for divorce are governed, not exclusively by section 1192, R. S., but also by article 138, C. C., amended by act No. 76, of 1870. 25 A. 208, *Michel v. Weil*.

8. A married woman may sue for a separation and divorce, on account of neglect, abuse and ill-treatment, on the part of her husband, who moreover is addicted to the use of intoxicating liquors. 28 A. 91, *Castell v. Castell*.

9. Causes of divorce, 1870, p. 108; 1877, E. S., p. 192; delay of appeal, 1871, p. 151.

IV. OF PUTATIVE AND SECOND MARRIAGES.

1. The declarations of the parties to the effect that they never had been married, will under certain circumstances outweigh the presumption of marriage, arising from the facts of the parties having lived together as man and wife, and having been publicly recognized as such. 15 A. 46, *Philbrick v. Spangler*. See EVIDENCE, III. (a), No. 1.

2. Where a man married a second time, while his first marriage was undissolved, and the second wife in contracting the marriage acted in good faith: *Held*: That at his death, the lawful wife, and the wife *de facto*, will be each entitled to one-half of the community, and the children born of each marriage, entitled as legitimate children and heirs at law, to succeed to the separate property of their deceased father in equal parts, as though they had been born of the same marriage. 15 A. 137, *Abston v. Abston*. See MARRIAGE, XIII. (a).

3. A marriage absolutely null, may produce civil effects; but this takes place by special provision of law, and only in favor of the party who has acted in good faith, and in favor of the children born of the marriage. The contract itself has in other respects no validity. 15 A. 519, *Summerlin v. Livingston*.

4. When neither party is in good faith, both knowing the wife to have a living husband, the marriage produces no civil effects in favor of the children born of the marriage. C. C. 118, 198; 24 A. 485, *Succession Virgin*.

5. If the wife did not know before the conception that her husband had a living wife, the child is legitimate. 24 A. 299, *Succession Navarro*; C. C. 117, 118; 3 N. S., 438; 1 A. 105; 7 A. 252; 15 A. 137.

6. Where the husband, who made large and valuable gifts to his wife, died, leaving children by his marriage with the donee, and she subsequently contracts a second marriage, the children still living, the property donated becomes vested in the children of the first marriage, if it still be extant in kind. 26 A. 195, *Succession Hale*; C. C. 1753. See DONATIONS, VII.

7. If the husband, in good faith, believed the first marriage of the woman null, his children by her, will be legitimate. See PARENT AND CHILD, I. No. 3.

8. Good faith is presumed. PARENT AND CHILD, No. 5.

9. See LEGITIMACY.

V. OF THE MARRIAGE CONTRACT.

1. A stipulation in a marriage contract, giving to each spouse "absolute control in and over their respective estates and property, as now owned by each, and *which may be obtained during their coverture*," with the right given to each of disposing of the same without consent or interference of the other, excludes the community of acquets and gains. 22 A. 221, *Succession Wilder*.

2. Parties can, in their marriage contract, stipulate that the property which they may acquire by succession or donation during marriage, shall fall into the community. 25 A. 427, *Desobry v. Schlater*; 12 R. 31, *Fabre v. Sparks*; 4 A. 339, *Succession Mossy*. See XII.

3. The father who signed the marriage contract, and afterwards made a donation to his daughter, and delivered the same to the husband without referring to the stipulations in the marriage contract, must be considered as having done so with reference thereto. 25 A. 427, *Desobry v. Schlater*.

4. A marriage contract entered into by a minor is voidable only, and may be ratified when she becomes of age. 22 A. 221, *Succession Wilder*.

5. The husband cannot contradict the marriage contract. See EVIDENCE, XVI. (b), 7), No. 4.

VI. OF THE CONTRACTS BETWEEN HUSBAND AND WIFE.

1. Where a husband sold property to his wife, and the price was money, and the labor of his wife's slaves, to which the husband was himself entitled; *Held*: That such an agreement is not within the protection of article (2421), of the Civil Code. 15 A. 491, *Atkinson v. Atkinson*. See SALE, I. (b).

2. A note transferred by the husband to the wife, not in conformity to article (2421), C. C., still belongs to the community. 18 A. 27, *Lacroix v. Derbigny*; C. C. (2373), (2369), (2371), (1784).

3. A commercial partnership cannot exist between husband and wife, nor can the wife bind herself for the debts of her husband, contracted before or during marriage. 19 A. 249, *City Insurance Company v. Steamer Lizzie Simmons*.

4. The husband has a right to transfer judgments obtained by him against third persons, to his wife, to replace her dotal and paraphernal funds, and the circumstance that he is at the time in embarrassed circumstances, does not necessarily imply that there was fraud in the transaction. 22 A. 327, *Murison v. Seiler & Co.*

5. The husband of one of the heirs, hired certain slaves from the deceased, and settled for his indebtedness with his wife's share. The husband having died, the wife has a right to claim the amount so paid, from his succession. 22 A. 81, *Succession of John A. Ross*.

6. A sale by the husband to his wife, wherein she credits her judgment against him, for a portion of the price, and for the balance, assumes certain mortgages executed by him, is absolutely null and void. The wife cannot assume the debts of her husband. 23 A. 439, *Oliver and Husband v. Dayries, Sheriff, et al.*

7. The husband and wife, before the judgment for divorce, which is a foregone conclusion, according to the evidence, may validly contract in relation to the partition of the community. 24 A. 437, *Mann v. Mann*.

8. It is lawful to stipulate in the marriage contract that the property acquired by inheritance or donation by either party, will belong to the community. 25 A. 427, *Desobry et al. v. Schlatter*.

9. Any thing not prohibited by law may be validly stipulated in the marriage contract. *Ib.*

10. Agreements between husband and wife are to be restricted to specific subjects; a declaration in an act of purchase that the property is paid for with the separate property of the wife and it therefore becomes paraphernal, is not conclusive on the husband's heirs. 28 A. 314, *Kerwin v. Hibernia Insurance Company*.

11. For donations between husband and wife, see DONATIONS, VII. SALE, I. (b).

12. The re-transfer by the wife to her husband, of property purchased by her, under writs issued in execution of her judgment of separation, is a mere nullity, and the mortgage granted to secure payment of the note, of no validity. 26 A. 376, *Garner v. Gay & Shiff*. See SALE, I. (b), No. 6.

13. A dation *en paiement*, by the husband, to restitute the paraphernal property of his wife, will debar a subsequent mortgage creditor from seizing the property given in payment. 26 A. 593, *Perret v. Sanarens*.

14. Parol is admissible to prove the wife's claims against her husband. See EVIDENCE, IX. (a), No. 15.

15. See OBLIGATIONS, III. (c), 1), No. 4. MINORS, III. (f), 1), No. 6. SALE, I. (c), Nos. 6, *et seq*; (b). SLAVES.

VII. OF THE WIFE'S CONTRACTS BEFORE AND AFTER MARRIAGE.

1. Where the property was purchased by the wife for her separate account, and mention is made in the act of the derivation of the paraphernal funds, which bear no proportion to the value of the property substituted, such acquisition belongs to the community, and the wife is not bound by the recitals mentioned in the deed of sale. 16 A. 215, *Bouligny v. Fortier*. See VIII. (a), No. 1.

2. The property purchased in the name of the wife being declared community acquets, the mortgages granted by her thereon must follow the same fate, and the mortgagees are community creditors. *Id.*

3. Where the wife, who is separate in property, gave her mortgage note, with the authorization of her husband, and the latter gave an additional mortgage on his own property to secure the same note; *Held*: That the husband is neither a principal debtor nor the surety of his wife, and that this was not his own debt, but that the property mortgaged by him is liable for the amount of the note for which consideration is proved or admitted. 16 A. 449, *Kennedy v. Bossier*. See VIII. (a), No. 8; (b).

4. A note given by the husband and wife, *in solido*, for money used in paying the price of property purchased during marriage in the name of the wife, is a community debt for which the wife could not bind herself. 25 A. 380, *Milaudon v. Carson*.

5. Supplies furnished in the name of the wife, for the cultivation of the plantation, carried on by the husband, do not inure to the separate advantage of the wife, and no judgment can be rendered against her. 26 A. 279, *Fluke v. Martin*.

6. An innocent third holder of a note secured by vendor's privilege on the wife's property, sold to a third person on terms of credit, for the purpose of raising money for the benefit of the husband, may enforce the mortgage. 26 A. 324, *Walker v. Limongy*.

7. If any force, threats or improper influences were brought to bear upon the wife by her husband to obtain the certificate of the judge to borrow money, the mortgagee, who is no party thereto, cannot be affected thereby. 26 A. 418, *Reich v. Rosselin*. See VIII. (a), No. 5; (b).

VIII. OF CONTRACTS AND OBLIGATIONS DURING MARRIAGE BETWEEN THE WIFE AND THIRD PERSONS.

(a) *In general.*

1. The seizing creditor, a commission merchant, who is closely allied to the wife, and took an active part in all the transactions from their origin, in relation to the purchase and carrying on of a plantation, and has blended all his accounts with those of the wife and her husband, cannot be viewed in the light of third persons. 16 A. 212, *Boulligny v. Fortier*. See VII. No. 1.

2. A married woman, properly authorized, may bind herself for any other person than her husband. 19 A. 48, *Wickliffe v. Dawson*.

3. Article (128) Civil Code, seems to imply some active agency of the married woman in the business which is conducted in her name, to constitute her a public merchant. C. C. (1779); 16 A. 50, *Chistensen v. Stumpf*.

4. The occupation of boarding house keeper, by a married woman, is not that of a public merchant. 25 A. 38, *Moussier v. Gustine*.

5. The holder of a note executed by a married woman, under the authorization of the judge, before maturity, must be protected; although the certificate does not state that the wife was examined separate and apart from her husband. 28 A. 232, *Mary B. Locke v. Lafitte, Dufilho & Co., acting for Marmillon*; R. S. 127; 26 A. 418. See No. 7; VIII. (b).

6. The husband's promise is not sufficient to bind his wife to pay the debt of a third person, unless his authority be express and special. 26 A. 221. *Baker & Thompson v. Mrs. Pagaud*.

7. The husband, who employs servants for his wife, duly separated from him, keeping a hotel, having authority to employ and settle with servants, has, without further special authority, power to acknowledge a debt due to the employees, and to sign a note. 26 A. 664, *James v. Lewis and Husband*. See MANDATE, I. (c).

8. The husband may be bound as surety for a debt due by his wife for her separate benefit. 29 A. 753, *Jordan & Co. v. Anderson*. See VII. No. 3; VIII. No. 3.

9. For capacity of the wife to appeal, see APPEAL, I. (e), 2).

10. If the agency of the husband, who gives a mortgage for his wife, duly

separate in property from him, be not shown, the act is null. 30 A. 493, *Nugent v. Stark*.

(b) *Wife's general incapacity and authorization to contract.*

1. The law, as it stood in regard to the contracts of married women, previous to the act of the legislature of 1855, entitled "an act to enable married women to contract debts and bind their paraphernal and dotal property," remains unimpaired, with the difference that a married woman taking the benefit of that act, is placed in the position of *feme sole*, her contract furnishing full proof against her; while under the general jurisprudence those who deal with a married woman are bound to see that the contract made with her inures to her benefit. 15 A. 54, *Rice v. Alexander*. See Nos. 6, 10. EVIDENCE, VIII. No. 19.

2. A married woman is not a public merchant within the meaning of the code, unless she carries on a separate business from her husband. 15 A. 277, *Spalding v. Godard*.

2. The acknowledgment of a debt by a wife, without the express authority of the husband, will not bind the husband, unless she be a public merchant. 17 A. 299, *Bower & Garner v. Frindell and Wife*.

4. The husband who holds the power of attorney of his wife, and acts under it shows sufficient authorization to validate his wife's signature. 26 A. 666, *Succession Gee*.

5. The wife is bound on her note given to her attorneys at law, for the purpose of defending her husband, who was confined in jail, on a charge of manslaughter. 16 A. 339, *Nettles v. Sheriff et als.*

6. The holder of a debt contracted by a married woman, with the authorization of the district judge, according to the act of 1855, "an act to enable married women to contract debts and bind their paraphernal or dotal property," is not bound to prove that the consideration thereof inured to the benefit of the maker. 22 A. 457, *Miller v. Wisner*. See No. 1.

7. That the debt is not contracted until several months after it had been authorized by the judge, is of no consequence. *Ib.*

8. The authorization by the judge, to a married woman, to borrow money, and mortgage her separate property, must be given before the debt be contracted, or the mortgage given, else it is of no effect, if after. 24 A. 89, *Falconer v. Stapleton*.

9. The judge of the Third District Court, for the parish of Orleans, may grant a certificate to authorize a married woman to borrow money. 26 A. 263, *Rainey v. Asher*. See No. 20.

10. If the authorization of the judge be given to the wife to borrow money, and the act of mortgage be made subsequently, but the note identified therewith, is dated prior thereto, the wife will be bound, the more so where the debt inured to her separate interest. 26 A. 714, *Brooks v. Stewart and Husband*.

11. The special authorization of the wife to borrow money and bind her property, cannot cover a previous indebtedness. 29 A. 123, *Conrad v. Leblanc, sheriff*.

12. In the absence of allegations and proof of fraud on the part of the purchaser, the wife cannot, by setting up that the certificate given by the judge to authorize her to borrow money is false, that she was not examined out of the presence of her husband, and that the money borrowed was for his use and benefit, have the sale of her mortgage property, under foreclosure of the mortgage, annulled. 28 A. N. R., *Mrs. Anna McGraw Pilcher v. L. Schwartz and Walter Pugh*; O. B. 45, fo. 407.

13. A married woman, who borrowed money under the authorization of the judge, must prove the want of consideration. See EVIDENCE, VIII. No. 19.

14. Weight of the testimony of a married woman against her authentic declarations. See EVIDENCE, XIII. (a), No. 11.

15. The force, threats or other improper means used to coerce the wife to obtain the authorization of the judge, do not concern third *bona fide* parties. See MARRIAGE, VII. No. 7; VIII. (a), No. 5.

16. The want of authority to contract can only be set up by the wife or husband and their heirs. See OBLIGATIONS, III. (a), No. 14. SURETYSHIP, I. (c), No. 2.

17. Husband's authorization to indorse. See OBLIGATIONS, III. (a), No. 15.

18. What judge may authorize the wife. See OBLIGATIONS, III. (a), No. 17.

19. When the wife has been authorized by the judge to borrow, she is thereby authorized to defend the suit. See PLEADING, I. (c), 1), B. No. 11.

20. The parish judge is not competent to authorize a married woman to borrow money. 30 A. 493. *Nugent v. Stark*. See No. 9.

(c) *Wife's incapacity to bind herself or her property for or with her husband; her renunciation, and the rule, that obligations during the community, are community obligations.*

1. Where a married woman confessed judgment upon a debt of her husband's, for which she had made herself surety by notarial act; *Held*: That such confession was but the complement or consummation of a contract which the law prohibits, and which was consequently null. 15 A. 628, *Baines v. Bridges*. See ESTOPPEL, No. 7. JUDGMENT, X. Nos. 1, 7, 8; *infra*, No. 12.

2. A note given by the husband and wife, to secure advances made to carry on a plantation leased by the husband, is a community debt, and the separate property of the wife mortgaged to secure the said note, cannot be seized. 16 A. 309, *Draughton v. Ryan*.

3. The wife cannot bind herself conjointly with her husband as surety; such an obligation binds only the husband and community. 16 A. 310, *Bartington v. Bradley*; C. C. (2412).

4. The wife cannot bind herself for her husband, nor conjointly with him for debts contracted by him. C. C. (2412); 22 A. 386, *Summers & Brannin v. Hollingsworth*.

5. The mortgage given by the husband to secure a debt of his wife, separate in property, is valid. See MARRIAGE, VII. No. 3.

6. The wife cannot be held liable on a note furnished jointly by her and her husband for supplies furnished to cultivate a plantation belonging to a succession, of which she is administratrix, and cultivated by her husband. 24 A. 142, *Carroll, Hoy & Co. v. Manning*.

7. The wife is not bound on her notes secured by mortgage on her separate property, if given to pay the debt of her husband. 26 A. 737, *Koechlin v. Thontke*.

8. A mortgage executed by the wife to secure the indebtedness of her husband, is null. 27 A. N. R., *Mrs. D. A. Taylor v. Goodrich*.

9. The husband being the head and master of the community, can alone be bound for the debts of said community. 20 A. 229, *Surls v. Hienn and Wife*.

10. The wife is not liable for an account of goods purchased by her husband, unless it be of such articles as the husband was not bound to furnish, or which went to the benefit of her separate estate. 23 A. 198, *Trudeau v. Row*.

11. The wife is not personally liable for notes given by her for property purchased during the community. 29 A. 76, *Graham v. Thayer*.

12. If a party has loaned money to a married woman in Louisiana, and has been induced, by her representations and those of her husband, to believe that the money loaned was for the sole benefit of the wife, the latter will be bound though the money was in part borrowed for the husband, and used by him, and, whatever be the law of Louisiana in this particular, a wife can obtain no relief in chancery against such a contract. It is a principle of chancery that one who asks relief must have acted in good faith. 6 H. 228, *Bein v. Heath*. See No. 1.

13. The wife may prove by parol that the redemption sale which she made was really a contract of suretyship for a debt of her husband. See OBLIGATIONS, VII. (b), 2), c. § 1.

14. A creditor of the husband, who knowingly takes the note of the wife, secured by mortgage, and issued under the authorization of the judge, in pay-

ment of his debt, or for advances made to the husband, cannot recover. 30 A. 292, *Claverie v. Gerodias*.

15. The community is liable for the attorney's fees incurred by the wife in defending a suit for interdiction, brought against her by her husband, unless it be alleged and proved that the husband acted from motives of interest or passion, when he alone may perhaps be responsible. 30 A. 338, *Breaux, Fenner & Hall v. Francke*.

(d) *Wife's incapacity as affected by the benefit she receives; proof thereof; and her obligation to contribute to marriage charges and household expenses.*

1. Where it is sought to hold a married woman liable on her notes, given with the authorization of her husband, it is incumbent on the party seeking to recover to show that the contract inured to her separate advantage, or that it related to her trade, if she acted as a public merchant. 15 A. 352, *Bowles v. Turner*. See **BILLS AND NOTES, IV. (b). EVIDENCE, VIII.**

2. As between the wife and creditor, it behooves the latter to prove the consideration of the note when denied, but the husband must show want of consideration to his own contracts. 16 A. 449, *Kennedy v. Bossière*.

3. A note signed by a married woman is invalid where it is not shown that the debt inured to her separate benefit, nor that she was properly authorized. 19 A. 206, *Thomson v. Chick*.

4. To recover against a married woman, it must be alleged and proved that the debt was contracted for and inured to her separate and individual benefit. 20 A. 229, *Surls v. Heinn and Wife*.

5. In a suit against a married woman, whether separate in property or not, the plaintiff must show affirmatively that the debt inured to her separate benefit. 24 A. 96, *Urquhart v. Bringier*.

6. After the separation of property, the wife is not bound for the debts of her husband, contracted before separation, unless it be shown that the debt inured to her separate benefit. A debt for the support and education of the children, is not one for the separate benefit of the wife. 21 A. 525, *St. Louis University v. Prudhomme and Wife*.

7. The fact that the price of the adjudication was applied to pay the husband's indebtedness, did not invalidate the purchase made by the wife, and she is liable for the price. 23 A. 186, *Lehman et al. v. Barrow and Husband*.

8. Money loaned to the wife, for the purpose of effecting the compromise of a law suit pending against her, for a draft of her husband, inures to her separate advantage, and is therefore binding. 26 A. 289, *Barron v. Sollibellos*.

HOWELL, J., *dissenting*: The wife could not bind herself by the compromise. *Ib.*

9. A married woman, separate in property from her husband, and doing business as a public merchant, cannot plead that the draft accepted by her did not inure to her personal benefit. 17 A. 113, *Levy v. Rose*.

10. The supplies and machinery, being for the benefit of the plantation owned by the married woman, she is liable for the same, although the account have been kept in the name of her husband. 28 A. N. R., *Jurey & Harris v. Hord and Husband*.

11. The wife, separate in property from her husband, is liable for advances made to her, to cultivate the land owned by her, and for the support of her family, when the husband owns nothing, and is impotent. 29 A. 333, *Mary L. Hardin v. Wolf and Cerf*.

12. The wife is bound for a debt which inures to the benefit of her separate property. 29 A. 749, *Jordan & Co. v. Anderson*.

13. The wife is not liable for a community debt. 19 A. 327. *Robertson v. Levy and Wife*; 14 A. 712.

14. The husband is bound to furnish the wife with medical aid during the community; she is not liable for professional services rendered by a physician. 24 A. 327, *Choppin v. Harmon and Wife*.

15. Where a husband is insolvent, the wife, separate in property from him, is bound, in proportion to her fortune, to contribute in part, or in whole, to

the household expenses, but she is not otherwise responsible for her husband's debts. 30 A. 552, *McElvin v. Taylor*.

16. The holder of a note signed by a married woman is put on his guard. See *BILLS AND NOTES*, IV. (e), 1), Nos. 5, 15.

17. Where the wife was authorized by the judge to borrow money, executory process will be maintained. See *EXECUTORY PROCESS*, II. (b), 1), No. 11.

18. When a sale made by the wife is binding on her, see *SALE*, I. (b), No. 2.

IX. OF DOWRY.

(a) *In general; its constitution; and distinction between dotal and paraphernal property.*

1. An immovable, bought with dotal funds, is dotal. 15 A. 62, *Fleytas v. Her Husband*.

2. Where a person acting under a power of attorney, which did not contain the power to donate, made a donation *propter nuptias*, which donation was ratified by the principal after the marriage had taken place; *Held*: That this act of ratification was not a constitution of dowry after marriage; for every ratification relates back to the time of doing the act or making the contract ratified. 15 A. 268, *Barnes v. Burbridge*.

3. Where, by the marriage contract, the present and future property of the wife is constituted dotal, property belonging to successions devolving upon the wife as heir, after the marriage, will be regarded as the dotal property of the wife. 15 A. 569, *Decuir v. Lejeune*.

4. The immovable dowry being mortgaged at the time of marriage, the creditor foreclosed, but by agreement, the advertisement was waived and the property adjudicated to the husband for the amount of the debt, a sum much below its value; *Held*: That the husband did not acquire the ownership of the property which retained its character of dowry, but that the wife was his debtor to the amount disbursed. 16 A. 166, *Esneault v. Cooley*; 19 L. 575; 15 A. 569, *Decuir v. Lejeune*. See *SALE*, X. No. 1; *infra*, XI. (b), No. 18; XIII. (b), 2), No. 1.

5. The wife who constitutes as her dotal property, a promissory note, minutely described, can only recover the note in kind, when the husband has been unable to collect it. 21 A. 228, *Lapice v. Lapice*.

6. The wife having died, leaving a minor child, during the pendency of a suit to recover a sum settled in dowry, the husband sets up a credit of the money expended on her account during her last illness; *Held*: That no part of this sum can be charged to the wife's succession. 16 A. 103, *Lacour v. Lacour*.

7. The wearing apparel settled in dowry, and valued, if extant and worn, is to be accounted for by the husband, who owes the amount at which it was estimated, and so may claim the same from the defendant who settled the dowry. *Ib*.

8. The amount paid by defendant for funeral expenses should be deducted. *Ib*.; 9 A. 112, *Succession Dr. Ira Smith*.

(b) *Administration and inalienability of dotal property.*

1. Plaintiff, who has been enjoined from seizing the property settled in dower, although the injunction has been perpetuated, may, at the dissolution of the marriage, seize the same property. 16 A. 365, *Bouvillain v. Bourg*. See *ELECTION*, V. (a), 3), A. No. 5.

2. The dowry cannot be divested of its character by the machinery of an administration, inventory and sale, at which the husband becomes the purchaser. The mortgages executed by him during his apparent ownership are null and void, even if the wife has renounced her mortgage. 22 A. 405, *Levy v. Ledoux*.

3. After dissolution of the marriage the dotal property loses that character. See *EXECUTION*, V. (a), 3), A. No. 1.

4. See *supra*, IX. (a), No. 4; *infra*, XIII. (b). 2), No. 1.

5. The husband may act alone to recover the dowry of his wife. See PLEADING, I. (c), 1), A. No. 8.

X. OF THE MARITAL FOURTH.

1. The husband who owns only three horses and a buggy, and whose wife's succession amounts to twenty-four thousand dollars, is entitled to the marital fourth. 27 A. 594, *Succession Newman*; 3 A. 104.

2. When the succession of the husband, who died without issue, amounts to about eight thousand dollars, his widow, whose father is rich, will not be entitled to the marital fourth. 30 A. 469, *Succession Leppelman*.

3. An opposition to an executor's account is not the proper form for a widow to claim the marital fourth. 30 A. 468, *Succession Leppelman*.

4. Before what court this claim must be presented, see COURTS, II. (d), 4), No. 6.

XI. OF PARAPHERNALIA.

(a) In general.

1. Where a woman, at the time of her marriage, was in possession of certain lots, as lessee, upon which she had constructed houses, and derived a profit by sub-letting them, and there was an arrangement that at the termination of the lease it might be renewed; *Held*: That if by the marriage contract this continued paraphernal property, and was administered by her through her agents, and at its expiration, the lease was renewed by her in her own name, it remained, after renewal, paraphernal property, and was not liable for debts of the community. 15 A. 277, *Spalding v. Godard*.

2. Property bought with the funds of the wife, under her separate management, is paraphernal. 20 A. 40, *Cockburn v. Wilson*; 17 L. 299; 5 A. 116.

3. Whenever the property has been purchased by the wife as her separate property, and with her separate funds, which she was administering independently of her husband, and which was not under his control, it is paraphernal. 22 A. 437, *McCay v. Boatner*.

4. The declaration, in an act of purchase by the wife, during the marriage, that the property was purchased with her separate funds, does not relieve her from proving the fact, *aliunde*. 18 A. 126, *Huntington, ad'r. v. Legros*. See (b), No. 14.

5. The paraphernal property of the wife cannot be seized for a debt due by the community, growing out of improvements made upon her said property, until her indebtedness to the community be judicially established. 21 A. 239, *Abat v. Atkinson*.

6. A judgment against the husband should not be permitted to encumber the paraphernal property of the wife. 22 A. 243, *Reilly & Co. v. Rodervald & Co.*

7. Even if the husband desired to replace the jewelry, and other valuables donated by him to his wife, and returned to him when in pressed circumstances, such desire will not give rise to a claim by his wife against his estate for the value of such articles. 26 A. 195, *Succession Hale*.

8. Where the wife, separate in property, claims the property seized under execution against her husband, she must establish her claim with legal certainty, otherwise the injunction will be dissolved with damages. 19 A. 273, *Goldsmith, Haber & Co. v. Michel*.

9. Property given to the wife, in the marriage contract, by the future husband, on account of the marriage, is paraphernal; a *dation en paiement* to replace this property, is valid. 27 A. 341, *Newman & Co. v. Eaton and Wife*. See SALE, IX.

10. The plantation, which was the wife's paraphernal property, was administered by the husband, who obtained advances from a commission merchant; for a balance due them they seized the plantation; the petition against the wife being served only on the husband; the wife enjoined; *Held*: That her plantation was not liable for the debt which was due by the community. 28 A. 300, *Wells v. Norton, Will Steven*.

11. Parol is admissible to show that the husband received the money, although the act of donation was in favor of the wife. See EVIDENCE, XV. (f), No. 2.

12. For *dation en paiement* by the husband to the wife, see SALE, IX.

13. Where the father and mother of the husband, bind themselves as security for the return of the wife's paraphernal property, they will be so held. See OBLIGATIONS, VIII. (e), No. 3. PLEADING, I. (c), 1), A. No. 5.

(b) *Administration and alienation of paraphernal property.*

1. The wife's separate estate is chargeable with attorney's fees paid by the husband and costs incurred during the marriage for the separate account of the wife. 16 A. 271, *Barbet v. Roth*; 14 A. 734.

2. The husband who administers the paraphernal property of his wife during the entire existence of the marriage, is responsible for the amount of paraphernal property, alienated by him, and the community is chargeable for the same. 16 A. 271, *Barbet v. Roth*; C. C. (2362), (2367); 6 A. 590; 16 A. 145, *Breaux v. Leblanc, administrator*.

3. The defendant having assisted and authorized his wife in various conveyances of landed property and slaves, declared in the acts to be her paraphernal property, the wife's heirs are not required, as against defendant, to prove the verity of the declarations of ownership. 16 A. 271, *Barbet v. Roth*; C. C. (2235); 1 A. 299. See ESTOPPEL, Nos. 35, 52.

4. The interest as well as the capital of the wife's personal debts, paid by the community, should be allowed against her. 16 A. 272, *Barbet v. Roth*.

5. Improvements put upon the separate property of the wife, by the community, form a charge in favor of the latter against the wife. 16 A. 272, *Barbet v. Roth*.

6. The wife need not be separate in property to recover from her husband or his sureties, her paraphernal property. 17 A. 225, *Pecquet v. Pecquet*.

7. The wife cannot recover judgment against her husband when there is no community by marriage contract, and her paraphernal property has been used for her benefit. 23 A. 518, *Rice v. Rice*.

8. A sale by the husband of one-half interest of his wife's drug store, she being separate in property, and additional purchases of stock by the firm, composed of the vendee and the husband, does not render the stock liable to seizure by the husband's creditors, when the transaction was done without the wife's sanction. 16 A. 414, *Fleitas v. Poutz*.

9. A married woman is not bound by her declaration that the property belongs to the community. See ESTOPPEL, No. 45.

10. The husband may sue, in his name, to recover a note which is the paraphernal property of his wife. See PLEADING, I. (c), 1), A. No. 9.

11. The husband is presumed to administer the paraphernal property, until the contrary be shown by those who are interested to contest it. 16 A. 145. *Breaux v. LeBlanc*. See Nos. 12, 13; EVIDENCE, III. (a).

12. When there is no evidence that the wife administered her paraphernal property separately and alone, it is presumed that the husband received and used it. 18 A. 106, *Johns v. Race*; C. C., (2362), (2363); 6 R. 41; 12 R. 524; 18 L. 434; 14 A. 281. See No. 10.

13. In the absence of evidence to prove that the wife administered her paraphernal property, separately and alone, the presumption is that it was under the administration of the husband. 18 A. 588, *Rachal v. LeRoux*; 16 A. 145, *Breaux v. LeBlanc*.

14. The mere declaration, in the act of sale, that the property was paid for, with the separate paraphernal funds of the wife, under her separate administration, does not relieve the wife from making this proof. 20 A. 532, *Shaw v. Hill*; 18 A. 126. See (a), No. 4.

15. When the husband has been appointed agent by his wife, to administer her paraphernal property, the fruits will then be hers. 27 A. 183, *Simoneaux v. Helluin*; 2 A. 890; 14 A. 68; 17 L. 426.

16. The husband who administers property inherited by his wife, when she

accepted the succession purely and simply, does not become liable for the debts of the succession. 21 A. 651, *Leon v. Bouillett*.

17. The husband is not responsible to the wife, for not collecting her paraphernal property. 20 A. 301, *Wallace v. McCullough*.

18. Under article 2421, Civil Code, the husband has the right to transfer, in a notarial act of giving in payment, the furniture and movable effects held by him on account of his wife's paraphernal property received and disposed of by him. 23 A. 163, *Barras v. Bidwell*. See IX. (a), No. 4.

19. The husband has the right to receive his own debt in payment of a judgment obtained by his wife against his creditor. 25 A. 288, *Miltenberger v. Keys, sheriff*. See MANDATE, V. (b), 4), No. 4. COMPENSATION. IV. No. 3.

20. The mortgage given by the husband on his wife's separate property cannot be enforced. 28 A. 237, *Compton et als v. Sanford*.

21. The husband who has the authority, may contract for his wife and bind her. 28 A. 298, *Davis v. Williams*.

22. The declarations that the property purchased is paraphernal, binds the husband and wife as between them. See ESTOPPEL, No. 34; *supra*, VI. No. 10.

23. And the husband, as to third persons, see ESTOPPEL, No. 52.

24. Same declaration *when* not binding on the heirs, see *Ib.*, No. 35.

25. A married woman not bound by her declarations, when, etc., *Ib.*, No. 45.

26. The husband has the right to transfer judgments obtained by him against third persons, in payment of his wife's dotal and paraphernal property. See MARRIAGE, VI. No. 4.

27. A mere discharge, signed by both husband and wife, where the latter acknowledges the receipt of a sum of money, is not sufficient to shift the onus from the creditor to the wife, so as to rebut the presumption that the husband administers the wife's paraphernal effects. 16 A. 145, *Breaux v. LeBlanc*; 2 A. 824; 6 A. 590.

XII. OF CONVENTIONAL COMMUNITY.

1. Where the community has been waived by the marriage contract, between husband and wife, the law does not in that case create the presumption that the property belongs to the husband. 15 A. 286, *Williams v. Hardy*. See XIII. (b), No. 2.

2. Where a marriage is null and void, no community can ever exist between the parties to it. 15 A. 519, *Summerlin v. Livingston*.

3. The defendant has no right to complain, if a suit be instituted by the wife, who is joined by her husband, on a note belonging to the community, when he alleges no defense against the husband. 24 A. 249, *Evans v. De L'Isle*. See BILLS AND NOTES, XII. (a), No. 2.

4. The conventional community may be composed of property acquired by succession, or donation by either spouse. See V. No. 2.

5. The wife's property may be excluded from the community. See XIII. (a), No. 1.

XIII. OF LEGAL COMMUNITY.

(a) *In general.*

1. The property purchased during the first marriage by the husband, after its dissolution, in an action of partition between the husband and his children, adjudicated to the former, during his second marriage, thereby becomes an acquet of the second community. 16 A. 170, *Chapman v. Woodward*; 14 A. 178; 15 A. 588.

2. The proceeds of a plantation in Mississippi, does not belong to the community, nor a wagon and mule of the said plantation, sometimes used in the State of Louisiana. 23 A. 174, *Succession Robinson*.

3. Property acquired here by non-resident married persons, during their stay in Louisiana, is community property. *Ib.*

4. The community is not a partnership; and it is not subject to the rules of the latter, for settlement; therefore a creditor of the community, applies only

to the survivor for satisfaction, and the heirs of the deceased have no right to enjoin the creditor from proceeding. 23 A. 424, *Baird v. Lemee*. *Infra*, (e), 1), No. 4.

5. At the moment of the death, the heirs of the deceased are vested with the ownership of one-half of the community property, and the surviving partner has no right to mortgage the whole. 23 A. 638, *Walker & Vaught v. Kimbrough*.

6. The husband, being the head of the community, and responsible for its debts, by the death of his wife, whose succession has not been opened, is not thereby deprived of the right to make *bona fide* settlements for the payment of the debts of the community and the renewal of the obligations, by furnishing new notes, does not novate the debt. 25 A. 305, *Rusk v. Warren*.

7. Where the wife, who claims by injunction the property seized, is not called upon by the seizing creditor to establish the validity of her purchase and show that she paid for said property with her paraphernal funds, or that after the dissolution of the community she had a separate industry, and no charge of fraud and simulation are made, her purchase made after judgment of separation and previous to the seizure will be maintained. 26 A. 172, *Mrs. Myers v. Sheriff*.

8. Property acquired by the wife, whilst separated from bed and board, does not fall in the community if she and her husband become reconciled. 26 A. 190, *Ford v. Kittredge*.

9. The community may be so modified as to exclude the wife's property from the community, and such property cannot be seized by the husband's creditors. 27 A. 343, *Barrow v. Stevens*.

10. The movables owned by either husband or wife at the date of the marriage, does not fall in the community. The presumption is that the property found is community, but that presumption may be rebutted. 28 A. N. R., *Denegre v. Denegre*; 5 R. 292; 9 A. 60; 13 A. 379; 14 A. 726.

11. Community how disposed of, in case the husband should have two living wives. See IV. No. 2. Or a concubine, see XIII. (d), No. 4.

12. When the property purchased by the wife bears no proportion to her paraphernal rights, the property belongs to the community. See VII. No. 1.

(b) *Of what actively composed, and distinction between separate and community property.*

1) In general.

1. Where the wife of an absconding debtor gives property in payment of a debt due by her husband, the law presumes that the property so given belongs to the community, and the act of the wife in giving the property in payment is a nullity, and the property attempted thus to be alienated by her is liable to attachments by the creditors of her husband. 15 A. 15, *Hart v. Gothwald*.

2. Property acquired during the marriage, although purchased in the name of the wife, belongs to the community, in the absence of proof that it was paid for out of the wife's paraphernal funds. 15 A. 119, *Pearson v. Ricker*. See XII. No. 1.

3. A sale by the husband of one-half interest of his wife's drug store, she being separate in property, and additional purchases of stock by the firm, of which the husband was a partner, does not render the stock liable to seizure by the husband's creditors, when the transaction was done without the wife's sanction. 16 A. 414, *Fleytas v. Poutz*.

4. The wife must show *dehors* the act of purchase, that the property claimed by her and acquired during the existence of the community was purchased with her separate funds. 21 A. 343; 10 A. 784; 22 A. 148, *Block v. Melville et al.* See No. 2.

5. The debt being contracted by the husband before the marriage, should be acquitted out of his own individual property, and not out of the share of the community belonging to the wife. C. C. (2372); 22 A. 514, *Markham v. Allen*.

6. The minors' share of the community property being duly adjudicated to

the father, the same became his separate property. 23 A. 17, *Succession of Lydia McClean*.

7. Property bought during the community, whether in the name of the wife or of the husband, is community, unless it be proved affirmatively that the sum paid was the wife's paraphernal funds, under her separate administration. 20 A. 531, *Shaw v. Hill*; 24 A. 521, *Pope v. Foster*; 295, *Sulstrong v. Belz*.

8. The community is liable for an account due at the date of its dissolution, and all payments made subsequently by the husband will be imputed to its extinguishment. 24 A. 536, *Sadler, tutor v. Kimbrough*.

9. The money on a policy of life insurance in favor of the wife and children, forms no part of the community, and cannot be used to pay community debts. 29 A. 711, *Succession of Bofenschen*.

10. Property acquired during a change of domicile. See XV. (b), 2), d.

2) Purchases made and perfected during the community.

1. Where the husband purchased the dotal property of the wife under an administrator's sale, made for the ostensible purpose of paying debts of the succession, to which the wife was heir, but with the real intention of divesting the property of its dotal character, so as to remove the obstacle of dealing in regard to it with third persons; *Held*: That it was a simulation, and that the adjudication to the husband was an absolute nullity. 15 A. 569, *Decuir v. Lejeune*.

2. An heir who acquires at a sale made to effect a partition, does not become sole owner under his ancient title as heir, but is invested with a new title as purchaser, and if he be married, the purchase is presumed to be made on account of the community, unless he declare his intention to be otherwise in the act by which his acquisition is evidenced. 15 A. 588, *Breaux v. Carmouche*.

3. Property purchased by the husband, in his name, with his wife's separate funds, belongs to the community. 20 A. 206, *Leblanc v. Leblanc*; 14 A. 281; 18 A. 105; 5 A. 688; 10 L. 181; 12 L. 170; 17 L. 293; 19 L. 406; 4 R. 114.

4. Property purchased in the joint names of husband and wife, is community property, although paid for with the wife's paraphernal funds. 29 A. 583, *Tally v. Heffner*.

5. A citizen of Mississippi, purchasing lands in this State, previous to act of March 18, 1852, and before removing to this State, acquires it for his separate benefit. 25 A. 211, *Succession Waterer*.

6. At the dissolution of the community, the husband has a right to take from the cattle remaining, a number of heads equal to that brought by him in marriage. 25 A. 211, *Succession Waterer*; C. C. 586, 587; 11 A. 278; 10 R. 46.

7. Until the community has been settled, so as to show what remained after paying the debts, the heirs of the wife, not placed in possession by the court, can claim nothing out of the acquets and gains. 25 A. 379, *Phelan v. Az*; 26 A. 639, *Daniels v. Ivy*. See (d), No. 1.

8. The husband, who having abandoned his wife, comes to live in this State, in open concubinage with a woman who has no particular trade or occupation, and under whose name he purchased certain real estate, should not be allowed to place that property beyond the reach of his wife. The property belongs to the joint account of the husband and his concubine. The husband's share will be subject to the community, the lawful wife being entitled to her half thereof. 25 A. 448, *Malady v. Malady et al.* See (d), No. 4.

9. WYLY, J., *dissenting*: The real estate being in the name of the concubine, should not be decreed to be joint, no proof being offered to show that the husband had paid for it. *Ib.*

10. Property purchased during the community will be presumed to be community property, in the absence of other proof. 26 A. 552, *Richardson v. Chevalley*.

11. Where the judgment of separation, and the moneyed claim, were revived after twelve years, and the husband sold property to his wife in payment of

the claim, such sale is null, and liable for the husband's debts, which arose even after such transfer. 27 A. 193, *Hyman v. Sheriff East Feliciana*.

12. Real estate purchased and recorded in the wife's name, during marriage, without mention in the act that it was paid for with her separate funds, is presumed to belong to the community, but this presumption may be rebutted by oral, as well as written proof. 30 A. 167, *Succession Pinard v. Holten*.

3) Inchoate acquisitions before, perfected during, and inchoate acquisitions, perfected after the community.

1. Where the property was purchased by the wife for her separate account, and mention is made in the act of the derivation of the paraphernal funds, which bear no proportion to the value of the property substituted, such acquisition belongs to the community, and the wife is not bound by the recitals mentioned in the deed of sale. 16 A. 215, *Bouligny v. Fortier*.

2. The purchase, in the wife's name, paid with paraphernal and community funds, belongs to the community. The wife becomes a creditor thereof to the amount of her separate funds so invested. 2 Woods, 151, *Reid v. Rochereau & Co.*

4) Property acquired by donation, inheritance, or from a succession fallen to the wife.

1. Property acquired by donation, may, by agreement, in the marriage contract, belong to the community. See XII. V. No. 2.

5) Fruits and revenues of separate property, and improvements thereon.

1. Improvements put by the community on the separate property of the wife, cannot be seized by a community creditor previous to dissolution of the community. See EXECUTION, V. (a), 4), No. 4.

(c) *Of what passively composed.*

This division is included in (b), 1); 2); 3); 4); 5).

(d) *Its administration; alienation of community property, and general nature of the wife's interest.*

1. The representatives of a deceased wife, have nothing to claim out of the acquets and gains, until community debts are paid or liquidated. 17 L. 247; 1 R. 378; 7 R. 404; 2 A. 30; 25 A. 380, *Phelan v. Az.* See (b), 2), No. 7.

2. The surrender of community property, after the death of the wife, by the husband, to pay community debts, and a sale thereof by the sheriff, will transfer a valid title, although the minor children were not represented in the insolvent proceedings. 25 A. 380, *Phelan v. Az.* See (e), 4), c. SUCCESSION, VIII. (e), 2), B. No. 2.

3. The keeper of a boarding house is not a public merchant. 25 A. 37, *Moussier v. Gustine*.

4. When the husband acquired property during his voluntary separation from his wife, in the name of his concubine, with whom he was in partnership, the wife who recovers one half of the husband's share, must contribute in the same proportion, to pay the partnership incumbrances resting on said property. 28 A. 61, *Malady v. Malady et al.* See (b), 2), No. 8.

(e) *Dissolution of the community, and its consequences.*

1) In general.

1. Although the code does not expressly declare that a dissolution of the community shall result from a judgment of separation of property between husband and wife, yet such is the legitimate conclusion to be drawn from the textual provisions on this subject. 15 A. 553, *Holmes v. Barbin*.

2. One of the objects of a separation of property is to put an end to the community. *Ib.*

3. A separation of property, dissolves the community of acquets and gains,

and the wife cannot claim any part of the property acquired by the husband, after such dissolution. 23 A. 590, *Peck v. Gillis*.

4. Property of the community may be validly seized and sold, after the wife's death, for community debts, contradictorily with her husband, without making the wife's heirs parties. 26 A. 294, *Riley v. Condran*; 21 A. 486, *Randolph v. Chapman*. See (a), No. 4; (e), 4), c.

5. The creditors of the husband cannot claim payment out of the estate of the wife, who was separate in property from him. 27 A. 270, *Succession Clark*.

6. The husband, after dissolution of the community, may give new notes for others, and the debt is not novated. See (a), No. 6.

2) Mode of dissolution.

1. By separation of property. 15 A. 553, *Holmes v. Barbin*; 23 A. 590, *Peck v. Gillis*.

3) Acceptance or renunciation of the community.

1. Where a marriage has been dissolved by a judgment of divorce, if the wife brings suit to recover her share of the community property, it must be shown that she accepted the community within the legal delays, after a dissolution by the sentence of divorce; otherwise, her pretensions are without foundation in law. 15 A. 416, *Succession of Ewing*.

2. The wife who is divorced from her husband, and takes no steps to accept the community within the legal delays, is presumed to have renounced it. 15 A. 569, *Decuir v. Lejeune*.

3. The widow, who disposes of the effects left by her deceased husband, tacitly accepts the community, and becomes responsible for one-half the community debts. 16 A. 291, *Collins v. Babin*; 12 R. 113; 10 L. 427; C. C. (2381), (2378).

4. The renunciation of the widow to the community, is of no effect, if she has concealed or disposed of any of the community property after dissolution of the marriage. 28 A. 850, *Ludeling v. Felton*.

5. The wife, who disposes of her husband's property at private sale, and for her own advantage after his death, becomes responsible for one-half of his debts, and is also liable to the husband's succession or his heirs for one-half the value of the property thus sold, although the community had previously been dissolved by a judgment of separation of property. 29 A. 719, *Ludeling v. Felton*.

6. Neither the wife nor her succession is liable for a community debt, unless she or her heirs have accepted the community, and in such cases they are liable only for one-half of the debts. 29 A. 16, *Reihl v. Martin*.

7. The widow who accepts the community becomes responsible for her share of community debts. 28 A. 854, *Paul v. Hoss*.

8. The wife may renounce the community at any time before a court of unlimited jurisdiction has passed judgment against her as partner in community. 20 A. 39, *Cockburn v. Wilson*.

9. After the expiration of the delays for deliberating, the wife has a continued power of renunciation, and may be forced by suit to elect whether she accepts or renounces, in the same manner as an heir, and then judgment may be rendered against her personally, if she does not renounce. C. C. (2383); C. P. 980, 982; 14 A. 1; 22 A. 435, *Tithe v. Lee*.

10. The widow in community may renounce the community at any time before the court, having unlimited jurisdiction over the subject matter, has pronounced a final judgment against her as a partner in community. 28 A. 850, *Ludeling v. Felton*.

11. After dissolution of the community, whether by judgment of separation or by the death of the husband, the wife may accept the community. 29 A. 721, *Ludeling v. Felton*. See SUCCESSION, V.

12. The heirs of the wife who do not renounce the community, cannot compete with the creditors of her husband's succession. See SUCCESSION, VIII. (f), 1), No. 8.

4) Effect upon the title to community property; rights of the parties thereto, and liquidation of the community.

A. *In general.*

1. Community property invested by the husband in a partnership, becomes liable for the partnership debts contracted during the life of the wife; a seizure of the assets under such a claim, after the death of the wife, will divest the community title. 19 A. 508, *Carpenter, curator v. Featherston & Amis*.

2. At the death of the wife, the husband becomes absolute owner of one-half of the community, and usufructuary for life, of the remainder. 29 A. 524, *Succession Planchet*.

B. *Presumption of community and resumption of separate property.*

1. If there be no community, there can be no presumption that the property belongs to the community. See XII. No. 1.

2. Property is presumed to belong to the community, but that presumption may be rebutted. See XIII. (a), No. 10; (b), 1), Nos. 1, 2, 7; 2), No. 10.

3. After divorce, if the wife has not accepted the community, she is presumed to have renounced. See (e), 3), Nos. 1, 2.

4. Oral evidence admissible to prove that property purchased by the wife is her separate property. See XIII. (b), 2), No. 12.

C. *Alienation or use of community property, and liability therefor.*

1. A party holding a mortgage, by authentic act, against community property, is entitled to executory process, after the death of the wife, only upon giving notice jointly to her testamentary executor, and to the surviving husband. 15 A. 636, *Poutz v. Bistes*. See No. 10.

2. A sheriff's sale, under a judgment against the surviving spouse, individually, of community property, does not divest the heirs of the pre-deceased spouse of their undivided half interest. 16 A. 49, *Waring v. Zuntz*.

3. Where community property has been seized and sold, after the death of the wife, in satisfaction of a judgment obtained against the husband, for a community debt, the minors cannot claim restitution *ad integrum*, without showing injury, and tendering the amount which has inured to their benefit. 21 A. 383, *Coulson v. Wells*. See EXECUTION, V. (d), 13), Nos. 3, *et seq.* TENDER.

4. A sale of community property, by the husband, after the death of the wife, only conveys title to one undivided half thereof. 21 A. 565, *Biossat v. Sullivan*.

5. The surviving husband in community, as vendor, has a right, even after the death of his wife, to compromise with the vendee, by reducing his claim and accepting new notes, the collection of which he may enforce. 24 A. 336, *Vinson v. Vives*.

6. Community property may be seized and sold for community debts, after the death of the wife, in proceedings against the husband alone. 26 A. 230, *Hawley v. Crescent City Bank*.

7. Community property, sold under execution against the husband for community debts, after dissolution of the marriage, cannot be recovered by the heir. 26 A. 391, *Ricker v. Pearson*; 294, *Riley v. Condran*; 21 A. 486, *Randolph v. Chapman*; 25 A. 380, *Phelan v. Az.*

8. The order of sale of community property being rendered in the succession of the wife, without evidence that it was to pay community debts, gave to the purchaser of the property a good title to only one-half of the property sold. 18 A. 407, *Howard v. Zeyer*.

9. After dissolution of the community, the husband, as the head, may sell the community property at private sale. The property stands in his name and he is personally bound for the debts. 27 A. 634, *Williams v. Fuller*.

10. After dissolution of the community, by the death of the wife, the husband has no right to alienate the property of the community; the wife's share belongs in full ownership to her heirs. 29 A. 665, *Bennett v. Fuller*; 7 L.

222; 9 L. 584; 1 R. 149, 378; 10 R. 18; 3 A. 562. (27 A. 634 overruled.) See No. 1.

11. For suits by husband and wife, and relating to the community, see PLEADING, I. (c), 1), A. B.

12. The widow in community need not join in the sale, where it is made to pay the debts of the husband's estate. See SUCCESSION, VIII. (e), 2), B. No. 2.

D. *Survivor's usufruct legal or testamentary.*

1. Where a party enters into a second marriage, having children of the first, surviving, he is incapable of giving to his intended spouse, more than one-fifth of his estate, and in usufruct only. 15 A. 286, *Williams v. Hardy*. See DONATIONS, VII.

2. The possessor of community property, purchased at sheriff's sale by virtue of a judgment against the individual survivor, cannot set up the usufructuary rights of said survivor, who failed to give the surety required by law, as a bar to the claim of the heirs of the deceased spouse; the seizure did not point to the usufruct. 16 A. 49, *Waring v. Zunts*. See *ante*, c. No. 2.

3. The right of the heirs of the deceased spouse to recover one-half of the fruits and revenues of the community property from the survivor, who is not entitled to the usufruct, is well settled. 16 A. 170, *Chapman v. Woodward*; 3 A. 562; 7 L. 217; 1 R. 149; 10 R. 18.

4. When the community has purchased the naked property, the usufruct thereof being held by the wife, at the death of the husband, she will be entitled to retain the same usufruct. 27 A. 589, *Succession Hasley*.

5. The husband, who is usufructuary of his wife's share in the community, inherited by her collaterals, must give bond. 29 A. 524, *Succession Planchet*.

6. For this and other usufructs, see SERVITUDES, I.

E. *Claims between the community and spouses.*

1. In a suit to liquidate the rights of a wife against the estate of her deceased husband, although the evidence shows that her paraphernal property was administered by her husband, this fact is not sufficient to entitle her to a judgment for the value of such property. She may resume the administration of whatever of her paraphernal property may still exist in nature, but she is a creditor for the value of such only as may have been disposed of by him, or for his benefit. 15 A. 597, *Daigle v. Crow*.

2. Where the wife's dowry consists of money, and the husband loans the money, and takes a note therefor, in his own name, the note belongs to him, and he becomes indebted to his wife for the amount he has taken from her dowry. 18 A. 585, *Tauzin, wife, etc. v. Deblioux, adm'r*.

3. In the absence of proof, showing that the separate money of the husband was used for the benefit of the community, it should not be charged therewith. 26 A. 605, *Belair v. Dominguez*.

4. No interest is due by the husband for the paraphernal property of the wife disposed of by him, until the dissolution of the community. 27 A. 590, *Succession Hasley*.

5. The community is the debtor of the wife for so much of her separate means as was used in paying for community property. 29 A. 522, *Succession Planchet*.

6. The community cannot be charged with the husband's separate means, invested by him in a partnership, but only with the amount actually realized after liquidation of the partnership. 30 A. 277, *Denegre v. Denegre*.

7. Where the husband sold, during his second marriage, property acquired during his first, the second community is not chargeable with the proceeds, in default of proof showing its expenditure for the benefit of the second community. The husband's estate is chargeable with one-half thereof for the benefit of the children of his first marriage, free from the surviving widow's usufruct. 30 A. 193, *Succession Bollinger*.

8. For cattle brought in marriage, see ACCESSION, I. No. 1.

9. See PRESCRIPTION, V. (d).

XIV. OF THE SEPARATION OF PROPERTY.

(a) *In general.*

1. Where the wife is not called upon by the seizing creditor to prove the validity of her purchase, since her separation, her title will be maintained. See XIII. (a), No. 7.

2. The separation of property puts an end to the community. 15 A. 553, *Holmes v. Barbin*.

(b) *Right to claim a separation.*

1. The wife may petition for a separation of property whenever her dowry is in danger, owing to the mismanagement of her husband, or when she believes his estate insufficient to meet her rights and claims. C. C. 2425; 23 A. 278, *Caulk v. Picou and Husband*.

2. A wife may petition for a separation of property although she has brought no dowry, if her own earnings for her family must be preserved. 24 A. 75, *Webb v. Bell*; 153 *Meyer v. Smith & Co*.

(c) *Pleadings, evidence and judgment; validity and effect of the separation.*1) *In general.*

1. In a contest between a wife, separated in property from her husband, and a judgment creditor of her husband, seizing property which she claims as belonging to her separate estate, when the creditor specially denies that the property seized was purchased with the separate funds of the wife, and alleges fraud and collusion between the spouses in obtaining the judgment of separation; *Held*: That in such case, the burden of proof is thrown on the wife to establish the validity of her judgment, and to show how she acquired the property in question. 15 A. 33, *Phelps v. Rightor*.

2. Where a judgment, obtained by the wife, against the husband, for a separation of property, is attacked by the creditors of the latter, proof that the husband had received money after the marriage, belonging to his wife, is admissible to show that the judgment was not rendered on the consent or admission of the husband. 15 A. 81, *Raiford v. Thorn*.

3. The judgment of separation of property is valid, although the wife fails to prove, when attacked by creditors of the husband, that he was indebted to her in the full amount for which she obtained judgment against him. The creditor can only then contest the amount of her judgment. 15 A. 81, *Raiford v. Thorn*.

4. The wife has the right, in case her judgment of separation proves inoperative, to prove her claims *aliunde*. 14 A. 684; 15 A. 33, 81; 17 A. 113; 23 A. 164, *Keller v. Vernon and Wife*; 24 A. 280, *Same v. Same*.

5. It is well settled, that a creditor of the husband can require the wife to establish the verity of her claims and judgment of separation, and is not concluded by the proof adduced when said judgment was rendered. Nor is the wife precluded from offering other proof. 28 A. 546, *Mrs. Mary Powlis v. N. B. Cook and P. Goldstein*.

6. The correctness of the judgment of separation, or the sufficiency of the evidence upon which it was rendered, cannot be enquired into by a creditor, whose claim arose subsequent to its rendition. 22 A. 619, *Farrell v. O'Neil*. See No. 8.

7. The judgment of separation will be maintained, where the claims of the wife are clearly *bona fide*, and the embarrassed state of her husband's affairs endanger them, and when she has used due diligence in executing it. 23 A. 321, *Bird v. Duralde, sheriff et al.*

8. The creditor who contests the judgment of separation, must show that his claim arose before the judgment, otherwise he has no cause of action. 24 A. 49, *Hanney v. Maxwell et als*. See No. 6.

9. A judgment of separation, which remains unexecuted, is null. 24 A. 134, *Succession James*.

10. The judgment of separation does not become a consent judgment,

because the husband consented that the case might be fixed and tried. 28 A. 546, *Mrs. Mary Powlis v. N. B. Cook and P. Goldstein*.

11. The husband's schedule of insolvency, filed after the judgment of separation, is admissible. See EVIDENCE, VII. No. 9.

12. When the judgment of separation is alleged to be fraudulent, it can have no effect as evidence, unless supported by proof of its truth. See EVIDENCE, XIII. (c), No. 2.

13. When the judgment is attacked, the wife may testify. See EVIDENCE, XVI. (b), 4), Nos. 9, 10.

14. Within what time. See PRESCRIPTION, III. (c), 5).

2) Execution and publication of the judgment.

1. A judgment of separation of property between husband and wife, is not rendered null and void for want of publication. 15 A. 81, *Raiford v. Thorn*.

2. Where the wife's execution against the husband was credited with the price of personal property of the husband; *Held*: That it was equivalent to a sale under the writ. 15 A. 81, *Raiford v. Thorn*.

3. A wife may disregard a judgment previously obtained, but not published and executed, and sue *de novo*; on the principle, that the judgment was a nullity. 23 A. 572, *Spires v. McKelvy*.

4. A judgment of separation, not executed, does not affect the community. 27 A. 403, *Morrison v. Citizens' Bank*.

5. A judgment of separation which remained unexecuted until dissolution of the marriage, is absolutely null, and the community is not affected by it. 28 A. 149, *Succession Constant Hearing*; 1 A. 308; 4 A. 513.

6. A judgment of separation becomes null for want of execution; a dation en paiement one year after its rendition, cannot revive or give it effect. 28 A. 345, *Mrs. Nachman v. Leblanc, sheriff*.

7. The wife, who by virtue of her judgment of separation, seizes her husband's interest in property inherited by him, from a succession which he accepted purely and simply, does not thereby become liable for his debts. 29 A. 440, *Sevier v. Gordon*.

XV. OF THE CONFLICT OF LAWS GOVERNING MARITAL RIGHTS.

(a) Conflict between laws of the same State.

1. The bond furnished under article (105), C. C., does not cover minority. See MARRIAGE, I. (a), No. 5.

2. The want of a license is no defect. *Ib.*, No. 6.

3. Effect of property acquired by non-residents. See MORTGAGE, IV. (c), 1).

(b) Conflict between laws of different States; marital rights in other States.

1) Validity of the marriage.

1. The validity of a marriage must be tested by the law of the country where it took place. 6 H. 550, *Patterson v. Gaines*.

2. A citizen of Mississippi purchasing property in this State, acquires it for his separate benefit. See XIII. (b), 2), No. 5.

2) Effects of the marriage.

A. In general.

1. A judgment obtained by the wife against her husband, in the State of Mississippi, contrary to the provisions of a prohibitory law, and in satisfaction of which judgment, he has made to her a *dation en paiement* of his property in Louisiana, cannot stand between the husband and his creditors. 28 A. 773, *Julia D. Kelley and Husband v. John Davis and Wife*.

B. Personal capacity of the parties.

1. At common law, the wife's estate being secured to her separate use, by

virtue of an anti-nuptial agreement, does not confer the capacity to buy property and contract obligations, that a married woman separated in property from her husband, enjoys in Louisiana. 15 A. 197, *Quigly v. Muse*.

2. The bond furnished under article (105), C. C., does not cover minority. See MARRIAGE, I. (a), No. 5.

(D) *Questions relative to the community and property acquired after a change of domicile.*

1. Where parties who were married in this State, and had acquired during the marriage and their residence here, property in slaves, removed for a time to Mississippi, and while there entered into a *post nuptial* contract, by which the slaves were conveyed to a trustee for the benefit of the wife, during her life, and after her death were to descend to the joint heirs of the husband and wife: *Held*: That after they return to this State to reside permanently, their rights must be determined by our law, the *post nuptial* contract disregarded, and the slaves will belong to the community. 15 A. 317, *Mc Vey v. Holden*.

2. The legislature of Louisiana is competent to provide that the laws regulating the community of acquets and gains, shall not apply to property acquired within the State by non-resident married persons. Such legislation does not violate the provisions of the constitution of the United States, which declares that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." 18 H. 591, *Conner v. Elliot*.

3. See XIII. (b); MORTGAGE, IV. (c), 1).

(E) *Wife's choses in action and husband's acquisitions, jure mariti.*

1. In a State governed by the common law, the title to personal property sold to the wife, rests absolutely in the husband. 15 A. 197, *Quigly v. Muse*.

MARSHAL.

1. Purchasers are not required to look into the mode of the appointment of an officer acting as marshal of a United States court. 22 A. 633, *Burke v. Trégre*.

2. The proclamation of the military governor of the appointment and authority of the marshal, seems to be sufficient. *Id.* See MILITARY AUTHORITY.

MASTER.

See LEASE, II.

MECHANICS' AND AGRICULTURAL FAIR ASSOCIATION.

1867, No. 181; 1870, E. S., p. 159.

MERCANTILE BUSINESS.

See LAWS, II. (d), No. 4, for its definition.

MERGER.

1. See CONFUSION. JUDGMENT. NOVATION. PRESCRIPTION.

2. A privilege not created by the seizure exists independently of the judgment. See JUDGMENT, I. No. 13.

3. A consent decree, not in accordance with the mortgage, does not novate the mortgage nor merge it with the judgment. See NOVATION, II. No. 12.

METROPOLITAN LOAN, SAVINGS AND PLEDGE BANK.

Incorporated 1870, p. 93.

METROPOLITAN POLICE.

1. Act No. 1 of 1868 creating a board of police commissioners, divested the mayor of all authority to appoint policemen. See NEW ORLEANS, II. (d), 1). No. 3.

2. See CORPORATIONS. NEW ORLEANS.

3. See acts of 1869, Nos. 44, 87, 92; 1870, No. 94; 1873, Nos. 37, 64; 1874, Nos. 33, 60; 1875, No. 16.

4. Act No. 35, E. S. of 1877, repeals the above metropolitan police acts, and establishes a police under the direction of the city of New Orleans.

5. Receivability of metropolitan police warrants for taxes, see *BILLS AND NOTES*, XVII. No. 3. *TAXES*, III. (a), No. 8; 1870, p. 74; 1877, p. 27.

6. The office of police surgeon was not abolished by act No. 60 of 1874. See *OFFICE AND OFFICER*, No. 30.

7. Board dispensed from giving bond, in judicial proceedings, 1870, p. 84; extra pay, 1870, p. 102; apportionment of New Orleans limited to four hundred and ninety-five thousand dollars, 1876, p. 10.

METROPOLITAN POLICE WARRANTS.

1. Metropolitan police warrants, signed by the chief clerk and accepted by the treasurer of the police board, are not valid. The warrants should have been issued in accordance with the thirtieth section of the act of 1868, to-wit: signed by the president and any two other members of the board, attested by the chief clerk. 29 A. 789, *State ex rel. Klein v. Pilsbury*.

3. Issuance of, 1873, p. 120; receivable in payment of police tax, 1877, p. 27.

MILITARY AUTHORITY.

1. See *CONSTITUTION*, II. (c), 3), A. No. 1; (e), 1), No. 5.

2. Liquidating the bank of Louisiana. See *CORPORATIONS*, X. (n), No. 1.

3. Establishing the provost court. See *COURTS*, I. No. 6.

4. Authorizing Civil Courts to exercise their functions. See *COURTS*, I. No. 16.

5. A sale of real estate being stayed by military authority, new advertisements are necessary when the order is revoked. See *EXECUTION*, V. (c), No. 4.

6. The military had power to authorize the judge of one district to try cases in another. See *JUDGMENT*, XI. (a), No. 5.

7. Also to accept the bond of an officer appointed by them. See *JUSTICE OF THE PEACE*, No. 3.

8. Further, for martial law and military orders. See *LAWS*, IX.

9. Had power to seize and collect rent. See *LEASE*, I. (b), 1), No. 11.

10. Also to appoint U. S. marshal. See *MARSHAL*, No. 2.

11. The value of timber seized by military authority, and used by the city, may be recovered from her. See *NEW ORLEANS*, II. (a), No. 1.

12. The military had power to make a lease of the wharves of New Orleans. See *NEW ORLEANS*, II. (a), No. 4.

13. Payment by the insurance company to the U. S. quarter master, discharges the debt. See *PAYMENT*, V. No. 2.

MILITIA.

1870, E. S., p. 164; 1871, p. 197; 1873, p. 47; metropolitan police to be used as militia, 1873, p. 77; appropriation, 1873, p. 135; riots, payment, etc., 1875, p. 16; repealed, 1877, p. 32; to organize the militia, 1878, p. 268.

MINORS.

I. OF THE APPOINTMENT AND REMOVAL OF TUTORS AND CURATORS; THEIR BOND, OATH AND SURETIES.

(a) *In general.*

(b) *Right to and qualifications for the tutorship; its forfeiture; action of family meeting; causes and evidence justifying a removal.*

(c) *Mode of removal and opposition; jurisdiction, and of curators ad hoc and ad bona.*

(d) *Confirmation, oath, and bond; proceedings against, and obligations of surety.*

II. OF THE UNDER TUTOR.

III. OF THE POWERS, RIGHTS, AND OBLIGATIONS OF TUTORS, AND THEIR ADMINISTRATION.

- (a) *In general.*
- (b) *Control of the minor's person and education, and removal of his property from the State.*
- (c) *Tutor's diligence, and the inventory he must make.*
- (d) *Expenses of the administration; their payment, and the tutor's powers in relation thereto.*
- (e) *Acquisitions for the minor; investment of his revenues, and interest on sums received by the tutor.*
- (f) *Tutor's account; interest thereon, and his commission.*
 - 1) *In general.*
 - 2) *Interest due on the account, and the commission.*
 - 3) *When accounts are to be rendered; at whose instance they may be ordered, and provisional accounts.*
- 4) *Opposition to the account, and its homologation; the settlement, and its avoidance.*
- (g) *Alienation of the minor's property; and its tortious conversion by the tutor.*
 - 1) *In general.*
 - 2) *Validity of the alienation, as affected by the authority under which made, and its ratification in behalf of the minor.*
 - 3) *Price, place and proces verbal of sale, and who may purchase.*
 - 4) *Minor's affirmance of the alienation, and right to recover the property; its tortious conversion by the tutor, and his liability.*
 - 5) *Adjudication of common property to the surviving parent.*
- (h) *Parties acting as tutors without authority.*
- (i) *Minor's mortgage.*

IV. OF THE EMANCIPATION AND CONTRACTS OF MINORS, AND LAWS BY WHICH THEY ARE GOVERNED.

V. OF FOREIGN TUTORS.

VI. OF THE FAMILY MEETING.

VII. OF SUITS RELATIVE TO MINORS.

I. OF THE APPOINTMENT AND REMOVAL OF TUTORS AND CURATORS; THEIR BOND, OATH AND SURETIES.

(a) *In general.*

1. The adoptor cannot appoint a testamentary tutor to the adopted, to the exclusion of the natural father. 16 A. 175, *Tutorship Upton*.

2. The letters of tutorship which recite that the tutor has complied with the requisites of the law, afford proof that bond was given, although the record of the mortuary proceedings offered in evidence does not show this fact. 16 A. 370, *Smith v. Porter*.

3. A natural tutor, though he need not be confirmed or appointed by the law, must, like all other tutors, take an oath before he can act as such. C. P. 949; C. C. (328); 20 A. 64, *Stilley v. Stilley*; 11 R. 503; 12 R. 636; 3 A. 562.

4. Confiding the management and raising of the testator's children to a woman, when another person was appointed their tutor, cannot be said to be her appointment to their tutorship. 25 A. 206, *Succession Payne*.

5. In permitting the adoption of children, the legislature had no intention to abridge the right of a natural tutor to the personal care and control of his minor child, or to the administration of the child's property. 25 A. 430, *Succession Forstall*. See ADOPTION.

6. The family meeting may dispense the dative tutor from giving bond. 26 A. 704, *Markham v. Schardt*; C. P. 957.

7. The wish of a testatrix that — should have entire care of her children, is tantamount to his designation as tutor. 27 A. 273, *Succession Mrs. Fuqua*.

8. No testamentary tutor can be deprived of the tutorship, unless for the causes mentioned in the code. 27 A. 274, *Succession Mrs. Fuqua*.

9. By what court the tutor may be appointed in case of vacancy, see COURTS, II. (d), 3), No. 2.

(b) *Right to and qualification for the tutorship; its forfeiture; action of the family meeting; causes and evidence justifying a removal.*

1. The failure of the tutor to render an annual account of his administration, is not, necessarily, a cause of removal. C. C. 356; 23 A. 565, *Boykin v. Hill*.

2. A person who has neglected to cause an inventory to be made within the time, and in the manner prescribed by law, is liable to be removed from the tutorship. 23 A. 566, *Boykin v. Hill*.

3. Even if he had given bond. *Ib.*

4. A divorced wife who marries a second time, may become the natural tutrix of her children, at the death of her first husband. 25 A. 54, *Succession Pin-niger*.

5. It is not the duty of one applying for the tutorship, to show that there are other persons entitled thereto by preference to him. They should oppose his application. 26 A. 703, *Markham v. Schardt*.

6. The one entitled to the legal tutorship, may, by timely proceedings, be appointed; but he cannot, for this reason, sue for the nullity of the appointment of the dative tutor. 26 A. 704, *Markham v. Schardt*.

7. One who may be indebted to minors, is not thereby disqualified from being appointed their tutor. 27 A. 273, *Succession Mrs. Fuqua*.

8. Going into the Confederate lines, and remaining there, during the late war, by the tutor of a minor, did not forfeit his tutorship. 29 A. 798, *Clement & Tremoulet v. Sigur*. But see III. (b), No. 2.

(c) *Mode of removal and opposition; jurisdiction; of curators and tutors ad hoc or ad bona.*

1. The right of preference to the tutorship is no ground to annul the appointment of another, as dative tutor. See JUDGMENT, XI. (a), No. 13.

(d) *Confirmation; oath; bond; proceedings against and obligations of surety.*

1. A surety on a tutor's bond has a right to demand the cancellation of the bond, when, without his consent, any of his co-sureties are released by a judgment homologating the proceedings of a family meeting, which consented to the erasure of the name of the co-surety from the bond. 15 A. 206, *Bradley v. Trousdale*.

2. In an action brought by the surety, for the cancellation of the bond, under such circumstances, both the tutor and under-tutor should be made parties to the suit. 15 A. 206, *Bradley v. Trousdale*.

3. Whenever any of the co-sureties, on a tutor's bond, are discharged without the other's consent, the latter may demand the cancellation of the bond. See SURETYSHIP, III. (b), 1), No. 2.

II. OF THE UNDER TUTOR.

1. The court cannot render a judgment against the tutor, in favor of the under-tutor, for any specific amount, without any account. 15 A. 121, *Gail-lard v. Foster*.

2. An under tutor who opposes the sale of the minor's property, made for their better advantage, after having given his assent thereto, solely because the tutrix refuses to share her commissions with him, should be removed from his office. 16 A. 341, *Marks v. Witkowski*.

3. The minor is responsible for the fees of attorneys employed by the under tutor, to dismiss the tutor from his trust, even if the action fails. 19 A. 153, *Lacey v. Lanaux, tutrix*.

4. An under-tutor is not responsible for the expenses of litigation with a tutor, in behalf of minors, unless he acts in bad faith; such expenses must be borne by the minors or their estate. 21 A. 17, *Succession Samuels*.

5. Under execution against the tutor, personally, the property of the minors being seized, the interest of the tutor is opposed to that of the minors, and they should be represented by the under-tutor. 23 A. 617, *McEnery v. Letchford*.

6. In the incipency of proceedings for partition, there is no such confliction of interest between the tutrix, who is herself interested in the property, and the minors, as makes it necessary for the under-tutor or special tutors to represent them. 23 A. 763, *Emmer v. Kelley*; 26 A. N. R., *Indes Peyroux v. M. A. Peyroux et als.* See PARTITION, II. III. (a).

7. One who receives from his under-tutor, notes and papers belonging to him, and under the management of the under-tutor, and gives him satisfaction, cannot several years, thereafter, when the succession of the under-tutor has been distributed, recover the value of the notes by offering to return them. 27 A. 651, *Bogart & Shall v. Foley and W. B. Conger, executor.*

8. The court of the last domicile of the tutor, being seized of jurisdiction as to the tutorship, may destitute the under-tutor. 29 A. 535, *Fraser v. Zylick*; 14 L. 478; 2 R. 418; 14 A. 465.

9. The tutor is the proper person to sue for the destitution of the under-tutor. 29 A. 534, *Fraser v. Zylick.*

10. See PLEADING, I. (c), 2).

III. OF THE POWERS, RIGHTS AND OBLIGATIONS OF TUTORS; THEIR ADMINISTRATION.

(a) *In general.*

1. The father and mother, as administrators of the property of their minor children, cannot bind them by confessing judgment in a court which has no jurisdiction over their domicile. 15 A. 225, *Michie v. Armat.*

2. A claim for board of the minors, cannot be brought against the succession of their tutor. 18 A. 611, *Normand v. Barbin.*

3. A minor cannot, pending the tutorship, execute his claims against his tutor. 29 A. 531, *Gibbs v. Lum & Co.*

4. The tutor cannot renounce prescription. See PRESCRIPTION, VI.

(b) *Control of the minor's person and education and removal of his property from the State.*

1. Where a party was appointed guardian to a minor, by the courts of Mississippi, and subsequently removed to the State of Louisiana, bringing the minor with him, thereby changing the domicile of the minor, and obtained the effects of the minor in a fiduciary capacity; *Held*: That, even if the authority granted by the Mississippi courts terminated on his removal, he was yet responsible as a *negotiorum gestor*, and the minor was entitled to call him to account, and moreover, had his tacit mortgage under article (3283), of the Civil Code. 15 A. 310, *Leverich v. Adams.* See MORTGAGE, IV. (b), 1), Nos. 1, 2.

2. By removing his residence to another State, the tutor's capacity ceases; he need not be removed by judgment previous to the appointment of another tutor. 18 A. 157, *Succession Bookter.* See I. (b), No. 8.

3. One who undertakes the care and education of a minor, cannot recover against her, more than the amount of her revenues. If the judgment, which he has obtained, reserves to him the right to afterwards sue for the balance due, such clause is null. 28 A. 898, *Sexton v. McMahon.*

(c) *Tutor's diligence and the inventory he must make.*

1. The tutor has a right to compromise respecting the rights of his ward, but he must act under the authority of the judge, granted on the advice of a family meeting; such a contract may be made for the purpose of preventing a law suit, as well as one already instituted. 15 A. 148, *Graham v. Hester.*

2. It is the duty of the tutor to protect the rights of his wards, and when necessary he may sign a judicial bond. 25 A. 222, *Duyré v. Swafford.*

(d) *Expenses of the administration; their payment; the tutor's powers in relation thereto.*

1. The tutor cannot, even for the *necessary maintenance and education* of the minor, expend more than the revenues of his estate, without the advice of a family meeting. 15 A. 88, *McWilliams v. McWilliams.*

2. A compromise made by a tutor without the authorization of the judge given by and with the advice of a family meeting, may be treated by the minor as an absolute nullity; but when it is made in pursuance of these legal formalities, the minor cannot, upon becoming of age, treat it as an absolute nullity. 15 A. 148, *Graham v. Hester*.

3. Under these circumstances, if the contract be voidable, the minor must resort to a direct action to have it rescinded; he cannot question its validity collaterally, and the tutor, who has made the contract, himself, cannot treat it as a nullity; *Query*: Could the tutor in such a case institute the action of nullity. 15 A. 148, *Graham v. Hester*.

4. If the payee was aware that the note was given by the tutor for the tuition of the minor, and that no credit was given to the tutor or drawer, he can only recover as against the estate of the minor. 18 A. 571, *Ford v. Miller*.

5. When the minors have an unproductive capital, their tutor cannot charge them board and tuition, to be paid out of the capital, unless so authorized by a family meeting. C. C. (343); 21 A. 16, *Succession Wm. Samuels*.

6. An obligation signed by the tutor, for supplies to carry on the plantation not shown to belong to his ward, will not bind the minor. 21 A. 374, *Carroll & Co. v. Dougherty*.

7. A tutor has no right to create a debt against the minors, without the authority of the judge, and the advice of a family meeting. 22 A. 296, *Woodbridge v. Pope et al.*

8. When the minor becomes of age, he is bound for the purchases made by his tutor, and where he has not charged the same to him, judgment may be recovered against said minor. 22 A. 137, *Giquel v. Daigre*.

9. It is the duty of a tutrix to carry on the plantation of the minor, and if she be authorized by the court to borrow money on mortgage, she may draw drafts, which when accepted by her merchant and discounted, will bind the minor. 28 A. 665, *Lapeyre v. Weeks*.

10. Tutor may rent the plantation, etc., 1876, p. 106.

(e) *Acquisitions for the minor; investment of his revenues, and interest on sums received by the tutor.*

1. A tutor who fails to invest the capital of his ward, should be condemned to pay, not eight per cent., as under the old law, but five per cent., according to article 347 (341) C. C. and section 3826 R. S.; 23 A. 106, *Succession Gross*. See (f), 2), No. 1.

2. The tutor is bound to invest the *revenues* of the minor, and not the capital. No interest is due when the capital has been used in paying the debts of the succession. 27 A. 300, *Succession Hebert*.

3. A tutrix cannot release any part of the minor's rights to mortgage notes; such reduction is null unless all the forms of law have been complied with. 28 A. 427, *Estate of F. N. Marrienneaux*.

(f) *Tutor's account; interest thereon, and his commission*

1) *In general.*

1. In the absence of allegations and proof to the contrary, the presumption is, that a tutor has done his duty in defending a suit against a minor, and he must, therefore, be allowed a credit for the payment of the judgment, as well as counsel fees for defending the same and rendering the tutor's account. 15 A. 88, *McWilliams v. McWilliams*.

2. If a minor be entitled to his account, and if he have a tacit mortgage under a real statute, he must have an action here to enforce his rights. 15 A. 310, *Leverich v. Adams*.

3. The minors who have become of full age, and made a contract, whereby they agree to receive from their tutor a certain sum of money in full settlement of the rights which are set forth in an account rendered by the tutor, which they had in their possession more ten days, they must be held to their contract. 25 A. 471, *Harris v. Keigler*; 13 A. 228, *Chapman v. Chapman*.

4. The provision which requires a tutor to render an account ten days pre-

vicious to entering into any agreements with his ward, is intended for the protection of the ward, and he alone can take advantage of its disregard. C. C. 355; 25 A. 529, *Neilson v. Neilson*.

5. The tutor should be called to account before the parish court. 26 A. 620, *Bowen v. Callaway*.

6. Slavery not being abolished when the note for purchase of slaves became due, and the drawer holding his note as tutor of the minor owners, must account for the whole amount. 27 A. 300, *Succession Hebert*. See MANDATE, V. (a), No. 8. OBLIGATIONS, III. (c), 1), Nos. 4, 5, 6. BILLS AND NOTES, IV. (a), No. 14. MORTGAGE, III. (c), No. 2.

7. Until the minor, become of age, has by proper proceedings ascertained and liquidated contradictorily with his tutor, his claims, he is not in a position to enforce them. 29 A. 532, *Gibbs v. Lum & Co*.

8. In a settlement with his ward, a tutor agreed to settle certain notes drawn by his ward and on which he was surety. In a suit on these notes judgment was rendered in favor of defendant, whereupon suit was instituted by the ward or his transferee against the tutor for the amount of the notes; *Held*: That he could not recover; the tutor being only surety. 28 A. 634, *Eastin v. Dupérier*.

9. The tutor is entitled to ten per cent. commission on the revenues of the minor. 23 A. 106, *Succession Gross*.

2) Interest due on the account and the commission.

1. A tutor must pay five per cent. on the funds from their receipt; and when his accounts are liquidated five per cent. on the aggregate amount from the day the accounts are closed. C. C. 353; 5 A. 565; 14 A. 764; 22 A. 255, *Minors Smith*. See (e), No. 1.

3) When accounts are to be rendered; at whose instance they may be ordered and provisional accounts.

1. The act of 1855 was intended as a relief to tutors, by allowing the homologation of their accounts, and giving to such, a decree a certain efficacy. But this act does not free them from the control which the probate court exercises over them by virtue of article (350) of the Civil Code. They are bound to render an account whenever they receive orders to that effect from the court, upon the suggestion of the under-tutor or any one else; or they may, at their option, render an account annually, and have the same homologated contradictorily with the under-tutor. 15 A. 121, *Gaillard v. Foster*. See 4), No. 3.

4) Opposition to the account, and its homologation; the settlement, and its avoidance.

1. The judgment on the tutor's account, being in favor of the minor, for a balance, it may be executed by the issuance of a *fi. fa.* 18 A. 606, *Tanneret v. Edwards, sheriff*; 13 A. 286.

2. Where the evidence preponderates in favor of a minor, and the executor has failed to furnish new proof in support of his account, although the case had previously been remanded expressly for this purpose, judgment will be rendered in favor of the minor. 21 A. 440, *Succession Duplantier, wife of Peniston*.

3. The homologation of a tutor's accounts, even when had contradictorily with the under-tutor, is not conclusive on the minors, who may, after majority, contest the accounts. 29 A. 722, *Lay v. O'Neil*; 10 L. 329; 1 R. 111; 13 A. 464. See 3), No. 1.

4. Evidence necessary to homologate an account. See JUDGMENT, XV. (c), 1), Nos. 8, 9, 10. SUCCESSION, VIII. (f), 4).

(g) *Alienation of the minor's property, and its tortious conversion by the tutor.*

1) In general.

1. The tutor has no right to pledge, as collateral security for his own debt, a note secured by mortgage on the minor's property, executed to build im-

provements thereon, as appears on the face of the mortgage. The note should be returned to the minor. 27 A. 443, *Coons v. Kendall*.

2. The rules which apply to the alienation of minors' property are not applicable to a case in which a judicial sale has been provoked by creditors, to pay the debts, created by the decedent of any estate in which minors are interested. 18 H. 497, *Beauregard v. The City of New Orleans*.

3. Minors cannot be estopped. See ESTOPPEL, No. 24.

4. For appraisalment, and terms of sale, see SUCCESSION, VIII. (e), 4).

5. Alienation by the minor, before rendition of accounts, null. See MINORS, IV. No. 1.

6. A family meeting should be held to fix the terms of a partition sale. See PARTITION, III. (b), No. 2.

7. The tutrix who, before receiving the property of the minors from the partnership, dissolved by the death of their father, enters with the surviving partners into a new partnership, with the same goods, has not received the minors' share, and the surviving partners are not discharged towards the minors. See PARTNERSHIP, III. (b), 1), No. 5.

8. The father, who exchanges his minor's property, cannot sell the same. See SALE, I. (b), No. 3.

9. The tutor, who received in gold the proceeds of slaves, cannot defeat his ward's claim, by setting up the slave consideration. 30 A. 390, *George v. Amacker*.

2) Validity of the alienation as affected by the authority under which made, and its ratification in behalf of the minor.

1. Heirs of age, who receive the money paid for the transfer of certain property by the tutor, thereby ratify all informalities. 25 A. 486, *Seyburn v. Deyris*.

2. A compromise by the tutor, whereby property was retroceded to the vendor, upon the advice of a family meeting, duly homologated, gives a good title to the property. 26 A. 681, *Mahle v. Elder*.

3. MORGAN and WYLY, JJ., *dissenting*: Retrocession is alienation, and this can only be effected by a sale at public auction. *Id.*

4. When minors' property may be sold at private sale. See PARTITION, III. (b), No. 6. SUCCESSION, VIII. (e).

5. A tutor can only sell by the advice of a family meeting, even to pay debts. See SUCCESSION, VIII. (e), 2), B. No. 5.

3) Price, place, proces-verbal of sale, and who may purchase.

1. Minor's property, not sold to pay debts, cannot be adjudicated for less than the appraisalment. 29 A. 536, *Fraser v. Zylicz*. See SUCCESSION, VIII. (e), 4).

4) Minor's affirmation of the alienation and right to recover the property; its tortious conversion by the tutor, and his liability.

1. The sale of property of a minor, by the tutor, for Confederate notes, is an absolute nullity, and the minor may recover the property or its value, from the vendee, after delivery. 21 A. 600, *White v. Nesbit*. See CONFEDERATE MONEY, Nos. 3, 4. MANDATE, V. (b), 1), No. 1. OBLIGATIONS, III. (c), 1). BILLS AND NOTES, IV. (a). EXECUTION, V. (d), 8), A. No. 10. SALE, I. (d).

2. A tutor cannot allege that he had no right to purchase his ward's property, when sued on his note. See ESTOPPEL, No. 18.

5) Adjudication of common property to the surviving parent.

1. The adjudication to the widow, of the husband's separate property, is not an absolute nullity, and cannot be attacked collaterally. 19 A. 190, *Fendler v. Daigre*.

2. A decree of court homologating the proceedings of a family meeting, which authorized the adjudication of community property, amounts to a sale and not a money judgment on which execution can issue. 21 A. 643, *Heirs Bedell v. Hayes, tutrix*.

3. The tutor, who is a surviving partner in community, and interested in the succession as such, can lawfully purchase at the succession sale. 24 A. 606, *Bland v. Lloyd*.

TALIAFERRO and WYLY, JJ. *dissenting*: See SUCCESSION, VIII. (e), 6).

4. The property, when once adjudicated to the survivor, becomes his. See MARRIAGE, XIII. (b), 1), No. 6.

5. The judgment adjudicating the property is not prescribed by ten years. See PRESCRIPTION, III. (g), 1), No. 21.

(h) *Parties acting as tutors without authority.*

1. Where an administrator took charge of the minor child, and administered the property, he will be held liable as tutor, although he was not appointed as such, and the accounts by him presented to the minor, when attacked for error and fraud, will be set aside. 26 A. 442, *Thacker v. Dunn*.

2. The tacit mortgage does not cover an intermeddler who is domiciled and interferes with property outside of Louisiana. See MORTGAGE, IV. (b), 1), No. 1.

3. Children not subjected to a tutorship can have no mortgage. *Ib.*, No. 4.

4. Commercial partners who undertake to administer the minor's interest, are bound *in solido*. See PARTNERSHIP, III. (b), 1), No. 4.

(i) *Minor's mortgage.*

1. Where a tutor presents a petition to a court, praying that a special mortgage which he tenders, to secure the rights of the minors, may be accepted, and the tacit mortgage annulled, he is entitled to a formal judgment on his petition, and this judgment must be entered on the minutes of the court: reduced to writing, and signed by the judge. 15 A. 164, *State v. Judge Second District Court*.

2. A private sale of the tutor's property, burdened with the minor's mortgage, cannot be ratified by a family meeting so as to cancel the mortgage without substituting a new security. 19 A. 55, *Fleetwood v. Bordis*. For commutation of minor's mortgage, see MORTGAGE, IV. (b), 2).

3. A mortgage given by the ward on the whole of a plantation, owned one-half by himself and the other half by his tutor, to secure a mortgage given by the tutor on the same plantation, is not a renunciation of the ward's legal mortgage resting on the tutor's half, and should take precedence to the mortgage given by the tutor. 24 A. 186, *Newell v. Buckner*.

4. The mortgage having been lost by the failure of the tutor to reinscribe it, the legal mortgage of the minor against his tutor, secures the claim for damages which the minor has suffered from want of such reinscription. 29 A. 533, *Gibbs v. Lum & Co*.

5. Without tendering back the money advanced to the tutor for the purpose of preserving his property and paying the education of the minor, and to secure which, the tutor, under the advice of a family meeting, regularly held and approved by the judge gave a priority of mortgage over that of the minor, the latter cannot treat all these proceedings as absolute nullities, and pursue the property of the mortgagee who purchased under foreclosure of his mortgage, by hypothecary action. 30 A. 302, *Beauregard v. Leveau*.

6. See also MORTGAGE, IV. (b) 1).

IV. OF THE EMANCIPATION AND CONTRACTS OF MINORS; THE LAWS BY WHICH THEY ARE GOVERNED.

1. A sale made by a minor, after his emancipation, and after a confession of judgment made by him, on the account of the tutor, is null, when it has not been preceded by the rendition of the account and vouchers, at least ten days previous to the passage of the act. 15 A. 476, *White v. Gleason*.

2. An emancipated minor has not the right to donate his property. 15 A. 505, *Johnson v. Alden*.

3. A party cannot be held liable for the notes and obligations of a firm, of which he became a member while a minor, and from which he withdrew before

he was emancipated, when it does not appear that he had been benefitted by the concern, nor that he had committed a fraud upon the plaintiff. 15 A. 605, *James v. Alford*.

4. Minors can never be estopped. 16 A. 98, *Zunts v. Courcelle*.

5. A judgment of emancipation cannot be attacked collaterally. See JUDGMENT, I. No. 2.

6. A settlement beneficial to minors, but made in two acts, cannot be set aside, so as to leave one act in force; the transaction must be considered as a whole. See TRANSACTION, No. 9.

7. The parish court may emancipate minors. See COURTS, II. (f), No. 31.

V. OF FOREIGN TUTORS.

See COURTS, II. (d), 3).

VI. OF THE FAMILY MEETING.

1. The individual consent to employ the minor's capital, by persons who had composed a family meeting, on a previous occasion, does not justify its expenditure. 26 A. 543, *Deblanc v. Levasseur*.

2. If the family meeting was not unanimous, this would be a good ground to oppose the homologation of their deliberation, or the convoking of another meeting, but not a ground to annul the judgment of homologation. 26 A. 704, *Markham v. Schardt*.

3. The family meeting may dispense the dative tutor from giving bond. 26 A. 704, *Markham v. Schardt*.

4. If the tutrix did not act on the advice of the first family meeting, she may pray for a second one, and if the latter's deliberations be for the advantage of the minor, the judge should approve it. 28 A. 427, *Estate Marrienneaux*.

5. On the advice of a family meeting, the tutor may mortgage the plantation of the minor, so as to carry on the same. 28 A. 299, *Leiser v. Branch Tanner*; C. C. 539; 14 A. 760; 13 A. 364; 12 A. 674; 11 A. 667; 4 A. 253, 543.

6. A family meeting must fix the terms of the minor's share, in a partition sale. See PARTITION, III. (b), No. 2.

VII. OF SUITS RELATIVE TO MINORS.

1. A minor should not be held responsible for the illegal acts of his tutor. 26 A. 580, *Lyons v. Dobbins*. See OFFENSES AND QUASI OFFENSES, II. (h).

2. Minor heirs cannot be made liable for trespass committed by their father. 27 A. 195, *Hunt v. Graves*.

3. The tutor cannot compromise without the authorisation of a family meeting. See III. (c), No. 1.

4. See PRESCRIPTION, V. (c).

MINT.

1. The city of New Orleans is the real owner of the property known as the "Mint," and as such bound for the costs of pavement in front of said property. 26 A. 451, *Coleman v. City*.

2. Acts 1876, p. 95.

MINUTES.

1. The minutes can at any time be corrected to make them correspond with the truth; and being under the eye of the judge who by law takes part in the proceedings, no evidence is necessary to authorize the correction. 25 A. 115, *State v. Branch*. See JUDGMENT, XV. (e), No. 6.

MISNOMER.

See NAME.

MISSISSIPPI RIVER PACKET COMPANY.

Incorporated 1870, p. 128.

MISSISSIPPI VALLEY NAVIGATION COMPANY.

The State to subscribe 1000 shares, 1870, p. 116.

MITTIMUS.

See CRIMINAL LAW.

MOB.

See NEW ORLEANS, II. (d). OFFENSES AND QUASI OFFENSES, II. (h).

MONEY.

See LOAN, III. CURRENCY. CONFEDERATE MONEY.

MONITION.

1. When an appeal is taken from a decree rendered on an application for a monition and confirming a tax sale, and neither the assessment roll, nor the ordinance of the police jury levying the tax, nor any adjudication of the property, nor sheriff's deed, has been offered in evidence, the decree will be reversed. 15 A. 129, *In the matter of Peyton Bond*. See TAXES, III. (d), 2).

2. A judgment cannot be attacked collaterally, in an opposition to a monition. 19 A. 69, *Frost v. McLeod*; 2 N. S. 292; 14 L. 214; 19 L. 198.

3. A final judgment homologating a monition, rendered in chambers, is null. 20 A. 176, *Gay's monition*.

4. A third person, who opposes a monition, must show an injury by the sale, as well as an interest in the result of the suit. 21 A. 589, *Gilmer's monition*.

5. The party opposing a monition is, to all intents, the plaintiff, and must establish his averments by proof. 6 A. 54; 23 A. 239, *Montgomery v. All the World*.

6. The want of authority in the sheriff, and want of sufficient description of the property, will be cured by a monition duly homologated. 24 A. 545, *Willis v. Nicholson*.

7. The act of 1834, March 10, relative to monitions, cures mistakes or omissions of the officers of the law, but does not apply to cases where the purchasers have obtained their titles by fraud, or where they are trustees *mala fide*. 21 Wall. 616, *Jackson v. Ludeling*.

8. In tax collectors' sales the assessment stands in lieu of a judgment; an assessment against the husband, where the property belongs to the wife, will vitiate the sale. A monition will not cure its defects. 30 A. 176, *Fix v. Succession Dieker*.

9. Advertised in English only, 1874, p. 113; once a week in thirty days, 1878, p. 157.

MONOPOLY.

1. There was nothing illegal and giving rise to damages in the contract made between the Pontchartrain Railroad Company and Charles Morgan, whereby they agreed to "pro rate" the charges on freight from New Orleans to Mobile, and were to charge the regular tariff to the public. 24 A. 12, *Eclipse Towboat Company v. Pontchartrain Railroad Company*.

2. TALIAFERRO, J., *dissenting*: The contract was a wrong perpetrated upon the public, which gave rise to exemplary damages. *Ib.*

3. The legislature may grant monopolies. See CONSTITUTION, II. (c), 1), No. 10.

4. Monopoly of the Sanitary and Fertilizing Company, repealed. See CORPORATIONS, X. (ff), No. 1.

MORA.

See OBLIGATIONS, VII. (a), 2); 3).

MOREHOUSE.

Burnt records, 1871, p. 45; 1876, p. 26; court house tax, 1871, p. 189; another tax, 1877, E. S., p. 183; tax to build a jail, 1877, E. S., p. 196; bail of Kelly, 1878, p. 136.

MONROE.

1. The eleventh section of act 81, of 1872, exempting the property of the corporation from parish taxes, is contained in the title, and does not violate uniformity of taxation. 25 A. 570, *Whited, collector v. Lewis*.

2. Section 4, of act No. 94, of 1868, amending act 76, of 1866, is violative of article 114 of the constitution, and is not covered by the title of the act, therefore the municipal authorities could not employ the sheriff to perform the duties of town constable. 25 A. 598, *Wisner's Curator v. City Council of Monroe*.

3. Incorporation of, 1871, p. 237. See INCORPORATION, I.; *verbo*, Monroe.

MONROE SAVINGS AND EXCHANGE BANK.

Incorporated 1870, p. 112.

MORTGAGE.

I. IN GENERAL.

II. THINGS SUSCEPTIBLE OF MORTGAGE.

III. OF CONVENTIONAL MORTGAGES.

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| (a) <i>In general.</i> | (d) <i>Thing mortgaged; its description and ownership.</i> |
| (b) <i>Formalities and evidence of the contract; its acceptance and mortgagor's capacity.</i> | (e) <i>Interpretation, general effect and modifications of the contract.</i> |
| (c) <i>Principal obligation.</i> | |

IV. OF LEGAL MORTGAGES.

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| (a) <i>In general.</i> | (c) <i>Wife's mortgage.</i> |
| (b) <i>Mortgage of the minor and curator.</i> | 1) <i>In general.</i> |
| 1) <i>In general.</i> | 2) <i>Mortgage covering paraphernal rights.</i> |
| 2) <i>Commutation of the minor's mortgage.</i> | 3) <i>Mortgage covering dotal rights; donations propter nuptias, and wife's joint obligations with her husband.</i> |
| | 4) <i>Wife's renunciation.</i> |

V. OF JUDICIAL MORTGAGES.

VI. OF THE EFFECT OF MORTGAGES APART FROM THEIR RANK.

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|---|---|
| (a) <i>In general.</i> | 4) <i>Liquidation of mortgagee's title; its sufficiency and effect as against the third possessor.</i> |
| (b) <i>Effects as regards the principal obligation and thing mortgaged.</i> | 5) <i>Who may be sued as third possessor; defendant's liability and discharge.</i> |
| (c) <i>Hypothecary actions.</i> | 6) <i>Previous demand; notice and affidavit; who are entitled to the rights of third possessors; and pact de non alienando.</i> |
| 1) <i>In general.</i> | 7) <i>Exceptions of discussion and cessionarium actionum.</i> |
| 2) <i>Election of proceedings and their injunction.</i> | |
| 3) <i>Concurrent mortgagees; mortgagor's title; latent equities of third persons.</i> | (d) <i>Assignment of mortgages.</i> |

VII. OF THE RANK OF MORTGAGES.

VIII. OF THE EXTINCTION OF MORTGAGES.

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| (a) <i>In general.</i> | (c) <i>Insolvent, partition, probate and bankrupt sales.</i> |
| (b) <i>Execution sales.</i> | |

IX. OF THE INSCRIPTION AND ERASURE OF MORTGAGES.

I. IN GENERAL.

1. A vendor who seeks to recover the property sold, must, to annul the mortgages given thereon by the vendee, show that the mortgagee was aware of the fraud. 21 A. 579, *Makler v. McClelland*. See III. (a), No. 8; (b), No. 4.

2. A mortgage may be given by a third person, for the benefit of the creditor. 26 A. 707, *Elbert v. Wallace & Co.*; C. C. 3295, 3297, 3298; 1 A. 62.

3. The notarial act having been recognized by the court, in a previous decree, as a valid mortgage, may be enforced. 28 A. 281, *Jannet and Husband v. A. G. Ober*; 26 A. 424.

WYLY, J., *dissenting*: It is the duty of courts to enforce contracts, and not make them. *Ib.*

4. The registry of a parish treasurer's bond, operates a mortgage only as against the principal, and not the surety. 28 A. 236, *Andrews, president v. Bissat*. See SURETYSHIP, II. (a), 1), No. 6.

II. OF THINGS SUSCEPTIBLE OF MORTGAGE.

1. When detached from the sugar house and removed from the plantation, an engine and machinery become movables, and do not pass to a purchaser subject to the mortgage. C. C. (3256), (459); 22 A. 118, *Citizens' Bank v. Knapp*. See THINGS, II. (a). SALE, V. (a), No. 5.

2. The half interest of the widow in the community is susceptible of being mortgaged by her. 24 A. 264, *Hickman, executor v. Thompson*.

3. Although an instrument which purports to mortgage a crop, the seed of which has not yet been sown, cannot at the time operate as the mortgage of the crop, yet when the seed of the crop intended to be mortgaged, has been sown, and the crop grows, a lien attaches. 19 Wall. 544, *Butt v. Ellett*.

4. The owner or lessee of land, may give a valid mortgage upon his crop before it is raised. 1 Woods, 214, *Ellett v. Butt et als.*

5. An act of the legislature of Mississippi, provided that it should be lawful to convey, by way of mortgage or deed of trust, any crop of cotton, etc., being produced or to be produced within fifteen months; *Held*: That a mortgage executed before the passage of this act, on a crop to be produced in the future, was valid, the enactment being merely declaratory of what the law was before its passage, adding a limitation that the crop must be produced within a given time. 1 Woods, 214, *Ellett v. Butt et als.*

6. Total property is not susceptible of mortgage. See MARRIAGE, IX. (b), No. 2.

III. OF CONVENTIONAL MORTGAGES.

(a) *In general.*

1. A mortgage may be given for a debt not yet in existence, and although a part of the debt may be simulated, yet the balance is not affected thereby. 18 A. 240, *Collins v. His Creditors*; 12 A. 529; 27 A. 562, *Gardner & Co. v. Maxwell*. See (c). Nos. 4, 6, 7; IV. (b), 2), No. 4; VI. (a), No. 1.

2. There is nothing immoral in using the contract of sale as the security for a *bona fide* debt. 18 A. 733, *Bailey & McKee v. Chase*; 12 A. 531. See (b), No. 1. SALE, VI. (a), No. 4.

3. Plaintiff may claim a recognition of his mortgage, and a personal judgment against the original purchasers and their vendees, who have assumed the mortgaged debt. 19 A. 452, *Boyce v. Hunt*. See (c), No. 5, *per contra*.

4. A mortgage executed in favor of a factor to secure his advances, to be evidenced by an account current, does not secure each item of the account, but merely the balance. Separate items transferred to third persons do not carry with them a mortgage. 20 A. 154, *Durrie et als. v. Key*.

5. Separate holders of the same series of mortgage notes, may be joined as plaintiffs in one suit, to enforce payment of the notes. 20 A. 254, *Brou v. Becnel*.

6. Obligations accompanied with a mortgage, are classed as movables. 21 A. 56, *Mille v. Dupuy*.

7. Negotiable notes, which are identified with the notarial act of mortgage, given to secure their payment, make full proof of themselves. 21 A. 607, *Simon v. Haifleigh*.

8. One holding under simulated, but ostensibly valid title, may give a valid mortgage to a third person acting in good faith. 16 A. 437, *Carpenter v. Allen*; 26 A. 145, *Bruslé v. Hamilton*. See (b), No. 4; I. No. 1; (d), No. 2.

9. For negotiability of mortgage notes, see BILLS AND NOTES, IV. (e), 1), Nos. 2, 5; I. No. 13. MORTGAGE, VI. (d).

10. The husband cannot mortgage his wife's property. See MARRIAGE, XI. (b), No. 20.

11. A mortgage given on property subsequently acquired, is valid. See MORTGAGE, VI. (a), No. 1.

(b) *Formalities and evidence of the contract; its acceptance; and mortgagor's capacity.*

1. Where it is evident that an instrument in the form of a conditional sale was intended by the parties to be executed in the form of a common law mortgage, it will not be regarded as a sale. 15 A. 386, *Watson v. James*. See (a), No. 2. SALE, VI. (a), No. 4.

2. The formalities of the act, as contained in Revised Statutes 1870, sections 2432 *et seq.*, enabling married women to contract debts and bind their paraphernal or dotal property, dispense the creditor from proving that the debt incurred to her separate advantage. 21 A. 398, *City National Bank v. Barrow and Husband*; 15 A. 54, *Rice v. Alexander*.

3. The judge of the Third District Court, for the parish of Orleans, may grant a certificate to a married woman to borrow money. 26 A. 263, *Rainey v. Asher*. See MARRIAGE, VIII. (b).

4. If the real owner of property allows it to stand recorded in the name of another by a title translatif of property, the ostensible owner may give a valid mortgage on the property. 29 A. 604, *Hunter v. Buckner Bro.* See (a), No. 8.

5. A mortgage may be accepted by one who is not interested therein. 21 A. 3, *Succession Dolhonde*; 22 A. 458, *Miller v. Wisner, sheriff*.

6. An administrator cannot give a mortgage. See SUCCESSION, VIII. (a). No. 15.

(c) *Principal obligation.*

1. Where the debt is extinguished, the mortgage falls with it. 20 A. 199, *Davidson v. Carroll, Hoy & Co.* See VIII. (a), Nos. 6, 7, 9.

2. A mortgage given by an heir to secure an annuity given by her father for the purchase of slaves, is null and void. 21 A. 663, *Lefebvre v. Haydel*. See OBLIGATIONS, III. (c), 1), Nos. 4, 5, 6. MINORS, III. (f), 1), No. 6. BILLS AND NOTES, IV. (a), Nos. 13, 14.

3. The mortgage given for a subscription to stock, and one given for a loan, made from the Citizens' Bank, are distinct and separate. 22 A. 484, *Rind v. Succession Fluker and Farmer*. See CORPORATIONS, X. (g).

4. A mortgage secures an unmatured obligation as well as a mature one; and a mortgage given to the person who obligates himself as security, in case of loss thereby, if prior in rank to the seizing creditor, must be paid first. 24 A. 250, *Ledoux v. Morgan*. See Nos. 8, 7; (a), No. 1.

5. The purchaser, who, as part of the price, assumed mortgaged notes bearing on the property, is not personally bound if the property be sold by the creditors of the vendor before the institution of a suit on his assumption. 27 A. 352, *Lapène & Ferré v. Delaporte*; 18 L. 45; 9 A. 195; 17 A. 255. See *per contra*, (a), No. 3.

6. Although there was primarily no consideration for the mortgage, it having

been executed to secure any future holder of the mortgaged notes, the moment they changed hands for a consideration, the mortgage became effectual. 16 A. 437, *Carpenter v. Allen*; 24 A. 36, *Brewer v. Gay et als*; 30 A. 89, *Billgery v. Ferguson*.

7. A mortgage may be given to secure a future debt; if the mortgagor owes nothing to the mortgagee, the moment the note is negotiated the mortgage attaches. 28 A. 357, *Richardson v. Cramer*.

8. The minor's mortgage cannot be extended so as to cover the interest agreed upon, for an extension. See MORTGAGE, IV. (b), 1), No. 3.

(d) *Thing mortgaged; its description and ownership.*

1. One in whom the legal title to property in Louisiana is vested, subject to a trust created in favor of others, by deed of trust executed in another State, has full power to mortgage the property. 15 A. 386, *Watson v. James*.

2. Secret equities which may exist between the original parties, do not prevent third *bona fide* persons from acquiring a valid mortgage from the ostensible owner. 16 A. 437, *Carpenter v. Allen*. See (a), No. 8.

3. Where there is a total want of description of the thing mortgaged, the mortgage is invalid. 27 A. 282, *Keiffer Bros. v. Starn*.

4. The validity of a mortgage will not be affected by an error in the number of the "range," if the property be otherwise so described as to be clearly identified. 29 A. 639, *Thornhill v. Burthe*.

5. The property being described, as being the same property which was acquired by the mortgagor, he cannot, by selling a part, which he supposed not designated in the act of mortgage, deprive the mortgagee of his rights. See EXECUTION, V. (d), 7), No. 1.

(e) *Interpretation; general effect, and modifications of the contract.*

1. A special mortgage, with the pact *de non alienando*, granted on a plantation, does not preclude the mortgagor from employing an overseer. 15 A. 665, *Scarborough v. Stinson*.

2. A creditor, with special mortgage, cannot be compelled to seek payment, on one rather than another part of the property mortgaged. C. P. 683; C. C. (3360); 16 A. 195, *Lallande v. McRae*. See OBLIGATIONS, VIII. (f).

3. A mortgage given to secure payment of an undivided share, sold by some of the co-heirs to the others, will bear on the whole, if the vendees mortgage "said land." 19 A. 167, *Potts v. Blanchard*.

4. The stipulation in an act of mortgage, of two per cent. to cover attorney's fees, in case of suit, is collectable with the principal. 21 A. 607, *Simon v. Haifleigh*. See OBLIGATIONS, VII. (a), 5), B. § 1.

5. Five heirs sold in one act their property, held in common, to their mother, who being unable to pay returned the undivided four-fifths to four of the heirs. The other had pledged the notes, and the sale of his share was not cancelled; *Held*: That the mortgage rested only on one-fifth of the property. 23 A. 411, *Stewart, Hyde & Co. v. Suzette Buard*. WYLY, J., *dissenting*.

6. ON RE-HEARING: The act of mortgage recited that the property purchased remained mortgaged, to secure each of the notes issued, and thus the whole tract was bound for the mortgage. *Ib.* LUDELING, C. J., *dissenting*. See OBLIGATIONS VIII. (f), No. 1.

IV. OF LEGAL MORTGAGES.

(a) *In general.*

1. A tacit mortgage does not exist in favor of the minor heirs, and against their mother, who is the executrix of their father's estate, and usufructuary of their share; she did not hold in her capacity of tutrix. 20 A. 513, *Woolfolk v. Woolfolk*.

2. Each of the universal legatees is bound by mortgage *for the whole*, in the discharge of a particular legacy, to the amount of the value of the immovable property of the succession withheld by them. 23 A. 98, *Doyal v. Doyal*; C. C. (1626).

3. The abolition of legal and tacit mortgages, is not unconstitutional. See CONSTITUTION, II. (c), 3), c. No. 2.

4. The minor who, on becoming of age, accepts a note from his tutor, does not lose his mortgage. See NOVATION, I. No. 4.

(b) *Mortgage of the minor and curator.*

1) In general.

1. A minor cannot claim a legal mortgage on the property of a person who interferes with the administration of his estate, unless the person so interfering was domiciliated in Louisiana, and the property within its jurisdiction. 15 A. 174, *New Orleans Insurance Company v. Tio*.

2. After the removal of a minor to Louisiana, through the agency of one who had intermeddled with the minor's estate abroad, a legal mortgage attaches to protect the minor against an unauthorized administration of his property situated here. 15 A. 174, *New Orleans Insurance Company v. Tio*. See MINORS, III. (b), No. 1.

3. A tacit mortgage in favor of the minor, cannot be extended to cover the expansion of the debt by the addition of the interest stipulated for the extension of the time of payment. 19 A. 177, *Perret v. Roussel*. See III. (c).

4. Children who have never been subjected to tutorship, cannot have a mortgage to secure their rights. 20 A. 161, *Moore v. Moore*.

5. Where the mother who contracts a second marriage has previously been retained in the tutorship, her husband's property is not burdened with a legal mortgage in favor of the minor; if she does not provoke the family meeting, it is so burdened. 21 A. 737, *Hatcher and Husband v. Jackson*; 7 A. 7. See No. 9.

6. The tacit mortgage does not attach to property to which the tutor never had any good and valid title. 22 A. 484, *Rind v. Succession Fluker and Farmer*.

7. A mortgage given by a ward, to secure the indebtedness of his tutor to a third person, on the plantation owned by both tutor and ward, cannot be interpreted as a renunciation of the ward's legal mortgage then existing on the tutor's share. 24 A. 185, *Newell v. Buckner*. 30 A. 404, *Chatenond v. Hebert*.

8. The minors' mortgage, on property sold by the tutor, recognized by a judgment, is prescribed unless the judgment should be revived before the expiration of ten years from its rendition. 24 A. 211, *Wade v. Casparé*. See PRESCRIPTION, III. (g), 1), Nos. 18, 19.

9. The legal mortgage of the minors against their mother and her second husband, resulting from the wife's failure to hold a family meeting to be retained in the tutorship, dates from the day of the second marriage and is for the amount of liability incurred during the period the tutorship was illegally held. 27 A. 232, *Keene v. Guier, sheriff*. See No. 5.

10. See ALSO, MINORS, III. (e).

2) Commutation of the minor's mortgage.

1. The effect of a special mortgage, authorized by article (338) C. C. and by the act of March 11th, 1830, has not the effect of annulling the general one in favor of minors; it is simply restrictive. 15 A. 417, *Guillet v. Juré*; 23 A. 546, *McDaniel v. Guillory*.

2. The minor's mortgage may be transferred with the debt which it secures. 19 A. 177, *Perret v. Roussel*; C. C. (2424), (2615).

3. A special mortgage, exacted by the tutor in favor of his wards, wipes out the tacit mortgage. 26 A. 144, *Bruslé v. Hamilton*.

4. Proceedings whereby the tutrix caused the property of the succession to be adjudicated to her, and afterwards filed her account, which was homologated, showing herself to be a creditor to the whole amount of the adjudication, cannot be set aside by the heir against the holder of a mortgage accepted in good faith, subsequent to these proceedings. 26 A. 596, *Webb v. Keller*. See III. (a), No. 1.

5. Rights of the tutor to a judgment. See MINORS, III. (i), No. 1.

6. The mortgage cannot be commuted without a special mortgage. See *ib.*, No. 2.

7. The tutor, with the advice and consent of a family meeting, may grant a priority of mortgage. 30 A. 302, *Beauregard v. Laveau*.

(c) *Wife's mortgage.*

1) In general.

1. Where a foreigner owned property in this State, and by the laws of his own country there existed no community between husband and wife; *Held*: That, prior to the passage of the act entitled: "an act relative to the property of non-resident married persons in this State," a community would not exist here; his wife would not acquire a legal mortgage on his property in this State, and the law would accord none to his minor children. 15 A. 349, *Leech v. Guild*. See MARRIAGE, XV. (b), 2), D.

2. The wife can have no mortgage on the property of her husband, where her money was received after her husband's death and by his administrator. 20 A. 175, *Cordill v. Succession McCullough*.

3. The domicile of the husband and wife being in the State of Mississippi, the latter has no legal mortgage on the property of her husband here, and can not sue him in Louisiana. 20 A. 313, *Sanderson v. Ralston*.

4. A surviving wife, who obtained from her husband a written transfer of one-half of the revenues of his property, and a promise not to alienate or encumber the property, duly recorded, cannot enjoin an executory process issued against the succession of her husband on mortgage notes given by him subsequent to the agreement. She must exercise her rights on the proceeds. 26 A. 644, *Hoss v. McWilliams*. See INJUNCTION, II. (b), 3).

5. After a wife has obtained a separation of property from her husband, and has executed the judgment, she can acquire no legal mortgage on his property by permitting him to manage it. 27 A. 550, *Succession Gayle*.

6. The recording in such a case amounts to nothing. *Ib.*

7. The legal mortgage which the wife has against her husband to secure her paraphernal funds, is inherited by her children. 28 A. 830, *Bridges v. Simonton*.

2) Mortgage covering paraphernal rights.

1. The wife's legal mortgage, dates from the time her paraphernal funds came into the hands of her husband. 20 A. 301, *Wallace v. McCullough*.

3) Mortgage covering dotal rights; donations *propter nuptias*; and wife's joint obligations with her husband.

1. The sale by the husband to the wife being declared null, by reason of assumption made by her of his indebtedness, the property still belongs to the husband, and the wife has no right to enjoin the seizure thereof, and at the same time, claim the nullity of her assumption and the ownership of the property. 28 A. 758, *F. C. Bienvenu v. Mathilde and Leda Prieur*.

4) Wife's renunciation.

See MARRIAGE, XIII. (e), 3). SUCCESSION, V.

V. OF JUDICIAL MORTGAGES.

1. The registry of a judgment against one who is dead, at the date of its rendition, does not create a judicial mortgage on the property left to his heirs, and transferred by them to third persons, although they may have made themselves parties to the suit. 23 A. 102, *Norton v. Jamison*.

2. The registry of a judgment absolutely null, does not operate a judicial mortgage. 23 A. 421, *Stevenson v. Riser*.

3. A judicial mortgage is created by the registry of a judgment, on "all the rights, title and interest of the judgment debtor in and to the succession of his ancestor," as regards the immovable only. 27 A. 504, *Smith & McKenna v. Charles*; 21 A. 253, *Tureaud v. Gez*. See VII. No. 10.

4. When the movables are of an insignificant value, as compared with the real estate inherited, and all the rights of the heir in the succession are sold, the proceeds should be distributed according to the rank of the judicial mortgagees. 27 A. 253, *Tureaud v. Gex*.

5. A judicial mortgagee must exercise his right of preference over the seizing creditor, either by way of third opposition, or by hypothecary action. 28 A. 593, *Alford v. Montejo*.

6. The prescription of ten years will destroy the validity of a judgment homologating a tutor's account. See VI. Nos. 3, 4.

VI. OF THE EFFECTS OF MORTGAGES APART FROM THEIR RANK.

(a) *In general.*

1. According to articles (3271), and (3276) C. C., a mortgage given on property, subsequently acquired by the mortgager, becomes valid. 16 A. 227, *Amonette v. Amis*. See III. (a), No. 1.

2. The judicial mortgagee, whose judgment is suspended by appeal, may proceed by opposition to the tableau of distribution and partition presented by the administrator, and claim to be paid out of the share accruing to his judgment debtor. The opposition has the effect of transferring the mortgage to the proceeds of the sale made to effect a partition. 21 A. 253, *Succession Tureaud*.

3. In case of doubt the clause should be construed against the mortgager. See OBLIGATIONS, IV. No. 5.

(b) *Effects as regards the principal obligation and thing mortgaged.*

1. A mortgage against a slave, who has become free, cannot be enforced. 25 A. 521, *Dejan v. Armand*.

(c) *Hypothecary action.*

1) *In general.*

1. In defense to the hypothecary action, the plea that the land belongs to other persons than defendant, puts him out of court. 27 A. 542, *Heard v. Patton*.

2. Defendant's discharge in bankruptcy relieved him from personal liability, but does not remove the mortgage existing on the lands re-purchased by the bankrupt, after his discharge. 27 A. 542, *Heard v. Patton*.

3. See PETITORY AND POSSESSORY ACTIONS, II.

4. For right of a judicial mortgage creditor ranking the seizing creditor, see *supra*, V. No. 5.

5. For jurisdiction of State courts, when the property was sold by a bankrupt court, see COURTS, II. (a), No. 11.

6. The possessor in good faith, who places improvements on land against which a hypothecary action is brought, is entitled to have their value ascertained and first paid to him out of the proceeds of sale. See POSSESSION, II. (c).

7. For prescription of such actions, see PRESCRIPTION, IV. (c), 2); III. (g), 2), No. 3.

8. Where brought, 1876, p. 106.

9. The creditor, who sues to set aside an involuntary conveyance made of his debtor's property, so as to subject it to his judicial mortgage, shows a good cause of action which can neither be classed as a revocatory nor hypothecary action. 30 A. 727, *Logan v. Herbert*.

2) *Election of proceeding and their injunction.*

1. A party who institutes the hypothecary action, cannot prevent the owner from alienating: first, because it is not the sale of another's property; second, because plaintiff, however successful, is not entitled to the possession. 16 A. 283, *Barelli v. Delassus*; C. C. (2428).

3) Concurrent mortgages; mortgagor's title; and latent equities of third persons.

1. The sale of a note includes the mortgages and privileges securing its payment. 18 A. 192, *Jeckell v. Freid*.

2. The holders of the same series of mortgage notes, can only share ratably in the proceeds of the sale of the mortgaged property, made in execution of one of the said notes. Above said share, the mortgage is extinct. 29 A. 129, *Howard v. Schmidt*.

3. When two or more persons have a common interest in a security, equity will not allow one to appropriate it exclusively to himself, or to impair its worth to the others. Community of interest, involves mutual obligation. If a corporation issue many bonds, and give a mortgage on all its estates to secure them, one holder of the bonds, admitting that he has a right to make use of the mortgage to enforce the payment of the bonds which he holds, has no right to employ it as an instrument by which he may become the owner of the property mortgaged, at the lowest price at which it can be obtained, leaving the bonds held by his associate holders, unpaid. His duty, if he uses it at all, is to make it productive of the most that can be obtained for all who are interested in it, and if he seek to make a profit out of it, at the expense of those whose rights in it were the same as his own, he is guilty of fraud. 21 Wall. 616, *Jackson v. Ludeling*.

4. The mortgage is not negotiable, and, although equities as to the note transferred before maturity, to a bona fide holder, cannot be pleaded, yet the mortgage is liable to attack. 28 A. 855, *Morris & Co. v. White*. See BILLS AND NOTES, I. No. 13; IV. (e), 1), No. 2. MORTGAGE VI. (d), Nos. 1, 2; VIII. (a), No. 8.

5. See III. (a), No. 8, for equities of third persons.

6. The pact *de non alienando* does not prevent the mortgagor from employing an overseer. See III. (e), No. 1.

7. How the rights of others are affected by a fraudulent or illegal erasure. See REGISTRY, II. (e), 1), Nos. 1, 2, 3.

4) Liquidation of mortgagee's title; its sufficiency, and effect as against the third possessor.

1. When the tutor of a minor dies, out of the State, in hopeless insolvency, leaving no property upon which to administer, the minor cannot be required, under the circumstances, to sue for a rendition of accounts, as a condition precedent to the institution of the hypothecary action. 15 A. 289, *Cummings v. Erwin*.

2. If plaintiff could not recover the property in a real action, he cannot enforce a real right in it; such as the hypothecary action, when prescription *liberandi causa* is opposed to him. C. C. (3495); 16 A. 343, *Adle v. Prudhomme*.

3. The judgment homologating the tutor's account, showing a balance against him, rendered for more than ten years, being prescribed, cannot form the basis of an hypothecary action, at the suit of the minors, become of age, to recover their tutor's property, sold to third persons, subject to their mortgage. 24 A. 211, *Wade v. Caspari*. See PRESCRIPTION, III. (g), 1), Nos. 9, *et seq.*

4. HOWELL, J., *dissenting*. The minors are, then, in a worse position than if no account was ever rendered. *Ib.*

5. The plaintiff, who is unable to cause his tutor to account, because the latter abandoned his trust, leaving no property in this State, may proceed against the third possessor. 24 A. 566, *Trezevant v. Holly*; 13 A. 205, *Brown v. Sadler*; 15 A. 289.

6. The purchaser cannot plead the consideration of the judgment, when he bound himself to pay it. See JUDGMENT, XI. (a), No. 14.

7. See *Infra*, VI. (d).

5). Who may be sued as third possessor; defendant's liability and discharge.

1. The judgment creditor, whose claim bears against a piece of property transferred to a third party, who does not assume to pay the same, must pro-

ceed by hypothecary action; he cannot obtain a personal judgment against the third possessor. 24 A. 29, *Massey v. Ferich*.

2. The possession of the lessee is that of the owner and when this fact is disclosed by the answer of the lessee, the lessors must be made parties to the hypothecary action, else the judgment is of no validity. 26 A. 609, *O'Brien v. Mc Vey*.

3. The possessory action cannot be used by a third possessor, to test the right to enforce a mortgage or regulate the validity of the proceedings. 26 A. 363 *Dahlgreen v. Duncan*.

4. See SUPRA V. No. 5.

6). Previous demand, notice and affidavit, who are entitled to the rights of third possessors and pact *de non alienando*.

1. The thirty days notice to the debtor is a prerequisite to the institution of the hypothecary action. 15 A. 104, *Gentes v. Blasco*.

2. The exception of prematurity is well taken, if the suit be instituted before the expiration of the ten days notice to the third possessor. 15 A. 564, *Taylor v. Pearce*.

3. Service of notice of amicable demand by the sheriff, should be proved, because the law does not make such a service, a part of his duty. *Ib*.

4. The demand and notice provided for by art. 69, C. P., need not be made on one who has been declared bankrupt. 15 A. 289, *Cummings v. Erwin*; 24 A. 508, *King v. Bowman*.

5. A party must proceed by hypothecary action against the third possessor, if it be not alleged or proved that the sale to the third possessor is simulated, or that the act of mortgage contained the pact *de non alienando*. 18 A. 732; 21 A. 271, 647; C. P. 709, 61 *et seq*; 3 N. S. 336; 6 L. 283; 6 A. 550; 22 A. 135, *Waddil v. Payne, Harrison and sheriff*; 3 A. 227; 4 A. 270.

6. One who forecloses a mortgage which does not contain the pact *de non alienando*, is bound to give the ten days notice to one who purchases the property during the pendency of the suit. 24 A. 551, *Taylor v. Pipes*.

7. On a writ of seizure and sale, although the mortgage property may be donated to the defendant, the mortgagor or his succession should be made a party, or else the hypothecary action should be instituted, if the act does not contain the pact of non alienation. 26 A. 370, *O'Hara v. Folwell*.

8. A mortgagee whose act of mortgage does not contain the pact *de non alienando*, should proceed against the third possessor by hypothecary action. 26 A. 532, *Reggio v. Blanchin & Giraud*.

9. Where the vendee assumed the payment of the mortgage as a part of the purchase price, the mortgagee may proceed against the mortgagor, without reference to the sale made by him. N. R., *Henry Père v. Meyer Goldman*, appeal by L. G'Sell, third possessor.

10. The purchaser from the mortgagee, having in the act of sale, promised to pay the debt, is not properly speaking, a third possessor. 16 A. 188, *Boissac v. Downs*; 1 R. 135.

11. The purchaser of property with the pact *de non alienando*, occupies no better position than the mortgagor, and cannot set up defenses, which the latter could not. 25 A. 398, *Lee v. Packard*; 2 N. S. 32; 1 L. 39; 13 L. 315; 14 L. 133; 15 L. 267, 471, 184; 19 L. 491; 2 R. 378; 4 R. 389; 6 R. 58; 9 R. 283; 10 R. 54; 2 A. 453; 3 A. 268; 4 A. 328; 8 A. 58; 16 L. 223; 6 R. 407; 1 R. 135; 8 A. 267; 12 A. 148; 4 A. 324; 6 A. 54; 8 A. 23.

12. Under the pact *de non alienando*, the mortgagee can proceed to enforce his mortgage directly against the mortgagor, without reference to the vendee of the latter, but the vendee has sufficient interest in the matter to sue to annul the sale, if the forms of law have not been observed by the mortgagee of his vendor in making the sale. 21 Wall. 123, *Watson v. Bondurant*.

13. If brought before the ten days notice on the third possessor, the hypothecary action is premature. See PETITORY AND POSSESSORY ACTIONS, I. No. 2.

7) Exceptions of discussion and *codendarum actionum*.

1. Where the tutor of a minor dies out of the State in hopeless insolvency,

having no property whatever to administer upon, the minor cannot be required to sue for a rendition of accounts previous to the institution of the hypothecary action. 15 A. 289, *Cummings v. Erwin*.

2. A third person who guarantees the payment of another's debt by special mortgage on his property, cannot be considered as a third possessor and is not entitled to discussion. 19 A. 181, *Ricard v. Harrison*.

(d) Assignment of mortgages.

1. A mortgage not being negotiable is subject to all equities between the original parties, and the assignees have no greater rights than the mortgagees. 20 A. 254, *Brou v. Becnel*; 8 R. 435; 14 A. 587. See VI. (c), 3), No. 4; VIII. (a), No. 8.

2. The third holder of a mortgage note before maturity, for valuable consideration, cannot set up the maxim of the commercial law, where the mortgage on its face appears to be an unauthorized sale by the wife to the husband. 26 A. 376, *Garner v. Gay and Sheriff*.

3. Where in an act of transfer of a mortgage note, the transferrer reserves all the rights of any holder or holders of the other notes secured by the same mortgage; in the event of the sale of the mortgaged property, the transferrer who holds the other notes shares equally in the proceeds of the sale. 29 A. 129, *Howard v. Smith*. See VII. No. 1.

4. The transferrer of a mortgage note, without warranty, and who is not guilty of any fraud, is not responsible to the transferee for any depreciation in the property mortgaged. 29 A. 129, *Howard v. Schmidt*.

5. For negotiability of mortgaged notes, see BILLS AND NOTES, I. No. 13; IV. (e), 1), Nos. 2, 5.

6. See MORTGAGE, VI. (c), 3).

7. The pledger cannot give a priority of mortgage over the pledgee. See PLEDGE, I. (b), No. 10.

VII. OF THE RANK OF MORTGAGES.

1. Where the holder of a claim secured by mortgage, assigns a part of it, he cannot come in competition with his assignee, if the property be insufficient to pay both. 20 A. 359, *Ventress v. His Creditors*; 30 A. 620, *Barksdull v. Herwig et al.* See VI. (d), No. 3.

2. Where a series of notes have been executed, secured by mortgage on the same property, and transferred to different parties, by the payee, the holders must share the proceeds concurrently. 21 A. 529, *Perot v. Levasseur*.

3. The transferees of portions of a mortgaged debt, are entitled to be paid *pro rata*, out of the proceeds of sale of the property mortgaged, without regard to the time of the transfer. 21 A. 624, *Begnaud v. Roy*.

4. The rank of mortgages is determined by the date of registry. 21 A. 262, *Peychaud v. Citizens' Bank*. See REGISTRY, II. (a), 2).

5. The return, of notes to the mortgagor, by one who refuses to discount the whole series, secured by the same mortgage, does not cancel the mortgage, and the holder of the other notes subsequently discounted, has a valid concurrent mortgage. 25 A. 365, *Merchants' Insurance Co. v. Jamison*.

6. The plaintiff in pursuit of his rights finding himself opposed by what purports to be a superior mortgage right to his, has the right to attack it and show its nullity. 25 A. 556, *Kennedy, Jr. v. Rust*.

7. The re-inscription of the mortgage after ten years, gives it effect only from the day of re-inscription. 25 A. 644, *Poutz v. Reggio*.

8. The registry in the mortgage office, a long time after the date of the contract for paying, and subsequent to a mortgage, will not outrank the mortgage, and an adjudication by the sheriff, under the paying privilege, for less than the amount of the mortgage, will be set aside. 27 A. 47, *Dunning v. Coleman & Co.*; — C. P. 684. See REGISTRY, II. (a), 1).

9. Prescription being acquired, its waiver could not affect subsequent mortgage creditors, so as to retain the preference of the prescribed mortgage. 27 A. 293, *New Orleans Canal and Banking Company v. Recorder of Pointe Coupee et als*.

10. When the property inherited, is immovable, and all the rights, title and interest of the heir in and to the succession, are seized and sold, his debts must be paid in accordance with the dates of registry. 27 A. 504, *Smith & McKenna v. Charles*. See V. No. 3.

11. The judgment debtor became, by the death of his wife, tutor of his minor children; his wife had a legal mortgage against him; the minors acquired said mortgage by the death of their mother, and it being anterior to the judgment of the seizing creditor, should not be erased. 28 A. 753, *Jean Dutrey v. Bertrand Laguens*.

12. If the pledger, after having made the pledge, grants a priority of mortgage, an act he had no authority to do, and the recorder reports the junior mortgage as first in rank, the certificate may be contradicted and the court will give each mortgage its proper rank. 29 A. 550, *Mechanics' Building Association v. Ferguson*.

13. The minor who gives a mortgage on his undivided share of a property, does not thereby renounce his legal mortgage on the share of his tutor. See MINORS, III. (1), No. 3.

14. The preferred creditor must exercise his rights by way of third opposition or by hypothecary action. See MORTGAGE, V. No. 5.

15. The privileges of a succession, or insolvency, must be paid by the least ancient mortgage. See PRIVILEGE, IV. (b), Nos. 1, 2.

16. A mortgagee, who transfers a part of his claim, cannot, pending proceedings in the district court by the transferee, to enforce the mortgage *via ordinaria*, with the consent of the mortgagor, obtain judgment against her on an ordinary claim, seize and sell the property in execution of his judgment, become the adjudicatee, retain as mortgagee the surplus of his adjudication after satisfying his ordinary claim, and then seek to defeat his transferee's claim by setting up that the district court cannot annul the judgment of the parish court, claim that his transferee should proceed by hypothecary action, and plead the prescription of six and twelve months. 30 A. 620, *Barksdull v. Herwig et al.* See No. 1.

15. A railroad company having executed a mortgage to secure a limited number of bonds, afterwards executed another mortgage on the same property to secure a larger number of bonds, which recited that the holders of the bonds secured by the original mortgage, had agreed to surrender the same, and receive in substitution therefor new bonds, to be secured by the original mortgage as modified by the second mortgage. All the bonds secured by the first mortgage, except twenty, were exchanged for bonds secured by the second; *Held*: That the holders of said twenty bonds were not entitled to be paid out of the proceeds of the mortgaged property, in preference to the holders of the substituted bonds; but, that they could not be prejudiced by the increase of the number of bonds secured by the second mortgage, but were entitled to the same proportion of the proceeds of the mortgaged property as if the second mortgage had not been executed. 2 Woods, 207, *Ames, Trustees v. New Orleans Mobile and Texas Railroad Company*.

VIII. OF THE EXTINCTION OF MORTGAGES.

(a) *In general.*

1. The qualities of mortgagee and owner of the thing mortgaged, cannot exist in the same person at the same time. 15 A. 407, *Clarke v. Peak*.

2. Although the purchase of property, by the mortgagee, extinguishes the mortgage, yet there is nothing illegal in the insertion in the condition of the sale, by which it is arranged, that the price is not to be collected until the mortgage has been satisfied. *Ib.*

3. The possession of the note by the mortgagor for the mortgagee, did not thereby destroy the mortgage. 18 A. 36, *Succession Norton*.

4. A mortgage given by a joint purchaser, to secure the whole debt, is not extinguished by confusion, by a transfer of the co-proprietor, to the mortgagee, of his interest in the joint purchase. 21 A. 617, *Bessan v. Moucheur*.

5. Payment of the note, made by the drawer to the holder, extinguishes the mortgage. 18 A. 44, *Succession Virgin*.

6. When the principal obligation is extinguished, the mortgage given to secure it, falls also. 22 A. 432, *Smith v. McWaters*; 20 A. 199, *Davidson v. Carroll, Hoy & Co.*

7. The mortgage is extinguished by payment of the debt. 23 A. 380, *Morano v. Shaw*.

8. When the mortgage note has been paid, and is re-issued, the drawer is bound, but there is no mortgage. 19 A. 260, *Schinkle v. Hanewinkel*; 4 R. 46. See VI. (c), 3), No. 4; VI. (d), Nos. 1, 2.

9. The notes having been taken up by the agents of the maker, the mortgage thereby became extinct. 23 A. 639, *Walker & Vaught v. Kimbrough*.

10. HOWELL and HOWE, JJ., *dissenting*: The notes were taken up by the commission merchants, who were the indorsers; the mortgage was not thereby extinguished. *Ib.*

11. Payment of the note, in anticipation, extinguishes the mortgage; and any subsequent holder of it, even before maturity, has no right to participate in the proceeds of sale which are insufficient to satisfy the series of notes of the same mortgage remaining unpaid. 25 A. 438, *Hoyle v. Cazabat*.

12. TALIAFERRO, J., *dissenting*: The bank, which was the agent of the holder, to whom the other notes belonged, should have marked paid on the note, and being in the hands of an innocent third party, the latter should recover his *pro rata* of the proceeds. *Ib.*

13. A *dation en paiement* by the husband to restitute the paraphernal property of his wife, will debar a subsequent mortgage creditor from seizing the property given in payment. 26 A. 593, *Perret v. Sanarens*.

14. The mortgage resting on the property seized for taxes, and which had been assessed on other property, cannot be enforced, if the formalities of law were observed for the tax sale. 28 A. 352, *M. Berwin v. Michael Legrus*.

15. A previous *bona fide* mortgage, is not divested by the confiscation of the mortgagor's property, under act of congress of July 17, 1862, and the joint resolution explanatory thereof. 26 A. 718, *Micou v. Benjamin and Day*.

16. TALIAFERRO, J., *dissenting*: The proceedings are *in rem*, and all mortgages and incumbrances are transferred to the proceeds.

17. The judicial mortgage resulting from the registry of a judgment, is extinguished by confusion, so far as the acquisition of the judgment creditor is concerned, if he becomes part owner of the property of his judgment debtor. The judgment is not reduced and continues to bear on the rest of the property. 25 A. 559, *Pipes v. Norsworthy*.

18. A written promise to pay, after prescription has run, creates a new debt, but does not renew the mortgage, so far, at least, as third persons are concerned. 23 A. 456, *Succession Kugler*.

19. The giving of new notes, with the special agreement that the mortgage is not novated, will not secure the new notes by mortgage. See NOVATION, II. No. 7.

20. Payment of the mortgage note, after its maturity, by the agent of the holder, to his principal, with no stipulation of subrogation in his favor, will extinguish the note and mortgage. 30 A. 21, *Brice v. Watkins*.

(b) *Execution sales.*

1. A stock mortgage given to secure the payment of stock to a property bank, is prior and superior to a loan mortgage, although given in the same act or hypothecary contract with the corporation, and a sale of the property mortgaged, under a decree to satisfy the amount of the loan, will not extinguish the stock mortgage unless the amount of the adjudication shall exceed the amount of the stock mortgage. 15 A. 630, *Haynes v. Courtney*. See CORPORATIONS, X. (g), No. 9.

2. The purchaser who assumes anterior mortgages cannot be compelled to pay until all the parties in interest are before the court for a distribution and final adjudication. 16 A. 198, *Cucullu v. Walker*.

3. It being shown that the first of a series of mortgage notes was paid before

maturity, the holders of the others, may cause all the price of sale to be paid to them on furnishing to the purchaser of the property sold under the foreclosure of the mortgage, bond for the amount of the first note, in favor of the purchaser. 18 A. 662, *Salter v. Clinch & Grief*.

4. A mortgage being indivisible in a suit for an installment, the whole property mortgaged must be sold on such terms of credit as are granted by the original act of mortgage. 18 A. 537, *Branner v. Hardy, sheriff*; 550, *Gordon v. Vicksburg, Shreveport and Texas Railroad*.

5. If the legal mortgage of the minor has precedence over the special mortgage given to third persons, this does not prevent a sale of the property, but the legal mortgage is not extinguished and the property may be pursued by hypothecary action. 19 A. 363, *Laplace v. Haydel*. See EXECUTION, V. (d), 3, No. 5.

6. The sheriff's sale divested the defendant's title to the land and at the same time extinguished all mortgages subsequent to that of the seizing creditor, unless it appears that the adjudicatee acted as the agent of the debtor in purchasing. 9 R. 72; 22 A. 447. *Willis v. Willis*.

7. The writ of seizure and sale having been recorded prior to the wife's mortgage, the latter may be cancelled on rule. 24 A. 328, *McNeil v. Hawk*. See SUMMARY PROCESS, II. Nos. 2, 9.

8. The purchaser's stipulations and the partition of the property among the co-owners did not affect the mortgage. 25 A. 398, *Lee v. Packard*.

9. One of several co-owners who purchases several lots of the mortgaged plantation for cash, when executory process issued, for a certain amount cash, and the balance on terms of credit to meet the unmatured notes, cannot enjoin the second seizure of the lots on the maturity of the notes. 26 A. 175, *Chaffraix & Agar v. Packard*.

10. LUDELING, C. J., *dissenting*: A sale under a mortgage extinguishes the mortgage. One of the co-owners having paid the amount of his indebtedness, his share could not be seized. *Ib.*

11. A sale under the draining privilege cancels neither State nor city taxes. 28 A., N. R. *In the Matter of the First Draining District*.

12. Effect of tax sales on mortgages. See MORTGAGE, VIII. (a), No. 14.

13. When the purchaser must pay a surplus over the claim of the seizing creditor, he may call on all parties in interest to distribute the fund. See MORTGAGE, IX. No. 1.

14. A sale under the first mortgage for cash, contrary to a *concordat* between the creditors, is valid and cancels all subsequent liens. See OBLIGATIONS, V. Nos. 8, 9.

15. The forced sale of an undivided share of a ship, has no effect on the privileges against her. See PLEADING, VIII. (d), 2, No. 7.

(c) *Insolvent; partition; probate, and bankrupt sales.*

1. The right to have a mortgage cancelled, by reason of bankruptcy and discharge, cannot be tested, unless the mortgagees be made parties. 21 A. 401, *State ex rel. Durrie v. Recorder of Mortgages*.

2. A sale of succession property, made to execute the will of the deceased, raises the mortgages from the property and transfers the rights of the creditors to the proceeds. 23 A. 298, *Succession Cordevielle*; 23 A. 582, *Payne v. Ferguson*.

3. A sale of succession property, made to pay debts, raises the mortgages and privileges, which are transferred to the proceeds. 24 A. 483, *Wooley v. Russ*.

4. A succession sale to pay debts, does not divest the mortgages with which the property was encumbered when it was bought by the deceased. 29 A. 385, *Succession Triche*; 9 L. 13; 11 A. 383; 3 R. 5; 8 R. 99.

5. The sale of community property, at probate sale, in the wife's succession, does not transfer the mortgages to the proceeds, where the debt is due by the community, at least as to the husband's half. 26 A. 690, *Harper v. Linman*.

6. A probate sale of property, mortgaged to the Louisiana Bank, does not release its mortgage, unless made with the bank's consent. 1 A. 120; 17 L. 373; 2 A. 607; 20 A. 311, *State ex rel. Sauvé v. Judge Third District Court*.

7. The Citizens' Bank mortgage is not divested by a succession sale; therefore the bank has no interest to enjoin the sale. 28 A. 771, *Citizens' Bank v. Bayley*.

8. The mortgages on a property surrendered by a bankrupt, sold by the assignee without order of court, are not raised. 24 A. 509, *King v. Bocoman*. See BANKRUPTCY, III. (b), No. 4.

9. A sale in bankruptcy of mortgaged property, to which the mortgagees are not parties, otherwise than by being set down on the bankrupt schedule, is not such a notification as will divest their rights. 28 A. 846, *Pickett v. Haynes*; 25 A. 600, 506; 21 A. 401. See No. 8.

10. The opposition of a judicial mortgagee, claiming to be paid out of the funds to be partitioned between the heirs, transfers his mortgage to the proceeds. See VI. (a), No. 2.

11. A discharge in bankruptcy does not relieve the bankrupt's land from a judicial mortgage. See VI. (c), 1), No. 2.

IX. OF THE INSCRIPTION AND ERASURE OF MORTGAGES.

1. The mortgaged property being sold for more than sufficient to pay the first mortgage creditor, the purchaser has a right to deposit the balance in court, and call upon all the mortgaged and privileged creditors for a distribution, for the purpose of causing all liens to be erased on his property. 18 A. 641, *Conery v. Holmes*.

2. A proceeding by rule is properly taken before the court issuing the execution, for the purpose of erasing mortgages. 28 A. 753, *Jean Dutrey v. Bertrand Laguens*.

3. WYLY, J., *dissenting*: Not where the mortgage reported is in favor of minor children; in such a case the Second District Court alone has jurisdiction. *Ib.*

4. Effect as to the heirs of a judgment against a dead man. See V. No. 1.

5. For inscription of mortgages, see REGISTRY, II. (a), 2).

MOTION.

See MINUTES. JUDGMENT, XV. (e), No. 6.

MOVABLES.

See THINGS, II. (a). LAWS, IV. Nos. 5, 6.

MUNICIPAL COURTS.

For Orleans, 1873, p. 170; for Carrollton, called Seventh District, 1874, p. 119; recorder's, 1877, E. S., p. 202; 1878, p. 61.

MUNICIPAL TAXATION.

See NEW ORLEANS, II.

NAME.

1. For misnomer in pleading, and use of another's name in bringing suit, see PLEADING, I. (b); V. (a), 1); 2; VI. (a), 2).

2. Change of name by judicial process, 1877, E. S., p. 178.

NATIONAL BANKS.

May sell real estate on credit. See CORPORATIONS, I. No. 12.

NATCHITOCHES.

1. The city council of Natchitoches had a right to exact a bond from the tax collector. 28 A. 274. *Mayor of Natchitoches v. Redmond*.

2. City of Natchitoches, incorporated, 1856, p. 185; amended, 1870, p. 68; French advertisements dispensed with, 1872, p. 133; Grand Ecore wharf, 1874, p. 264; poor house, 1874, p. 268; additional justice, 1877, p. 54.

NAVIGABLE.

See THINGS, I. (b).

NEGLIGENCE.

See FAULT. MANDATE, V. (a).

NEGOTIORUM GESTOR.

See QUASI CONTRACTS, I. MARRIAGE, XIII. (e), 4), c. INSURANCE, III. (j). MANDATE, III. (a), Nos. 1, 3; (b), No. 1.

NEW ORLEANS.

I. OF THE HISTORY OF THE CORPORATION; ITS LIMITS AND PROPERTY.

(a) *In general.*

(b) *Division into municipalities; and subsequent consolidation of the city; and addition of territory.*

II. OF THE POWERS AND OBLIGATIONS OF THE CORPORATION; AND THE ADMINISTRATION OF ITS GOVERNMENT.

(a) *In general.*

(b) *Constitutional guaranties; and subjection to legislative control.*

(c) *Power to acquire and alienate property; and general power to contract.*

(d) *Powers of administration and police; incidental obligations and infliction of penalties.*

1) *In general.*

2) *Administration of the public ways and river banks; wharves.*

(e) *Power to levy taxes and other contributions and of licenses.*

1) *In general.*

2) *Exemption from taxation.*

3) *Taxes on occupations and exhibitions and of licenses.*

4) *Taxes on front proprietors for pavements and banquettes.*

5) *Opening and improving of streets.*
A. *In general.*

B. *Duties and powers of commissioners and mode of assessment; indemnification for property expropriated and constitutionality of the proceedings.*

C. *Proceedings before the court, their discontinuance or reversal and damages consequent thereon; homologation of the report and its execution.*

(f) *City and municipal ordinances; their enactment, interpretation and general effect.*

(g) *Officers of the corporation; their powers, rights and disabilities; their election, suspension and motion.*

1) *In general, and of the mayor, aldermen, administrators and recorders.*

2) *Master and wardens of the port; branch pilots and harbor masters.*

3) *Surveyor.*

4) *Recorder of births and deaths.*

5) *Treasurer, administrator of finance, tax collectors and attorneys.*

I. OF THE HISTORY OF THE CORPORATION; ITS LIMIT AND PROPERTY.

(a) *In general.*

1. The portion of the city of New Orleans, situated between the Mississippi river and the first row of buildings, now designated as the quay on the first map of the city, made in 1728, had been used as such, from the foundation of the city; *Held*: That notwithstanding the erection of government buildings, the granting of lots and other acts of ownership by the governments, which had from time to time held sway in Louisiana, the ground in question, was the property of the city of New Orleans, and if any grant from the French crown were necessary to confirm the city's title, such grant might from long usage be presumed. 10 P. 662, *New Orleans v. United States*.

2. City charter, p. 136, 1856, committee to frame city charter, 1868, p. 184; 1877, p. 9; city charter, 1870, E. S., p. 30; 1871, p. 145; 1872, p. 124; 1874, p. 78; floating debt to be settled, 1871, p. 233; defined, 1871, p. 243; amend-

ment of the constitution proposed to limit city's debt, 1874, p. 56; assessment, 1875, p. 32; improving streets, 1876, p. 116; city to elect all its officers except mayor and administrators, 1877, E. S., p. 112; New Orleans may sue, 1877, E. S., p. 127; before justices for taxes and licenses, 1877, E. S., p. 128; new mode of assessing and collecting taxes, repealing anterior laws, 1877, E. S., p. 136; municipal courts, 1873, p. 170; 1874, p. 119; recorder's courts, 1877, E. S., p. 202; back taxes payable in warrants, etc., 1877, E. S., p. 208, divided by wards for elections, 1878, p. 217.

(b) *Division into municipalities; and subsequent consolidation of the city; and addition of territory.*

1. The parish of Orleans, is the city of Orleans. Act 1870, p. 30, section 2. 24 A. 513, *Southworth v. City*.

2. The title of the act of 1870, incorporating the city of New Orleans is sufficient, and as a consequence the boundaries must be defined. 27 A. 156, *City v. Cazelar*. (N. B. No mention is made that the police jury of the right bank is abrogated.)

3. By act 71, of 1874, all that portion of the parish of Jefferson below Upperline street, is annexed to the parish of Orleans, that is the city of Carrollton. 28 A. 42, *Succession S. Teaulet*; 28 A. 873, *City of New Orleans v. G. L. Bright*; 28 A. 38, *State v. Daniels*.

4. Act No. 71, of 1874, annexing Carrollton to New Orleans, is constitutional. 28 A. 873. *City v. Bright*; 29 A. N. R., *Succession Rochum Crasto*.

5. The city of Jefferson and the sixth municipal district of New Orleans, legally formed part of the first judicial district until November, 1876. The effect of act No. 45, of 1876, was suspended until that date. 29 A. 428, *Lafayette Fire Insurance Company v. Remmers*. See COURTS, II. (e), No. 20.

6. Power of legislature to enlarge cities. See CONSTITUTION, II. (c), 3), B. No. 4.

7. Jefferson added, 1870, E. S., p. 30; Carrollton added, 1874, p. 119.

II. OF THE POWERS AND OBLIGATIONS OF THE CORPORATION AND THE ADMINISTRATION OF ITS GOVERNMENT.

(a) *In general.*

1. The value of lumber seized without authority by the military, and used by the city after being turned over to it, may be recovered from the city. 18 A. 660, *Sherman v. City of New Orleans*.

2. The city of New Orleans is liable for damages done to property by mobs and riotous assemblies; but the destruction by the mob, must be clearly shown. Acts 1855, approved March 9th. 20 A. 410, *Fauvia v. City of New Orleans*; 23 A. 507, *Williams v. City*. See OFFENSES AND QUASI OFFENSES, II. (h), Nos. 3, 9.

3. The city of New Orleans need not give bond to have an injunction dissolved in cases where bond is ordinarily required. 20 A. 300, *Wells v. City*; 30 A. —, *Jefferson City and Lake R. R. Co. v. City*.

4. The military authorities in charge of the city of New Orleans had the power to make a lease of the wharves or part thereof; the general order of General Canby, No. 11, did not affect the previous lease, nor did the restoration of the city to civil authority destroy the same. 20 Wall. 394, *New Orleans v. Steamship Co.* See (d), 2).

5. How judgments against the city must be paid. See EXECUTION, I. No. 14.

(b) *Constitutional guaranties; and subjection to legislative control.*

1. The clause in the act, of 1857, which requires the city of New Orleans to pay one-half of the expenses incurred to carry into effect the election of police officers of the city, is not in violation of article 123 of the constitution, which provides that, "taxation shall be equal and uniform throughout the State," etc. 15 A. 354, *State v. New Orleans*.

2. Section 1 of act No. 27 of 1868, requiring vacancies in municipal offices

to be filled by appointment, and not by the city, is not unconstitutional. 21 A. 538, *State, ex rel. v. Leovy*.

3. The omission in the constitution of 1868 of article 133 of the constitution of 1864, left the whole subject of the corporation of New Orleans under the power of the legislature. 21 A. 309, *Diamond v. Cain*.

4. By act approved February 27, 1869, entitled an act to authorize the city of New Orleans to fund its floating debt, and to liquidate its indebtedness, the legislature ratified the issuance of city notes. 23 A. 6, *Smith v. City*; 24 A. 20, *Same v. Same*.

5. To constitute a bill of credit within the constitution, it must be issued by a State, on the faith of the State, and be designed to circulate as money. The city notes were not bills of credit. *Ib.*

6. The legislature had the right, in annexing Carrollton to New Orleans, to validate the bonds issued by the former, and compel their payment by the latter. 95 U. S. (Otto's) 644, *New Orleans v. Clark*.

7. See TAXES, II. (b), 2), A.

(c) *Power to acquire and alienate property; and general power to contract.*

1. An addition to a market, constructed by the city, may be leased by the city, without liability in damages to the lessee of the previous portion. 16 A. 22, *Cougot v. New Orleans*. See MARKET.

2. A contractor by municipal authority, has no right of action against the proprietor for filling up lots, in the city of New Orleans, unless he shows that the contract was adjudicated to him as the lowest bidder. 16 A. 134, *Succession. Erwin*; 10 A. 11; 12 A. 154. Acts 1850, p. 164.

3. City ordinance 708, contracting with E. B., an attorney at law, to collect all bills for taxes on property assessed as unknown, and all unsatisfied judgments in favor of the city for taxes, does not violate the city charter, nor does it conflict with any rights of the assistant city attorney. 20 A. 172, *State ex. rel. Bermudez v. Heath, mayor*.

4. The city of New Orleans, in her corporate capacity, must be regarded and treated as an individual person, and when she enters into a legal contract, by virtue of an ordinance, she cannot, by the adoption of another ordinance, repeal her contract. 20 A. 172, *State ex. rel. E. Bermudez v. Heath, mayor*.

5. The bonds of the Commercial water works, and of the N. O., J. & G. N. R. R. Co., are liable to be seized by the judgment creditors of the city. They do not have the character of public property. 23 A. 61, *City v. Home Mutual Insurance Company*.

6. No *fi. fa.* can be issued against the city of New Orleans. Act No. 5, E. S. 1870, p. 10; 23 A. 708, *City v. Ruleff*.

7. In all contracts adjudicated by the council, wherein it is stipulated that if the work be not satisfactory to the council, they have the right to annul the same, without indemnity, this stipulation is law, as there is nothing therein contrary to law. 24 A. 21, *Bietry v. City*.

8. In the absence of city ordinances, testimony received without objection, showing that the creditor's claim was in accordance with the ordinance, and equivalent to an approved and registered claim, judgment must be rendered in favor of plaintiff. 24 A. 28, *Greuling v. City of New Orleans*.

9. New Orleans had authority, during the military possession, to contract for and sell the ferry privilege, and the more so, if the contract was specially approved by the military authorities. 24 A. 42, *Prather v. City of New Orleans*.

10. A valid contract entered into by the municipal authorities, who exercised their functions during the military occupation, continues to be valid, even if the administration is succeeded by another set of officers. 24 A. 42, *Prather v. City*.

11. The city of New Orleans, having caused a *fi. fa.* to issue in the tax cases, has the right to have said writs set aside, but cannot, by so doing, deprive the clerk of his legitimate costs. 26 A. 48, *Lynne v. City*.

12. The city having reserved the right to reject, *in toto*, any and all bids made to a proposal to furnish shells, had a right to limit, to a smaller amount

of shells, the acceptance of the bid made, reserving her right to accept the balance. No damage can arise to the contractor. 25 A. 660, *Thomas v. City*.

13. The plaintiff is bound by his construction of the word *cash*, used in his contract, by taking convertible certificates for bonds of the city, at ninety cents on the dollar, in payment of the shells. *Ib*.

14. The city having reserved, in their proposals, the rejection of any and all bids, has that right without incurring any liability. 26 A. 754, *Batt & Michel v. City of New Orleans*.

15. For powers of political corporations, see CORPORATIONS, II. (b).

16. The consolidated bonds form a contract between the bondholders and the city. See OBLIGATIONS, II. No. 3.

17. An order on the controller by a city contractor, does not make the city liable to the payee. See OBLIGATIONS, VII. (b), 1), No. 1.

18. An action for work performed for the city, is prescribed by one year. See PRESCRIPTION, III. (c), 4), No. 3.

(d) *Powers of administration and police; incidental obligations and infliction of penalties.*

1) In general.

1. By the city ordinances, the commissaries of the markets are authorized to have disturbers of the public peace arrested; and the arrest of an individual on the charge of taking possession of another's stall in the market without his permission, is unlawful, unless ordered by the commissary. 15 A. 276, *Tujague v. Weisheimer*. See MARKET.

2. For elections in the parish of Orleans, see ELECTIONS BY THE PEOPLE, Nos. 4, 5.

3. Act No. 1, of 1868, creating a board of police commissioners for the city of New Orleans, divested the mayor of all authority to appoint a chief or other policemen. 21 A. 309, *Diamond v. Cain*; 320, *Metropolitan Board v. Conway and Diamond*; 447, *Carrollton v. Metropolitan Police*.

4. The city of New Orleans is not an insurer against fire and cannot be sued for dereliction of the fire companies which had all their engines and members at the Fair Ground on the day of the fire. 25 A. 394, *Tule v. City*; *Howes v. City*.

5. The destruction of the Pontchartrain railroad depot by the city authorities, was a trespass, and rendered the city liable for the value of the buildings thus destroyed. 27 A. 162, *Pontchartrain Railroad Company v. City of New Orleans*.

6. The city is not responsible for the wounding and suffering of a police officer while in the discharge of his duty. It is a risk which he runs when he accepts the position. 27 A. 159, *Spalding v. City of Jefferson*.

7. The neighbors who suffer an inconvenience from the pursuing of a lawful occupation under authorization of the city council, and in conformity to police regulations, cannot complain. 28 A. 130, *Lewis v. Behan, Thorn & Co*.

MORGAN, J. *dissenting*: The distillery is a nuisance which should be abated. *Ib*.

8. A municipal corporation has the power to employ physicians to attend to indigent police officers wounded during the performance of their duty. 27 A. 101, *Logan v. New Orleans*; 4 A. 43.

9. For administration of markets, see MARKET.

10. Offal, etc., how disposed of, 1877, p. 19.

2) Administration of the public ways and river banks; wharves.

1. The city of New Orleans has, by law, the administration of the batture, and had, until the passage of the act of 1853, the exclusive right of determining when, and to what extent the riparian proprietors might occupy the batture or alluvion within the limits of the corporation. 15 A. 657, *Remy v. Municipality* No. 2.

2. One occupying a portion of the wharves under the special permission of

the city council, and during its pleasure, may be ejected whenever the permission is revoked. 26 A. 357, *Kendig & Co. v. City*.

3. The city of New Orleans has a right to charge wharfage on boats arriving in port; this in neither impost nor duty. 27 A. 17, *Cannon v. City of New Orleans*; 30 A. 190, *Ellerman v. McMains*.

4. An ordinance of the city of New Orleans, which demands of all steam-boats which moor or land in any part of the port of New Orleans, a sum measured by the tonnage of the vessel, is a tonnage tax within the meaning of the Federal constitution, and therefore void. 20 Wall. 577, *Cannon v. New Orleans*.

5. It is a tax for the privilege of stopping in the port of New Orleans, and cannot be justified under the plea that it is intended as a compensation for the use of wharves built by the city. *Ib.*

6. For the use of wharves, piers and similar structures, whether owned by individuals or by the city or other corporation, a reasonable compensation may be charged to the vessel, to be regulated in the interest of the public by the State legislature or city council. *Ib.*

7. But in the exercise of this right, care must be taken that it is not made to cover a violation of the Federal constitution, which prohibits the States to lay any duty on tonnage. *Ib.*

8. Any duty or tax, or burden imposed under the authority of the States, which is in its essence a contribution claimed for the privileges of arriving and departing from a port of the United States, and which is assessed on a vessel according to its carrying capacity is a violation of that provision, unless the consent of congress be obtained. *Ib.*

9. The joint resolution of the legislature of Louisiana of March 6, 1869, does not confer upon the railroad company or those claiming under it the right to collect wharfage dues from vessels, etc., landing at the levee front of its riparian property. 2 Woods, 120, *Ellerman v. N. M. & T. R. R. Co.*

10. The military had power to lease the wharves. See II. (a), No. 4.

11. New Orleans is responsible for the damages occasioned by the unsound condition of her wharves. 20 A. 124, *Fennimore v. City of New Orleans*. 5 A. 100, 504; 4 A. 440. See OFFENSES AND QUASI OFFENSES, II. (h).

12. Fast driving is not permissible on the streets of New Orleans. 25 A. 235, *Avegno v. Hart*.

13. The city has the right to collect wharf dues, and the legislature having once delegated this power, cannot afterward grant exemption therefrom on certain vessels. 30 A. 190, *Ellerman v. McMains*; 1874, p. 261.

14. For the administration of markets, see MARKET.

15. A warrant issued by the city authorities, to fulfill a guarantee to a wharf lessee that he should make four thousand dollars profit, is null. See OBLIGATIONS, III. (c), 2), A. No. 14.

16. A contractor cannot claim for extra work done under the direction of a city officer. See QUANTUM MERUIT, No. 10.

17. Power of the legislature over wharves. See CONSTITUTION, II. (c), 4), No. 1.

18. Locks on New Orleans Canal and Bayou St. John, 1873, p. 122; turning bridge, New Orleans Canal, on Broad street, 1873, p. 123; to bridge New Basin, 1870, p. 36.

(e) *Power to levy taxes, and other contributions; and of licenses.*

1) *In general.*

1. The law expressly limits the existence of a privilege for taxes to two years, to be computed from the first day of April of the year for which they may have been assessed. 16 A. 133, *Succession Erwin*; 23 A. 3, *Succession Rousseau*. Acts 1855, p. 512, § 43; 1850, p. 138, § 35. See PRIVILEGE, V. PRESCRIPTION, III. (d), No. 2.

2. The seventh section of the revenue law of 1871, prohibits municipal corporations from levying a tax, for any purpose, in any year, in excess of two per cent. on the assessed value of all property therein listed for taxation, and

they must be governed accordingly. 23 A. 358, *State ex rel. Mayor v. Mayor and Administrators*. See CONSTITUTION, II. (c), 4). TAXES, II. (b), 2), A. LICENSES.

3. There is no law requiring tax bills to be signed by the administrator of finance. 25 A. 391, *City v. Crescent Mutual Insurance Company*.

4. Stamps are not required on tax bills. *Ib.*

5. A tax judgment need not specify the amount of different kinds of property assessed. *Ib.*

6. The testimony of one witness to prove publication of tax bills, with the newspapers offered in evidence, and subsequently filed, is sufficient. *Ib.*

7. Publication on three several days during thirty days, is all that is required. *Ib.*

8. Judgment by default, thirty days after first publication, is sufficient. *Ib.*

9. The notice of judgment need not have the signature of the judge attached. *Ib.*

10. Ordinances 1261, 1262, 1272, do not make the aggregate taxation exceed two per cent., and are valid. *Ib.*

11. Ordinances 1497 and 1498, adopted in April and May, 1872, are valid, being authorized by act of April 26, 1872. *Ib.*

12. The revenue acts of 1865, 1868 and 1869, do not levy a specific tax on cotton. 23 A. 511, *Abbot v. Britton & Koontz*.

13. The boundaries of the city having been changed, the rural property included in its limits, becomes liable to the same proportion of taxes as urban. 27 A. 156, *City v. Cazelar*.

14. The citation of delinquent tax payers, by advertisement in the official newspaper, is constitutional and binding. 20 A. 140, *Bond v. Hiestand*; 3 M. 720; act 15th April, 1853, No. 121; act 1858, No. 85; 1859, No. 175; 10 A. 727, 764, 771; 11 A. 146, 338, 420; 12 A. 751; 13 A. 405.

15. No valid tax title in the city of New Orleans, is shown, where the tax bill is not stamped, "published according to law," by the treasurer, and the property is assessed in the name of Widow L.; the notice thus addressed is served on —, tutor of the minor heir of Widow L., deceased. 27 A. 150, *Succession Trainor*.

16. Metropolitan police warrants are receivable for all licenses and debts, other than taxes, due the cities of New Orleans, Carrollton and Kenner. 27 A. 493, *State ex rel. Lubie v. Administrator Finance*; act No. 33 of 1874. See TAXES, III. (a), No. 8.

17. The capital employed in free banking, which was exempt from taxation by act of 1857, became taxable under article 118 of the constitution of 1868, the bank being organized in 1869. 27 A. 646, *City of New Orleans v. People's Bank*; 27 A. 648, *Same v. Metropolitan Loan, Savings and Pledge Bank*.

18. The assessment being made against the land of which defendant is lessee, and said property being exempt from taxation, because owned by the Poydras Asylum, no tax can be recovered as against defendant. 28 A. 16, *City of New Orleans v. John W. Cannon*. See 2), No. 6.

19. Relative to the consolidated bonds, see INJUNCTION, II. (a), No. 9.

20. The city had no power to tax the capital of banks, after the promulgation of the act of 1857, exempting free banks from taxation. See LAWS, II. (d), No. 1.

21. The statute directing the city to levy a railroad tax, in January of each year, is directory as to time. See LAWS, II. (g), No. 1.

22. For city charters, assessments, etc., see NEW ORLEANS, I.

23. For delegation of power of taxation to subordinate corporations, see TAXES, II. (b), 2), A. B. CONSTITUTION, II. (c), 4).

24. Taxes of 1871, called taxes of 1872; act 1874, p. 228.

2) Exemption from taxation.

1. The capital of an insurance company, secured by *premium notes*, i. e. notes given by the stockholders for the amount of stock not called in, is not exempt from taxation. 18 A. 416, *City v. Union Insurance Co.*; 519, *Same v. Star Mutual Insurance Co.*

2. The capital stock of a company, invested in bonds and stocks, exempt from taxation, may, nevertheless, be taxed as the capital of the corporation. 18 A. 707, *City v. Citizens' Mutual Insurance Co.* See No. 1.

3. HYMAN, C. J. and TALIAFERRO, J., *dissenting*: The inherent qualities of the bonds exempted them from taxation, no matter what use was made of them. *Ib.*

4. The capital of an insurance company, invested in bonds and stocks, which are exempt from taxation, is not liable to taxation. 20 A. 447, 450, *Home Mutual Insurance Co. v. City of New Orleans.*

5. Act No. 192, of 1857, cannot exempt from taxation the capital of a bank. Article 118 of the constitution of 1868, declares what property may be exempted from taxation, and no other can be exempted. 27 A. 376, *City v. Bank of Lafayette.* See No. 7.

6. The buildings and improvements placed on lots owned by the Poydras Orphan Asylum are liable to taxation, if they are owned by others than said asylum. 27 A. 413, *City v. Russ.* See 1), No. 18.

7. Neither the legislature nor the city has authority to exempt from taxation the property of an association, not actually used for church, school or charitable purposes. 28 A. 512, *City of New Orleans v. St. Patrick's Hall Association.* Constitution 1868, article 118; acts 1874; 15 A. 390, *City of New Orleans v. New Orleans Mechanics' Society.* See No. 5.

8. Property owned by an individual, and actually used for school purposes, is exempt from State and municipal taxes. 27 A. 188, *Lefranc v. City.*

9. Property rented by the owner, and used as a school, is liable to taxation. 28 A. 403, *C. Armand and Husband v. F. E. Dumas.*

10. Further, for exemption from taxation, see TAXES, II. (b), 3).

3) Taxes on occupations and exhibitions, and of licenses.

1. The city has no right to assess a firm which has ceased to exist, and such assessment is not binding on the members thereof. 24 A. 261, *Von Phul et al. v. City.*

2. The revenue act of 1872, exempting insurance companies paying a license of one thousand dollars from all other taxation, is controlled by act No. 73 of the same session, which provides that those general provisions shall have no application to the city of New Orleans. 27 A. 656, *City of New Orleans v. Globe Mutual Life Insurance Company.* See LICENSE.

4) Taxes on front proprietors for pavements and banquettes.

1. Where a contractor brought suit for the price of a banquette or sidewalk made in front of defendant's property, pursuant to a contract entered into with the city authorities, and it was contended by defendant that the plaintiff should be non-suited, because he did not prove "that the petition for the paving of the sidewalk was signed by one-fourth of the property holders, and that the necessary publications, as required by the one hundred and nineteenth section of the act of 1856, were given;" *Held*: That in the absence of the proof to the contrary, the city authorities will be presumed to have complied with the law in that respect; *omnia præsumuntur solemniter esse acta.* 15 A. 376, *Weber v. Gottschalk.*

2. The certificate of a municipal surveyor may be contradicted by parol. See EVIDENCE, III. (d), No. 3.

3. The front owners are not bound by a contract with the city, for paving or shelling a street, if one-fourth of the front proprietors do not join in a memorial to have said street paved. 16 A. 326, *McGuinn v. Peri.* See No. 10.

4. A majority of the front proprietors, not opposing in proper time, the application for a banquette or side walk, of one-fourth of the front owners on the portion of street to be paved, after due publication, will be bound by the contract entered into, in accordance with said application. 26 A. 1, *Daniel v. City*, § 24, city charter, 1870.

5. The share to be paid by each front proprietor is not a tax. *Ib.*; 20 A. 497, *City, praying, etc.* See TAXES, II. (b), 2), B.

6. WYLY, J., *dissenting*: The contract could not be made with one having the sole right by patent, to construct said banquette, but should be adjudicated at public auction to the lowest bidder. 26 A. 1, *Daniel v. City.*

7. When middle ground intervenes between the two avenues of a street, property owners, on the south avenue, cannot be compelled to pay the expenses of shelling the north avenue. 26 A. 362, *Correjolles v. Succession L. Foucher*; 13 A. 320.

8. Under the charter of the city of Jefferson, a contract for paving, etc., must be adjudicated to the lowest bidder, therefore, a contract entered into, with one having sole authority, by patent right, to use a certain kind of pavement, is contrary to law, and the front proprietors cannot be made to contribute. 21 A. 143, *Burgess v. City of Jefferson et als.*

9. The act of 1856, revising the city charter, gives no privilege to secure the payment of the cost incurred in paving the street fronting the property. The act of 1840, p. 51, section 7, accorded a privilege which existed only two years. 23 A. 3, *Succession Rousseaux.*

10. The charter of Jefferson, of 1867, p. 111, applies to one-fourth of the front proprietors of the whole street, and no pavement can be made unless upon their application. 23 A. 306, *McKee v. Brown.* See sections 12, § 7, of 1867, p. 111; *ante*, Nos. 3, 4; *infra*, No. 13.

11. Where the account for paving was not definitely stated and recorded until a few days after the sale of the property, although the work, at the time, had been commenced, the property will be bound nevertheless. 17 A. 183, *New Orleans v. Ferrière.* See REGISTRY, II. (b).

12. The majority of the front proprietors having withdrawn their opposition to the paving of the street, the common council was authorized to pass the requisite resolution to adjudicate the contract to pave. 18 A. 710, *City, for use of Nicholson & Co. v. S. Stewart.*

13. One-fourth of the owners on the portion of the street to be paved, must make application to the council. 27 A. 170, *Ready v. City*; 23 A. 306; 26 A. 1.

14. The city is liable for the pavement constructed in front of the mint. See MINT, No. 1.

15. The presumption is, that persons signing for banquette, are owners. See EVIDENCE, III. (c), No. 6.

16. The usufructuary is liable for taxes and paving. See QUASI CONTRACTS, I. No. 6.

17. When sued by a city contractor for the construction of a banquette, the front proprietor, by denying generally that the formalities required by law to authorize the ordinance, have been fulfilled, will not defeat the presumption that they were. He must allege specifically what formalities are wanting. 30 A. 251, *Connell v. Hill.*

18. The city is liable for one-third of the cost of constructing a banquette, and the whole cost of the intersection of streets. 30 A. 254, *Connell v. Hill*; 1870, No. 7; 1871, No. 48.

19. Improving, grading streets, 1876, p. 116.

5) Opening and improving of streets.

A. In general.

1. Where, a contractor in laying the pavement, unnecessarily cuts down the trees in front of the property, put there for the gratification of the owner, he is liable for a reasonable compensation for their removal. 20 A. 504, *City v. Wire.*

2. The law requires that the signers of the petition to the council for the opening of a street, should possess a portion of the land on which the projected street is to be traced. Adjacent owners cannot require the opening of a street wholly through their neighbor's property. 16 A. 394, *New Orleans v. Shor.*

3. Acts 1876, p. 116.

B. Duties and powers of commissioners and mode of assessments; indemnification for property expropriated and constitutionality of the proceedings.

1. Section four, of the act of 1855, provides: "That estimating the value of the property to be expropriated, the basis of assessment shall be the true value

which the land possessed, before the contemplated improvement was proposed, and without deducting therefrom any amount of the benefit derived by the owner from the contemplated improvement, or work." The true intention of the legislature in the passage of this act was, that the contemplated improvement and the expropriation were to follow immediately upon each other; and, in this sense, the fourth section is not unconstitutional. 15 A. 481, *Vicksburg Railroad v. Calderwood*.

2. The city of New Orleans should be made to pay the value of the land taken by her for the purpose of opening a street. 28 A. 64, *Brabazon v. City of New Orleans*.

c. *Proceedings before the court, their discontinuance or reversal and damages consequent thereon; homologation of the report and its execution.*

1. In a proceeding for expropriation, although the owner be satisfied with the appraisement, the city has the right to complain. 20 A. 497, *City, praying for the opening of Casacalvo street*.

2. A jury of freeholders summoned to value property to be expropriated under compulsory process, have no right to assess their compensation; they are to be paid as special jurors. 20 A. 394, *City of New Orleans, praying, etc.*

3. The city of New Orleans having elected to pursue the mode of proceeding for the compulsory transfer of property for public use, is bound thereby, and the verdict of the jury fixing the price to be paid for the same is conclusive, where the proprietors do not complain nor desire to take advantage of the informalities. The city's remedy is by appeal. 20 A. 394, *City of New Orleans, praying, etc.*

(f) *City and municipal ordinances; their enactment, interpretation and general effect.*

See city charter of 1870; budget of 1877; 1877, E. S., p. 107.

(g) *Officers of the corporation, their powers, rights and disabilities; their election, suspension and amotion.*

1) In general; and of mayor, aldermen, administrators and recorders.

1. The street commissioner has no right to incur expenses for the purpose of cleaning the city, without special authority of the council. 15 A. 449, *Dugan v. New Orleans*.

2. The sanitary commission appointed by the board of health can claim no compensation from the city: 1st, because they acted as agents, and the law presumes, gratuitously; 2d, because if they were officers, this was a public trust without fees; 3d, because there was no agreement on the part of the city to pay. 16 A. 317, *Barton et als v. New Orleans*.

3. The mayor of New Orleans, when acting as a magistrate or justice of the peace, is invested by law with concurrent criminal jurisdiction with the several recorders of the city. 16 A. 395, *State ex rel v. Monroe, mayor*.

4. It is no part of a mayor's duty to enforce the judgment of a court. 27 A. 162, *Pontchartrain Railroad v. City of New Orleans*.

5. The office of recorder of the sixth district, created by an act of the legislature, which does not provide the mode of filling a vacancy occurring even by the expiration of the term of the officer who was to be elected by the city council, may be filled by the governor, under the general laws; and after the appointment it will be too late for the city council to go into an election. 25 A. 341, *State ex rel. Michel v. Campbell*.

6. HOWELL, J., *dissenting*: The law never contemplated any race or test of speed in electing or appointing officers, the governor had no authority to make the appointment, the city council alone was vested therewith. *Id.*

7. The administrator of commerce has no authority to allow a salaried officer of the city of New Orleans to retain money collected in his official capacity, in compensation of his salary, and to pay other creditors of the city. 27 A. 681, *City v. Finnerty*; 650, *Same v. Fassman*.

8. Duties of the controller. See MANDAMUS, I. (b), No. 1.

9. Duties of the mayor. See MANDAMUS, I. (b), No. 2.
10. Duties of the treasurer. See *Ib.*, Nos. 3, 4, 5, 25.
11. Duties of the auditing officers. *Ib.*, No. 14.
12. The recorder who has been elected and qualified, but who has not attained the age required by the charter, is not competent to hold the office. See OFFICE AND OFFICER, No. 7.
13. A *quo warranto* may be sued out to test the right of the officer to his office. See QUO WARRANTO, No. 2.
14. A mandamus cannot issue against the city for salaries of its officers. See MANDAMUS, I. (b), No. 53.
15. The administrator of commerce cannot be compelled to close the private markets. See MARKET, No. 12.
16. Election of mayor, etc., 1870, E. S., p. 1; municipal police courts, 1873, p. 170; 1874, p. 119; recorders' courts, 1877, E. S., p. 199; council to elect all officers except mayor and administrators, 1877, p. 112.

2) Master and wardens of the port; branch pilots and harbor masters.

1. The harbor master and city of New Orleans, are not responsible for the loss of a flatboat loaded with coal, by reason of the want of skill on the part of the crew. 18 A. 669, *Smith v. Ivey and City of New Orleans*.
2. The legislature has the right to designate by whom the hatches of sea-going vessels shall be examined, and such person has the right to enjoin any other who may pretend to exercise this right to his prejudice. 26 A. 107, *Master and Wardens v. Foster*. See No. 3.
3. A State act, giving to the master and port wardens an exclusive right to survey damaged goods, is a monopoly, and is unconstitutional, in that it abridges "the privileges or immunities of citizens of the United States." Such an act which fixes a charge, if the survey is refused, is a clog upon, and a blow to commerce, which usurps the authority of the United States, and is unconstitutional. 94 U. S. (Otto's), 246, *Foster v. Master and Port Wardens of New Orleans*; act No. 68, approved March 6, 1877; 6 Wall. 36; 6 L. 390; 16 Wall. 79; 18 Wall. 129, *Bartmeyer v. Iowa*.
4. Harbor master's fees, 1877, E. S., pp. 4, 104; warden's charges, 1877, E. S., p. 4; 1869, p. 67; 1868, p. 22.

3) Surveyor.

1. The city surveyor is without authority to make a contract for city work, which will be binding on the city, without pursuing the formalities required by law. But if in the specifications of a proposed contract, submitted to public adjudication by publication in the newspaper, something has been inadvertently omitted which was absolutely necessary to the useful and proper completion of the work, the surveyor's duty would be to require the contractor to perform such necessary incident of a good job, before delivering a certificate. 15 A. 667, *White v. New Orleans*.
2. The presumption of correctness of the surveyor's certificate may be rebutted. 23 A. 30, *Rooney v. May*.
3. The city's acceptance of paving, for which it was authorized to contract, is *prima facie* evidence of its completion and mode of execution against the front proprietor. 17 A. 183, *New Orleans v. Ferrière*; 185, *New Orleans v. Halpin*; 15 A. 376; 14 A. 297.
4. The contract entered into in December, 1865, between the city and Nicholson & Co., to construct a railroad to connect the depot of the Pontchartrain railroad with that of the N. O. J. & G. N. R. R., was made prior to the military order of 9th February, 1866, and was not affected thereby. The city ratified the contract and transfer by Nicholson & Co., to the St. Charles Street Railroad Company, expressly, and also by receiving the stipulated bonus on each passenger, and the company has not abandoned the contract because the injunction issued by a property holder, on Royal street, was kept in force from 1866 to 1872, against the will of said company. The city was without authority to sell the same rights to others, and when called upon,

the city surveyor was bound to furnish the lines and levels to the St. Charles Street Railroad Company. 25 A. 357, *State ex rel. v. Cockrem*.

5. The surveyor who discovers certain property of the city, outside of the records of his office, is entitled to the reward offered. See OFFICE AND OFFICER, No. 6.

6. See also PUBLIC LANDS, III. (d).

4) Recorder of births and deaths.

See Acts 1870, E. S., p. 57; index bound, 1870, E. S., p. 107; this office has been transferred to the board of health. Acts 1877, E. S., p. 117.

5) Treasurer, administrator of finance and attorneys.

1. The treasurer cannot appeal from a judgment against him as such, without giving bond. 21 A. 177, *State ex rel. George v. Mount, city treasurer*.

2. A mandamus cannot be issued against the auditing officers of the city of New Orleans, to compel the payment of money directly or indirectly, in accordance with act No. 5 of 1870, E. S. 23 A. 791, *State ex rel. De Monasterio v. Shaw, administrator*.

3. The assistant city attorney, previous to the charter of 1870, was entitled to commissions only on the taxes collected. 28 A. 456, *Heistand v. City of New Orleans*.

4. The city attorney is not entitled to the ten per cent. on the judgment homologating the assessment rolls for the draining tax. 28 A. 158, *Lacey v. R. Waples and City*.

5. MORGAN, J., *dissenting*: The proceedings were carried on under the direction of the city attorney, by his subordinate, the assistant city attorney, and the ten per cent. accrued to him. *Ib.*

6. Where there is no vacancy in the office of the city attorney, but his term of office has expired, the governor cannot appoint; the city council must elect his successor. 27 A. 179, *State ex rel. Attorney General v. B. F. Jonas*.

7. An attorney at law is entitled to commissions on a judgment obtained by him, although he be suspended by an appointment of another attorney, and the amount of the judgment collected by his successor. 15 A. 7, *Commandeur v. City of Carrollton*.

8. The city attorney, who obtained judgment for taxes, is entitled to receive the five per cent. from the sheriff. 18 A. 668, *Bright v. Hewes*.

9. The city attorney, upon whom the military assigned the duties of the assistant city attorney, and his compensation, is entitled thereto. 18 A. 667, *Bright v. Hewes*. (See General Order No. 124, Department of the Gulf.)

10. The city attorney must be elected biennially. The temporary organization of the city, in April, 1870, cannot be computed as the time of the regular election by the council, which must take place on the third Monday in November, or as soon thereafter as practicable. 27 A. 179, *State ex rel. Attorney General v. Jonas*.

11. For city attorney and assistant, see ATTORNEYS, III.

NEW ORLEANS, MOBILE AND CHATTANOOGA RAILROAD COMPANY.

1. The bonds issued to the New Orleans Mobile and Chattanooga Railroad Company, being issued under a conditional agreement, as provided by act No. 26, of 1869, that the road should be constructed, and the condition not having happened, the bonds became null and should not be funded. 28 A. 249, *State ex rel. Citizens' Bank v. Funding Board*.

2. HOWELL, J., *concurring*: These were the bonds of the railroad company guaranteed by the State, and are not included in the funding act. *Ib.*

3. LUDELING, C. J., *dissenting*: The State is liable for these bonds and they should be funded. *Ib.*

4. Further, see CORPORATIONS, X. (aa).

NEW ORLEANS SANITARY AND FERTILIZING COMPANY.

Acts 1871, p. 16.

NEW TRIAL.

I. IN GENERAL.

II. OF THE APPLICATION; WHEN AND BY WHOM THE AFFIDAVIT MUST BE MADE.

III. OF THE GROUNDS; AND REQUISITES OF THE AFFIDAVIT.

- (a) *Matters relating to the jury.* (c) *Other matters.*
 (b) *Matters relating to the evidence.*

I. IN GENERAL.

1. On a rule for a new trial from a judgment of non-suit for plaintiff's non-appearance, evidence is admissible to prove that plaintiff's attorney was in the building, and in accordance with the custom of the court, should have been sent for. 19 A. 25, *Gernon v. Handlin*. See ATTORNEYS, II. (e).

2. After the granting of a new trial in general terms, the judge cannot sign the judgment as to one of the parties; an execution issued thereunder, will be quashed. 20 A. 555, *Converse, Harding & Co. v. Bloom, Kahn & Co.* See III. (b).

3. A new trial should be granted if the party discover new evidence, which he could not have obtained before, and make affidavit of the fact. C. P. 560, 561; 2 A. 225; 22 A. 524, *Robinson v. Howell*.

4. The right of a party to move for a new trial within three judicial days after the rendition of the judgment, is not affected by a premature signing of the judgment. 5 N. S. 224; 4 A. 561; 6 A. 251; 20 A. 168; 23 A. 110, *Succession Carraby*. See JUDGMENT, IV; *infra*, II. Nos. 2, 3.

5. The cause being remanded by the Supreme Court, to be tried on a distinct issue, no other can be entertained by the lower court. 23 A. 611, *Succession Arick*.

6. A new trial is the proper remedy for an improper verdict; an appeal might not be taken if the verdict be well founded. 24 A. 314, *Southworth v. City*; 25 A. 114, *Adams v. Webster*. See JURY, IV. (a).

7. It is as much the duty of the lower as of the Supreme Court, to see justice done between the parties, and whenever the verdict is contrary to the law and the evidence, a new trial should be granted. 25 A. 374, *Halliday v. Lanata*.

8. For appeals, see APPEAL, I. (b), 2), C.

II. OF THE APPLICATION; WHEN AND BY WHOM THE AFFIDAVIT MUST BE MADE.

1. A motion for a new trial may be made, after three days from the rendition of the judgment, if the same be not signed. 19 A. 376, *Citizens' Bank v. Bellocq, Noblom & Co.*

2. A judgment signed previous to three judicial days, does not bar the granting of a new trial ex-officio, by the judge, within the three days. 20 A. 168, *McWillie v. Perkins, Jr.* See I. No. 4.

4. The right to a new trial is not affected by a premature signing of the judgment. 23 A. 110, *Succession Carraby*. See No. 2; I. No. 4.

III. OF THE GROUNDS AND REQUISITES OF THE AFFIDAVIT.

(a) *Matters relating to the jury.*

1. Where a party, on the trial of a cause before the jury, is taken by surprise by the loss of evidence, his remedy is a continuance on a proper showing; he should not be permitted to take the chances of a verdict in his favor, and afterwards claim the benefit of a new trial. 15 A. 220, *McClure v. King*.

2. Where the misconduct of the jury is brought home to the judge, it is his duty to grant a new trial. A refusal thereof is official misconduct. 29 A. 134, *Hawkins v. New Orleans Printing and Publishing Company*. See PLEADING, II. (a), No. 17.

3. See JURY, IV.

(b) *Matters relating to the evidence.*

1. The affidavit for a new trial, on the ground of newly discovered evidence, should disclose the names of the witnesses, and what is expected to be proved by them. 16 A. 367, *Pack v. Chapman*.

2. A new trial will not be granted, if applied for, on the ground of newly discovered evidence, which would be inadmissible under the pleadings. 19 A. 491, *Devot & Co. v. Marx*.

3. Where plaintiff asked for a new trial, by reason of improper conduct of the jury, and the judge ruled out the evidence offered to prove these allegations, the case should be remanded, with instructions to receive such evidence. 26 A. 368, *Higgins v. Haley*.

4. When the proper affidavit is made, a new trial should be granted. See I. No. 3.

(c) *Other matters.*

1. Absence of counsel is not a ground for a new trial. See TRIAL, No. 4.

NORTH LOUISIANA AND TEXAS RAILROAD COMPANY.

To substitute stock for second mortgage bonds, to the State, 1873, p. 13.

NOTARY.

1. When a notary public ceases to be such, the law makes it the duty of the governor to designate the notary to whose custody his records shall be consigned; and where the notary certifies a copy from such records, the presumption is that they are lawfully in his possession. 18 A. 130, *Ledoux v. Jamison*.

2. The sureties of a notary are not liable for money deposited with the notary to enable him to erase mortgages. 18 A. 470, *Lescauzève v. Ducatel et als*.

3. The office of city notary is not a municipal office, not being created or recognized under the city charter, and the provisions of the act of 1868, No. 156 (intrusion act), cannot be invoked in a contest between two notaries for the position. 22 A. 15, *State ex rel. Andrew Hero, Jr. v. Wm. J. Castell*.

4. A notary who receives money from the purchaser, is bound to return the same to the vendor, in kind, and not by his check. If he deposits the money under his name, and the bank fails before payment, he is liable for the amount so received. 22 A. 605, *John T. Norris v. Andrew Hero, Jr. et al*.

5. A notary is an officer appointed by the governor, by and with the advice and consent of the senate, commissioned and sworn as such, and the city of New Orleans has no right to impose a license on them. 23 A. 710, *City v. Bienvenu*.

6. The law only allows three dollars for affixing and removing seals. 25 A. 647, *Succession Caballero*. See SUCCESSION, VIII. (f), 8), A.

7. The law provides for fees of inventories, and notaries should charge no more. *Ib*.

8. A notary public who violates section 2519, R. S., may be fined, and at the same time suspended from office, under section 2505, R. S. 28 A. 26, *State v. Laresche*.

9. It is no part of the duty of a notary to receive moneys or checks from one party to deliver to another; his surety is not liable therefor. 20 A. 78, *Monrose v. Brocard*.

10. The sureties on the official bond of a notary public, are liable for any loss caused by him affixing his, notarial paraph to a mortgage note which he knew to be forged. 29 A. 82, *Rochereau v. Jones*.

11. No buggy hire can be allowed to a notary for taking an inventory. He shall charge fifty cents per hour, not exceeding twelve hours per day, for taking inventories out of his office and twenty-cents per hundred words for the *proces verbal*, with twenty-five cents for the seal and certificate, and twenty-five cents for swearing each appraiser. 29 A. 747, *Succession Harris*; 12 L. 73.

12. Acts 1877, No. 7, authorizes notaries to administer oaths.

NOTICE.

1. For notice to produce in evidence, see EVIDENCE, IX. (b); XXV. (a).
2. For notice on garnishees, see ATTACHMENT, X. (b); XVIII. (a); (d). 2); 6); XIX. (b); (c). EXECUTION, V. (a), 3), D. § 2.
3. For notice of judgment, see JUDGMENT, VII.
4. In hypothecary actions and executory proceedings, see EXECUTORY PROCESS, III. (b). MORTGAGE, VI. (c), 6).
5. In insolvent and mortuary proceedings, see INSOLVENCY, III. (b); VII. X. (b); XI. (b); XII. (b). JUDGMENT, XV. (c), 2). SUCCESSION, VII. (a), 2); VIII. (e), 2), c; (f), 3).
6. In matters relating to the execution of judgment, see EXECUTION, II. V. (a), 5); (c); (d), 3); 11). ARREST, IV. (b).
7. In proceedings by arbitrators and referees, see ARBITRATION, III. EXPERTS AND AUDITORS, II.
8. For other matters, see CITATION, IV. CONTINUANCE, IV. CRIMINAL LAW, V. (d), 2); XIII. (e), 3).
9. For notice in contracts, in matters relating to bills and notes, see BILLS AND NOTES, IV. (d), 3); (e), 2); VII. VIII. (c); (d).
10. In contracts of lease, see LEASE, I. (a); (c), 1); II. (a), 3).
11. In the assignment of incorporeal rights, see SALE, VIII. (b).
12. For purchasers or mortgagees, with notice of defects of title, and for notice in other matters of sale and registry, see SALE, I. (c); III. (b), 4). B; IV. (b), 3), c.; 4); V. MORTGAGE, VI. (c), 3). REGISTRY, II. (a), 3); (e). 3); III. (a), 1), d.
13. In contracts of insurance, see INSURANCE, I (b); (d); (e); (g).
14. In contracts of mandate and partnership, see MANDATE, II. (a). PARTNERSHIP, III. (a); IV. (d).
15. In other contracts, see PLEDGE, I. (b). SHIPPING, X. (c), 3); 5); 6). SURETYSHIP, II. (a), 2).
16. See, for other matters relating to notice, ROADS AND LEVEES, III. (a); (b), 1); 2), c.
17. The knowledge of one partner is that of the others. See PARTNERSHIP, III. (a), No. 4.
18. One who knew of a fraudulent erasure of a mortgage, cannot avail himself thereof. See REGISTRY, II. (e), 1), No. 1.
19. Notice to a resident must be given by process, and a non-resident, by letter from the notary. See RESPITE, No. 4.
20. If the tax payer had notice of the opening of the assessment rolls, it is not necessary that the same be published in the official journal. See TAXES, III. (b), Nos. 12, 13.

NOVATION.

I. IN GENERAL.

II. OF THE SUBSTITUTION OF A NEW OBLIGATION.

III. OF THE SUBSTITUTION OF A NEW CREDITOR.

IV. OF THE SUBSTITUTION OF A NEW DEBTOR.

I. IN GENERAL.

1. A debt is not novated because a creditor accepts a note from the debtor. Novation is never presumed. 23 A. 48, *Austin, Tharp & Co. v. Da Rocha, Becker & Co.*

2. A written promise to pay, made after prescription has accrued, creates a new debt, but does not renew the mortgage, so far at least as third persons are concerned. 23 A. 456, *Succession Kugler*; C. C., 3285.

3. Novation is not presumed, it must appear clearly from the terms of the agreement. 24 A. 293, *Levy v. Police Jury Pointe Coupée.*

4. One who accepts from his late tutor, a note for the amount ascertained to be due to him, does not change the character of the debt, nor extinguish his legal mortgage. C. C. 2190. 25 A. 529, *Neilson v. Neilson.*

5. A conditional obligation, not complied with, does not create novation. 16 P. 169, *Hyde v. Booraem*.

6. The judgment is not satisfied, nor the debt novated by a sale on a twelve months bond. See EXECUTION, V. (d), 6), B. No. 4.

II. OF THE SUBSTITUTION OF A NEW OBLIGATION.

1. Where a bill of exchange was given for a sum of money loaned, and it was agreed that upon the borrower's executing a mortgage to secure the payment of the sum, the bill of exchange should be given up; *Held*: That although the mortgage was objected to when presented, yet the fact that it was retained and suit instituted on it, would act as a waiver of the objection, and all recourse on the bill of exchange will be lost. 15 A. 428, *Johnson v. Watt*.

2. This exception is not personal to the principal debtor. *Ib*.

3. An extension of time for the payment of the notes, by a contract in writing is not a novation. 22 A. 184, *Frank v. Hardee*.

4. A note given in renewal of one secured by vendor's privilege, is not a novation of the debt. 24 A. 193, *Aillett v. Woods*.

5. By exchanging notes which correspond with a detailed statement recorded by a builder to secure his lien for new notes secured by an act of mortgage, in which a stipulation is made that no novation is intended, novation takes place nevertheless. 24 A. 612, *Marmillon v. Archinard*.

6. The giving of a note for the balance due to a builder, does not novate his debt. 29 A. 752, *Jordan & Co. v. Anderson*.

7. The giving of new notes with the agreement that they should not operate a novation, nor affect the validity of the mortgage, given to secure the old notes, do not secure the new notes by mortgage. 18 A. 697, *Citizens' Bank v. Bailey*. See No. 13.

8. Unless it is expressly agreed that the draft is given in payment, it does not operate a novation of the debt. 15 A. 49, *Graham v. Sykes*.

9. Plaintiff having agreed to accept a draft, which, *when paid*, would extinguish a note, or rent, may sue on the note, or for his rent, if the draft be not paid. 28 A. 617, *Tucker v. Charpentier*; *Ib.*, 863, *Phifer v. Maxwell*.

10. Novation takes place when a debtor, in failing circumstances, offers to his creditors new notes on a reduced indebtedness, and the old ones are returned to the drawers. A failure to pay the new notes, does not give rise to a cause of action on the old notes. 28 A. 679, *Gardner & Co. v. Levasseur & Co.*

11. Where a pilot held an account for wages against a steamboat, and took the note of the owner for the amount, signed by another person as security, due in thirty days, with interest at a rate higher than the account bore, and receipted the account as paid in full by the note; *Held*: That these facts, with other circumstances, showed a purpose on the part of the payee to take the note in extinguishment of his debt, and that his lien upon the steamboat was lost. 1 Woods, 192, *Risher v. Frolic*.

12. A consent decree made in a case brought to enjoin the enforcement of a mortgage by which the mortgage was recognized, the rate of interest increased, and the time for the payment of the debt secured thereby, extended, and which declared that "this decree is not to operate a novation of the original mortgage, or in any manner affect the validity of the same," did not have the effect of extinguishing the mortgage, nor was the mortgage merged in the decree. 2 Woods, 103, *Hunt v. Innis*.

13. The modification of a mortgage does not extinguish it, nor is its lien affected by the substitution of a new note or bond for the original note or bond secured by it. 2 Woods, 206, *Ames, trustee v. The New Orleans, Mobile and Texas Railroad Company*. See No. 7.

14. Novation is not presumed, but where from the intention of the parties it appears that a partnership creditor accepted in the place of his debt a new note, with indorsers and a mortgage, the partnership debt will be declared extinguished. 29 A. 586, *Meyer, Weis & Co. v. Atkins*.

15. A twelve months bond, which remains unpaid, does not novate the judgment. See JUDGMENT, XVI. No. 6.

16. Drafts taken in payment of the judgment, if discounted, create novation. See JUDGMENT, XVI. No. 7.

III. OF THE SUBSTITUTION OF A NEW CREDITOR.

1. There is novation when the creditor accepts the note of a third person, and signs a receipt in full to his original debtor; and moreover receives property from the subsequent debtor, to satisfy his claim. 26 A. 345, *McCan v. Fulkerson et als.*

2. An agreement to take the place of a creditor upon condition that the securities should be continued as they then existed, does not cancel the mortgage notes held in pledge, and transferred to the new creditor. 27 A. 647. *Mechanics' & Traders' Insurance Co. v. Powell.*

IV. OF THE SUBSTITUTION OF A NEW DEBTOR.

1. The acceptance of the husband's note for advances made by the father to his daughter, novates the debt, which cannot then be collated. 25 A. 183. *Succession Landry.*

2. Where the individual notes of the liquidating partner, who had assumed all the liabilities of the firm, are accepted in full settlement of the partnership debt, the debt is novated, and the retiring partner discharged. 19 A. 201. *Hoopes & Townsend v. McCan*; 4 A. 543; 2 A. 174; 16 L. 140; 2 L. 111.

3. The husband who gives new notes, after the dissolution of the community, by the death of his wife, does not novate the debt. See MARRIAGE, XIII. (a). No. 6.

NUISANCE.

1. See NEW ORLEANS, II. (d), 1), No. 7; 2); 3). SERVITUDES, II. (a), 1); 2), A. THINGS, I. (b).

2. Offal, garbage, etc., in the parishes of Orleans, Jefferson and St. Bernard, how disposed of, 1877, E. S., p. 19.

NULLITY.

I. IN GENERAL.

II. OF ABSOLUTE NULLITIES.

III. OF RELATIVE NULLITIES.

I. IN GENERAL.

1. To the action of nullity, none can be parties, except those who were parties to the judgment sought to be annulled. 15 A. 273, *Winn v. Dickson.* See JUDGMENT, XI.

2. Where a party sues to annul a judgment of partition, on the ground of error in the description, and the owner of the land has suffered no injury, and no fraud or ill practice is shown, but the error arose from the fault of the party suing; *Held*: That such error in description is not a sufficient cause of nullity. *Id.*

3. In order to annul a judgment, a direct action of nullity must be instituted in the same court which rendered the judgment, but when an action is made the basis of another action, in another court, the defendant may plead the nullity arising from want of proper parties. 15 A. 279, *Clark v. Hebert.*

4. All the parties interested in the judgment must be cited, in an action to annul it. 23 A. 569, *Bell v. Silbernagle*; 26 A. 156, *Willis v. Peet.*

5. An appeal dismissed for want of signature of the judgment, does not interrupt prescription of the action of nullity. 22 A. 348, *Weber v. Frost.*

6. An action for the nullity of a judgment, on the ground of fraud and false evidence, should be brought within one year from the discovery of the fraud, and this prescription runs, notwithstanding the pendency, a rule for a new trial taken after the judgment is signed. 24 A. 260, *Peyroux v. Deblanc*; 28 A. 625, *Jacobs v. Frère.*

7. Allegations concerning the insufficiency of evidence on which the judgment is based, are matters for appeal and not actions of nullity. 22 A. 371, *Abat v. Wilbur*.

8. A judgment can be annulled for vices of form only in the cases specified in article 606, C. P.: when the defendant could not stand in judgment; where he has not been cited, and where the court was without jurisdiction *ratione materiae*. 23 A. 147, *Blanck v. Speckman*.

9. As to the causes of nullity mentioned in article 607, they are merely illustrative and not exclusive. *Ib.*

10. A judgment may be annulled upon equitable grounds, in case an appeal would have afforded no remedy and a real injury would be sustained, and the party had not been guilty of *laches*, and a just defense was alleged and proved. 1 R. 523; 3 A. 346; 11 A. 33; 23 A. 147.

11. The plaintiff cannot make his own dereliction of duty the ground for a nullity of judgment. 23 A. 167, *Osturn v. Rogers*.

12. The action is not lost against a judgment rendered by a court without jurisdiction *ratione materiae*, although the appeal has been dismissed by the Supreme Court for want of jurisdiction. *Res judicata* cannot be maintained against the action. 23 A. 209, *Price v. Cummings*.

13. A direct action must be brought to cancel a judgment confessed by the wife. 23 A. 599, *Bell v. Frankee & Dannell*.

14. *Ligatoris absentia Dei presentia refleatur* applies where a judgment has been obtained in the absence of defendant on a note which has been partly paid on its face, although the credit was erased and the balance remitted. In such a case the action of nullity will lie. C. P. 607; 24 A. 48, *Noyes v. Loeb*.

15. The members of a firm against which the city of New Orleans has made an assessment and obtained a judgment, although it had ceased to exist prior to such assessment, have the right to have such judgment annulled. 24 A. 261, *Von Phul v. City*.

16. An action in nullity is not barred because the defendant suffered the judgment to be executed. 24 A. 332, *Widow de St. Romes v. Carondelet Canal, etc.*

17. The testimony of plaintiff that no citation has been served on her, and that of her two sons of a negative character, will not overcome the return on the citation, showing personal service. *Ib.*

18. The creditors of the husband can only bring their action to annul the judgment obtained by his wife against him within the year from its rendition. 24 A. 522, *Powell v. O'Neil*; 28 A. 481, *Boulon v. Waggaman*.

19. Where the clerk failed to post the attorney's name for the defense, and judgment is thereupon rendered in favor of plaintiff, and no more evidence can be brought in an action to annul, than was offered on the trial, the remedy is by appeal, and not by action of nullity. 27 A. 36, *Esterbrook & Gallier v. Gauche*.

20. Defenses which were available before judgment, furnish no grounds for an action of nullity. 28 A. 578, *Robichaud, etc v. Nelson et al.*

21. A judgment attacked in nullity cannot be pleaded *res judicata* as to the action. See JUDGMENT, XV. (a), 1).

22. For nullity of judgment, see JUDGMENT, XI. (a).

23. Nullities of judgment confirmed without default. See JUDGMENT, IX. Nos. 4, 5, 8, 9.

24. Nullities as to nature of the defense. See *ib.*, XI. (a), No. 11.

25. Nullity of judgment homologating family meeting when the members were not unanimous. See MINORS, VI. No. 2.

26. Want of description of the thing, nullifies the mortgage. See MORTGAGE, III. (d), No. 3.

27. Who must be made defendant in a suit of nullity of contract. See OBLIGATIONS, VII. (b), 2), B. § 2.

28. All parties interested may set up the nullity of the donation made to the donor's concubine. See DONATIONS, III. (a), No. 2.

29. Plaintiff cannot sue for the nullity of the sale made under his execution. See PLEADING, V. (a), 3), B. No. 1.

30. For prescription of actions in nullity, see PRESCRIPTION, III. (g), 4).
31. An advertisement of sale of succession property signed by the clerk, and an error in the time of making the sale, will vitiate it. See SUCCESSION, VIII. (e), 3), No. 3.
32. When the order of sale is for terms of credit, and the property is sold for cash, the sale is void. See SUCCESSION, VIII. (e), 4), No. 2.
33. A tax on every four hundred bales of cotton raised, is unconstitutional. See POLICE JURY, No. 7.
34. For nullity of assessment, see TAXES, III. (a), Nos. 6, 7; (b).
35. A sale for taxes, under an assessment, not in the name of the true owner, is null. See TAXES, III. (d), 2), Nos. 7, 15, 16.

II. OF ABSOLUTE NULLITIES.

1. Proceedings under a forthcoming bond the conditions of which are executed, are null. See EXECUTION, (a), 7), No. 1.
2. A fraudulent device by which the vendor and purchaser obtains judgments of eviction, the one against the other, will be of no effect against the enforcement of a twelve months bond. See EXECUTION, V. (d), 6), A. No. 2.
3. When the court is without jurisdiction, the judgment is null. See COURTS, II. (d), 1), No. 7.
4. A judgment for slaves is null. See JUDGMENT XI. (a), No. 4; (b), No. 7. REGISTRY, II. (e), 2), A. No. 2.
5. A judgment against an ordinary partnership is absolutely null as to the partner not cited. See JUDGMENT, XI. (a), No. 10.
6. A judgment against an unrepresented dead person, is null. See JUDGMENT, No. 20.
7. So is one, homologating an account before legal delays. JUDGMENT, XV. (c), 2), No. 8.
8. Marriages between whites and blacks, are absolutely null. See MARRIAGE, I. (a), No. 1.
9. A second marriage of persons legally married before, is null. *Id.* No. 2.
10. The *dation en paiement* made by the wife, of community property, is null. See MARRIAGE, XIII. (b), 1), No. 1.
11. A simulation by which the character of dotal property is to be divested, is null. See MARRIAGE, XIII. (b), 2), No. 1.
12. So is a transfer by the husband to the wife in satisfaction of a judgment revived after ten years. See MARRIAGE, XIII. (b), 2), No. 11.
13. A judgment which reserves the right to sue the minor hereafter for the difference between the debt and his revenues, is null. See MINORS, III. (b), No. 3.
14. A compromise made by the tutor without the advice of a family meeting, may be treated as null by the minor. See MINORS, III. (d), No. 2.
15. The sale of minors' property for Confederate notes, is null. See MINORS, III. (g), 4), No. 1.
16. A judgment homologating a monition, rendered in chambers, is null. See MONITION, No. 3.
17. A judgment rendered without citation is an absolute nullity. 24 A. 253, *Walworth v. Stevenson*.
18. A judgment confessed by a defendant residing in another parish, is null. 24 A. 277, *Bush & Goode v. Chapman*; but see COURTS, II. (g) 1), Nos. 2, 3; (a), No. 23.
19. The judgment rendered by a court without jurisdiction, *ratione materiae*, is null. 27 A. 630, *Sorrels v Stamper*.
20. Contracts between the belligerents were absolutely null. See OBLIGATIONS, III. (a), Nos. 2, 4, *et seq*; (c), 2), A. No. 2.
21. Absolute nullities cannot be ratified. See OBLIGATIONS, IV.
22. For simulations, see OBLIGATIONS, VII. (b), 2), A. No. 1. *et seq*.
23. A sale under execution pending a revocatory action, is null. See OBLIGATIONS, VII. (b), 2), B. § 1, No. 11.
24. A judgment against a dead man, is null. See PLEADING, I. (d), No. 6.

25. A commission issued by the governor, before the returns published by the returning board, is null. See RETURNING BOARD, No. 1.

26. A contract between husband and wife, worth more than the judgment, is null. See SALE, I. (b), No. 5.

27. A re-transfer of property by the wife to the husband is null. See SALE, I. (b), No. 6.

28. When a sale by the United States revenue collector, is null, see TAXES, III. (d), 2), No. 10.

29. A judgment for municipal taxes against one not the owner, and a sale thereunder is null. See TAXES, III. (d), 2), No. 11.

III. OF RELATIVE NULLITIES.

1. A sale for less than the first mortgage is not rendered valid by the lapse of five years. See EXECUTION, V. (d), 3), No. 1; and is null as to the first mortgagee. See PETITORY AND POSSESSORY ACTIONS, II. (c), 1), No. 5.

2. See JUDGMENTS, I. Nos. 1, 2, 3, 4, 10; XI; XV. (c), 1), Nos. 2, 3, 4, 5, 11; (e), No. 1.

3. A judgment of separation, rendered on the confession of the husband, is not absolutely null. See MARRIAGE, III. No. 3.

4. Nor is a marriage contract by a minor. See MARRIAGE, V. No. 4.

5. The adjudication of the husband's separate property to the widow, cannot be attacked collaterally. See MINORS, III. (g), 5).

6. A donation by an emancipated minor, is a relative nullity. See MINORS, IV. No. 2. DONATIONS, I. (b).

7. A sale by a minor is null, when, etc., see MINORS, IV. No. 1.

8. The nullity of a contract, resulting from minority, is only relative. See OBLIGATIONS, III. (a), No. 13.

9. Fraudulent, but real contracts, can only be set aside by a direct action. See OBLIGATIONS, VII. (b), 2), A. Nos. 7 *et seq.*

10. The purchase by an administrator of an heir's share, if nullity it be, is only a relative one. See SUCCESSION, VIII. (e), 6), No. 4.

11. A probate sale cannot be treated as an absolute nullity. See SUCCESSION, VIII. (e), 7), D. No. 7.

NUNC PRO TUNC.

See MINUTES. JUDGMENT, XV. (e), No. 6.

OBLIGATIONS.

I. SOURCES OF OBLIGATIONS.

II. OF THE GENERAL NATURE OF CONTRACTS.

III. OF THE REQUISITES TO THE VALIDITY OF CONTRACTS.

(a) *Capacity to contract.*

(b) *Consent.*

1) In general.

2) Evidence and presumption of consent; completion of the contract, and *locus penitentiae*.

3) Error and fraud.

4) Lesion and violence.

(c) *Object and cause.*

1) In general.

2) Their legality.

A. In general.

B. Contracts in restraint of trade or fraud of the revenue.

C. Contracts touching legislative proceedings and the performance of duty by public officers.

D. Contracts touching judicial proceedings; and those tainted with fraud or usury.

IV. OF THE RATIFICATION OF CONTRACTS.

V. OF THE INTERPRETATION OF CONTRACTS.

VI. OF THE LAWS GOVERNING CONTRACTS AND THEIR CONFLICTS.

(a) *Laws of the same State.*

(b) *Laws of different States.*

1) In general.

2) Assignments of personal property for the benefit of third persons; and remedial and accessory rights.

3) Contracts relative to immovable property.

VII. OF THE EFFECTS OF CONTRACTS AND THEIR OBLIGATIONS.

(a) *As between the parties.*

- 1) In general.
- 2) Default as a condition precedent to recovery upon contracts; their rescission, or damages.
 - A. *In general.*
 - B. *When a default is unnecessary*
- 3) Mode of putting in default.
- 4) Form of the contract; extent of the obligation; and what is a performance.
- 5) In execution of conventional obligations.
 - A. *In general.*
 - B. *Measure of damages and interest.*
 - § 1 Pecuniary obligations.
 - § 2 Other obligations.

(b) *As to third persons.*

- 1) In general; and stipulations *pour autrui*.
- 2) Acts and contracts, simulated or in fraud of creditors; revocatory action and action en declaration de simulation.
 - A. *In general; distinction between the two actions; and when the revocatory action must be employed.*
 - B. *Right to sue; acts or contracts that may be declared fraudulent or simulated; the pleadings and parties.*
 - § 1 In general.

§ 2 Prerequisites to the action; who must be parties defendant; and defenses they may plead.

§ 3 Who may sue; and acts done or contracts made before the creditors' claim accrued.

§ 4 Payments; and contracts with creditors giving them a preference or security.

§ 5 Contracts making a partial distribution among creditors.

§ 6 Onerous contracts with persons not creditors.

§ 7 Debtors' renunciation of his rights.

c. *Evidence.*

§ 1 In general.

§ 2 The admissibility; proof of debtor's insolvency and creditor's claim.

§ 3 Presumption of fraud or simulation and burden of proof in relation thereto.

d. *Judgment and its effect.*

VIII. OF THE DIFFERENT KINDS OF OBLIGATIONS.

- | | |
|---|---|
| (a) <i>Personal, heritable, and real obligations.</i> | (e) <i>Obligations several, joint and in solido.</i> |
| (b) <i>Simple and conditional obligations and resolutive condition.</i> | (f) <i>Divisible and indivisible obligations.</i> |
| (c) <i>Obligations with a term.</i> | (g) <i>Principal and accessory obligations and penal clauses.</i> |

IX. OF THE EXTINCTION OF OBLIGATIONS.

I. OF THE SOURCES OF OBLIGATIONS.

1. The Roman law defines obligations in a metaphorical sense as a tie or duty imposed by law or equity, "*vinculum juris*." All legal obligations are derived from law; they are created by the law, which constrains us to do what it commands, not to do what it prohibits, and to suffer the execution of what it permits.

2. See CONTRACTS. QUASI CONTRACTS AND QUASI OFFENSES. PARENT AND CHILD. SERVITUDES. SUCCESSION. ACCESSION. PRESCRIPTION. OCCUPANCY. TRADITION.

3. A natural obligation exists to pay taxes, see QUASI CONTRACTS, II. Nos. 4, 5.

II. OF THE GENERAL NATURE OF CONTRACTS.

1. The obligation of a deputy sheriff to his principal, arises *ex contractu* and not *ex delicto*. 19 A. 458, *Simpson v. Lewis*.

2. If not contrary to the law itself, the contract is the law between the parties. 29 A. 156, *Larguier v. White*.

3. An act of the legislature, which provides for the issue of bonds by a municipal corporation, and prescribes the manner in which the tax to pay the interest thereon should be levied, and enacts safe guards to secure its levy and collection, on the faith of which legislation the bonds were sold, constitutes a contract with the bondholder, the substantial performance of which he is entitled to exact. 2 Woods, 108, *Maenhaut v. New Orleans*. See INJUNCTION, II. (a), No. 9.

III. OF THE REQUISITES TO THE VALIDITY OF CONTRACTS.

(a) Capacity to contract.

1. The engagements and stipulations made in favor of a slave are not absolutely null and void, and cannot be utterly disregarded and treated as pure and simple nullities, by all mankind, but only by such persons as have an adverse interest. 15 A. 547, *Muaillon v. Lynch*.

2. Public war, duly declared or recognized as such by the law making power, imports a prohibition by the sovereign, to the subjects or citizens, of all commercial intercourse and correspondence with citizens or persons domiciled in the enemy's country; and neutrals, or even loyal citizens, who remain in the enemy's country after the declaration of war, have impressed upon them so much of the character of enemies, that trading with them becomes illegal, and all property so acquired becomes liable to confiscation. 5 Wall. 377, *The William Bagley*. See WAR. *Infra*, No. 4, et seq.; III. (c), 2), A. Nos. 2, 10.

3. Corporations not yet in existence cannot incur debts. 26 A. 389, *Marchand v. Loan and Pledge Association*. See CORPORATIONS, II. (a), No. 4.

4. Trade with the enemy is illegal and gives no right of action. 18 A. 632, *Marchand v. Coyle*. See No. 2.

5. A sale of merchandise by a party residing within the Federal lines, to one residing in the Confederate lines, is contrary to the prohibitory law of congress of 1861, July 13th, section 5, and cannot be enforced. 2 Blackstone, 635; 19 A. 328; 20 A. 241; 22 A. 593, *Webster & McKenna v. Mahoney*.

6. Contracts entered into during the late war, between parties, the one residing in the military lines of the United States, and the other in the Confederate lines, are absolutely null. 21 A. 641, *Noblom v. Milborne*; 647, *Noblom v. Swords*; 211, *McWilliams v. Bryan & Irvine*.

7. Parties residing on the opposite side of the military lines during the war, were prohibited from carrying on trade with each other, and all such contracts are null and void, unless such trading was specially authorized by the secretary of the treasury of the United States. 22 A. 67, *Beckwith v. Peirce*.

8. No recovery can be had against a party who chartered a boat to carry on trade with two parts of the country, held one by the United States, and the other by the Confederate authorities, although a permit was had from the military authorities in command. The president of the United States was the only competent authority to give such a permit. 3 Wallace, 617, 531; 5 Wallace, 631; 22 A. 217, *Mansfield's Assignee et als. v. McLearn & Church*.

9. A contract made with Frenchmen during the war, was not illegal. 19 A. 491, *Devot & Co. v. Marx*.

10. There is no law which prevented a French citizen from securing by mortgage on his plantation, a debt contracted in 1862, although the mortgagor and mortgagee resided within, the one of the Federal, and the other of the Confederate lines. 25 A. 514, *Bancker v. Durand, Jr.*

11. A member of the board of trustees, may validly contract with the board. 28 A. 813, *Chaffe v. Trustees Minden Female College*; 13 L. 527.

12. Where the mortgagee and purchaser was not intimately acquainted with his vendor, and could not have known that he was insane, and such insanity was not notorious, the sale will be maintained. 26 A. 466, *Raw v. Katz*.

13. The nullity declared by article (355) Civil Code is not absolute, and can be urged only by the minor, and not by the mortgagee, who may be sued by the minor become of age. 19 A. 80, *Frost v. McLeod*; 9 L. 305; 10 L. 268; 1 A. 35.

14. The want of authorization of the wife can only be set up, by the husband or wife or their heirs. 27 A. 120, *Cronan v. Cochran*; 461, *Jumonville v. Sharp*; C. C. 133; 5 A. 369; 9 A. 216; 10 A. 433; 17 A. 204; 6 A. 360; 16 A. 448, *Kennedy v. Bossière*.

15. The signature of the husband, to the note and mortgage, is sufficient to authorize the wife to indorse the note. 21 A. 397, *City National Bank v. Barrow*.

16. Defendant, being a married woman, to the knowledge of the broker, who negotiated the lease, she was without authority to make the contract. 27 A. 456, *Stewart v. Killmartin & Davis*.

17. Where the husband has left the State for more than two years, the wife, who still resides here, has no domicile, and may, to enter into any contract, other than borrowing money, obtain the authority of the judge most convenient to her. 29 A. 245, *Blake v. Nelson*.

18. EGAN and DEBLANC, JJ., *dissenting*: The judge of the last domicile of the husband, alone could give such authority. *Ib.*; 12 L. 70.

19. For authorization of the husband to his wife, and ratification of her acts, see BANKRUPTCY, III. (a), No. 11.

20. For authorization of the wife by the judge, see MARRIAGE, VII. No. 7; VIII. (b), Nos. 1, 6, 7, 8, 9, 10, 11, 12, 13; 30 A. 493, 811.

21. For power of New Orleans to contract, see NEW ORLEANS, II. (c).

22. Parties residing in the Confederate lines could validly contract with one another. — U. S. (Otto's), —, *Conrad v. Waples*; — U. S. (Otto's), —, *Burbank v. Conrad*.

23. Where the husband and wife gave a procuration, jointly and severally, after the death of the husband, a mortgage given by their agent, on the paraphernal property of the wife, cannot, in the absence of authentic evidence, showing that the debt inured to her separate benefit, cannot be enforced by the *via executiva*, although the wife afterwards ratified the act. 30 A. 772, *Calhoun v. Mechanics' and Traders' Bank*.

24. DEBLANC and SPENCER, JJ., *dissenting*: The wife was a *feme sole* when the contract was entered into, and afterwards ratified the act; besides the agent is owner of a part of the mortgaged property, and there is no reason why his share should not be sold. *Ib.*

(b) *Consent.*

1) In general.

1. In order to establish a valid contract, it should appear that the offer was not only seriously made, but accepted. 15 A. 521, *Vicksburg Railroad v. Hamilton*.

2. Where the obligor knew precisely what she was doing, when she signed the contract; that it was a compromise of the claims asserted against her; that neither error, force, threat, or fraud, were practiced upon her; that it was entered into under legal advice, and afterwards confirmed, the contract will be maintained. 27 A. 76, *White v. Gaines*.

3. For consent in contracts of sale, see SALE, I. (e).

2) Evidence, and presumption of contract; completion of the contract; and *locus penitentiae*.

1. Where one partner in a commercial firm made a proposition to his co-partner, that he would either sell his own interest in the concern, on certain terms, and the partner, to whom the proposition was made, failed to signify his assent at the time, but went off, and three days afterwards notified the proposer of his determination to purchase; *Held*: That an immediate signification of change of intention by the proposer released him from the obligation which he would have otherwise incurred, from his proposition, unless it appears from the situation of the parties, or from the nature of the contract, that it was the intention of the proposer to allow several days for reflection and decision upon his proposition. 15 A. 609, *Boyd v. Cox*.

2. Articles (1795) of the Civil Code, must be construed to mean, that the assent to a proposition, in order to be binding upon the proposer, must be

made at once, without any intervening separation of the parties, unless an intention, on the part of the proposer, to grant time for consideration to the opposite party, appears evident, either, first, from the situation of the parties, or, secondly, from the nature of the contract. 15 A. 609, *Boyd v. Cox*.

3. Article (1798), Civil Code, is not inconsistent with article (1796); the former refers to the case stated in the article preceding it, where one party proposes and the other assents, without an immediate signification of dissent from the proposer; where the conversation, or correspondence, terminates with the assent of the party to whom the proposition has been made. But article 1796 refers to its own immediate preceding article (1796), and to the state of facts of that article, to-wit: a proposition, an assent, and an immediate signification of change of intention on the part of the proposer. 15 A. 609, *Boyd v. Cox*.

4. When parties agree to have their contract reduced to writing, the contract is not complete until the deed has been signed by both parties. 28 A. 31, *J. A. Fernández v. Bernard Soulié*. See LEASE, I. (a), No. 18.

5. The consent of a municipal corporation may be as effectually given by the inaction of the common council, as by a formal resolution. 29 A. 581. *Booth v. Shreveport*.

6. Silence is sometimes consent. See CORPORATIONS, II. (b), No. 7. INSURANCE, I. (d), No. 1. MANDATE, II. (b); III. (a), No. 4.

7. Creditors who knowingly accept a dividend, declared under an amicable assignment, are tacitly bound by the terms of the contract. See INSOLVENCY, IV. (b), No. 3.

8. An objection to the acceptance of a contract is waived by suing thereon. See NOVATION, II. No. 1.

9. Signatures to an obligation are not mere ornaments. The parties will not be relieved simply because they do not know why they signed. 30 A. 495, *Boullt v. Sarpy*.

10. Where a lease was entered into, and was partly executed, and it appears that the parties did not intend that it should be put in writing before being bound, a refusal by one of the parties afterwards to sign, will not vitiate the contract. 30 A. 50, *Montague v. Weil Bro.* See LEASE, I. (b), Nos. 9, 10.

3) Error and fraud.

1. Under the plea of error, a party must show fraud, force or improper influence on the part of the opposite party. An allegation that he signed the contract without reading it will not relieve him. 22 A. 14, *Watson v. Planters' Bank*.

2. A creditor who assents to a proposition of compromise from his debtor, believing his claim not to be secured, may withdraw his acceptance, on learning that his claim is secured, because there was error in the motive of the contract. 25 A. 295, *Goodwin v. Perry & Co.*

3. WYLY, J., *dissenting*: The acceptance of the compromise was a ratification of the acts of the one who acted as agent, and is binding on the principal. *Ib.*

4. Error as to the value of the property, is not an error, of fact but one of judgment. 26 A. 264, *Citizens' Bank v. James*. See SALE, VI. (b).

5. A settlement cannot be set aside without showing error. See ESTOPPEL, No. 33.

6. For fraud in the distribution between creditors, see OBLIGATIONS, VII. (b), 2), B. § 5.

4) Lesion and violence.

1. The degree of violence and threats requisite, under article 1846, of the Civil Code, to invalidate a contract, is the same in regard to contracts between husband and wife, as in regard to contracts generally. 15 A. 615, *Hawkins v. Hays*.

2. The wife's signature to an act granting priority of mortgage to another mortgagee, under threats from her husband, is not binding. 23 A. 240, *Succession Smith v. Smith*.

3. Where the note was obtained by a combination, whereby money was sought to be extorted from the defendant, he will not be liable.

ON REHEARING: The combination was a resort to legal means; the notes were given to compromise the suit and may be enforced. 27 A. 478, *Benner v. Van Norden*.

4. For lesion beyond moiety, see SALE, VI. (b).

(c) *Object and cause.*

1) In general.

1. No action lies to recover on a note given to make up a loss as partner in a faro banking game. 15 A. 401, *Whitesides v. McGrath*.

2. The proprietor of a gambling saloon, who advances money to pay gambling debts incurred in his house, cannot recover. 27 A. 294, *Sampson v. Whitney*.

3. The purchase and sale of gold is a commercial transaction, which may give rise to an action. 28 A. 731, *Wheless & Pratt v. F. M. Fisk*. See CURRENCY. DEPOSIT, I. No. 1.

4. A note given for the hire of a slave, even after the labor has been performed, cannot be enforced judicially. 22 A. 300, *Agnes Rodriguez, Widow Cormier v. Bienvenu*. *Per contra*, see MARRIAGE, VI. No. 5.

5. A promissory note given for the purchase of a slave, in 1861, is valid. 18 Wall. 546, *Boyce v. Tabb*. See VII. (b), 1), No. 4. SALE, I. (c), No. 7.

6. Such notes are not valid, and only the proportional value of land to the slaves, sold in block, can be recovered. 21 A. 757, 771; 22 A. 153, 189, 215, 426, 427, 430, 433, 453; 23 A. 496. See BILLS AND NOTES, IV. (a), No. 14; (d), 1), No. 1; (e), 1), No. 13. PAYMENT, III. Nos. 11, 12, 13. REGISTRY, II. (e), 2), A No. 2. SALE, I. (c), No. 6.

7. The lease of a house to be used as a brothel, is valid. 24 A. 625, *Lyman v. Kate Townsend*.

8. No action lies to recover rent for the lease of a house, to be used as a brothel. 22 A. 54, *Kathman v. Walters*.

9. The sale of furniture by a dealer, to a woman keeping a house of prostitution, will not, of itself, vitiate the contract. 24 A. 591, *Hubbard v. Moore*; 25 A. 78, *Sampson Bros. v. Kate Townsend*.

10. HOWELL and MORGAN, JJ., *dissenting*: Selling to defendant a large amount of furniture, on credit, to fit up a house of prostitution, known to plaintiff, was something more than furnishing her with necessary beds to sleep in. *Id.*

11. Interest due, forms a valid consideration to a note which may, in its turn, bear interest. R. S. 1870, section 1889; 25 A. 486, *Legburn v. Deyris*.

12. The prescribed notes of the father, who is absent, form a valid consideration for notes given by the son. 25 A. 585, *Matthews v. Williams*.

13. There is nothing illicit in a contract to "transact an importing business, principally between ports in Europe and the Island of Cuba," during the war with the Confederate States. 26 A. 246, *Wallis v. Wheelock*.

14. The arrest of a fugitive, and his delivery from another State into the hands of the marshal here, is a consideration sufficient in law, to be the basis of a legal obligation. 15 A. 385, *Murray v. Kennedy*.

15. A contract to supply one of the Confederate States with salt, cannot be enforced. 19 A. 328, *Bowman v. Gonegal*.

16. The price of a horse sold to be used in the Confederate States service, cannot be recovered. 20 A. 158, *Railey v. Gay*.

17. All contracts and transactions in aid of the Confederate struggles, are contrary to good morals and public policy. 21 A. 166, *Haney v. Manning*.

18. The courts will not entertain a suit founded on army stores, furnished to the enemies of the United States. 24 A. 446, *Clements v. Graham*. LUDELING, C. J., *dissenting*.

19. Plaintiff cannot maintain an action for Confederate money, delivered to, and invested by defendants in bonds of the city of New Orleans, payable in same currency. 19 A. 161, 288, 359, 464; 21 A. 705, *Cousin v. Abat, G  n  r   & Co.*

20. Contracts, the consideration of which are Confederate notes, are null.

19 A. 432, *Howard v. Kirwin*; 161, *Hunley v. Scott*. See CONFEDERATE NOTES. See *infra*, 24.

21. Contracts, the consideration of which are Confederate notes, cannot be enforced. The transferees stand in no better position than their transferers. 21 A. 476, *Boyd v. Chaffe*.

22. No action lies to recover the price of property sold for Confederate money. 21 A. 658, *Fournet v. Beer*.

23. A sale of tobacco for Confederate money, cannot be enforced. 22 A. 459, *Christian v. Baer*.

24. Plaintiff cannot recover on a contract based on Confederate notes. 26 A. 55, *Denney v. Johnson*. See *supra*, 20.

25. Payment of a promissory note given for a loan in Confederate money, cannot be judicially enforced. 22 A. 132, *Durbin v. McMichael*; 485, *Winter v. Jones*.

26. A contract for Confederate money, cannot be enforced, and it cannot be ratified. 22 A. 462, 495; 19 A. 450; 21 A. 14, *Barron v. Pike*; 21 A. 18, *Bank of West Tennessee v. Citizens' Bank*; 23 A. 227, *Vonche v. Villemarette*; 722, *Irwin v. Short*.

27. Notes of the Confederate States, in ordinary use, as a circulating medium, during the rebellion, constituted a valid consideration for a contract. Article 127, of the constitution of Louisiana, which declares that "All agreements, the consideration of which, was Confederate money, notes or bonds, are null and void," is therefore in violation of the constitution of the United States. 14 Wall. 661, *Delmas v. Insurance Company*. See BILLS AND NOTES, IV. (a), No. 17.

28. A promise to pay in Confederate notes, in consideration of the receipt of such notes, cannot be considered a *nudum pactum* or an illegal contract. 16 Wallace, 483, *Planters' Bank v. The Union Bank*.

29. When one person has collected Confederate notes for another, and held them subject to the latter's order, the measure of damages for failure to deliver such notes on demand, was the value of the notes at the time of the demand. The subject of the contract in such a case, was a commodity, not money. *Ib.* See BILLS AND NOTES, IV. (a), No. 17.

30. Loans made by a Frenchman, in Paris, to a Confederate agent, unless knowingly made, for the express purpose of carrying on hostilities against the United States, are to be regarded as made by an innocent neutral, and valid. 1 Woods, 221, *The Confiscation Cases*.

31. But such agent could not transfer to such neutral, property within the Union lines, as security for the loan, after it became subject to confiscation, so as to defeat the right of the United States, to seize and confiscate the same. 1 Woods, 221, *The Confiscation Cases*.

32. An executed contract for Confederate money, cannot be annulled. The law leaves the parties where they have placed themselves. 28 A. 647, *Delhomme v. Duson*.

33. An obligation for the purchase of land, giving to the vendee the privilege of paying in Confederate money, is not void. 28 A. 801, *Hyams v. Baer*.

34. See CONFEDERATE MONEY. CONFISCATION, No. 1.

35. Evidence to show that the members of the general assembly were bribed, is inadmissible. See EVIDENCE, VII. No. 20.

36. The sale of minors' property, for Confederate notes, is null. See MINORS, III. (g), 4), No. 1.

37. The courts can take no cognizance of an immoral contract, to enforce it. See PLEADING, V. (b), 4), No. 8.

2) Their legality.

A. In general.

1. Where an agreement had been entered into between parties to ship flour from Cincinnati to New Orleans, to be sold for a profit, and it appeared that such agreement had originated in a conversation, in which one of the parties urged as a reason for the safety of such transaction, the fact of his having

English orders in hand, into which he could put the flour in case the market should have declined on its arrival at New Orleans, to a point that would pay no profit; *Held*: That there is nothing necessarily immoral in such an agreement, within the meaning of articles 1887 and 1889, of the Civil Code. 15 A. 353, *Nevins v. Chapman*.

2. Contracts entered into between belligerent enemies during the war of the States, are absolutely null. 21 A. 493, *Overby v. Hezekiah*; 12 U. S. Statutes at large, 1262; proclamation of the president, August 16, 1861; 1 Kent, 66, 74, 77; 19 A. 491; 20 A. 241; 18 H. 114. See III. (a), No. 2.

3. A contract of partnership between two parties residing, one, in the Federal, and the other in the Confederate lines, is contrary to good morals. See act of congress of July 13, 1861; 21 A. 211, *McWilliams v. Bryan & Irvine*; 641 and 647. See *supra*, III. (a), 2), *et seq.*

4. A contract to carry slaves, and other property, into Texas, and managing and taking care of the same, being lawful at the time, may be enforced. 23 A. 289, *Powell v. Daniel*.

5. A contract, whereby the agent was placed in possession of Confederate notes, to purchase cotton, cannot be enforced. 20 A. 295, *Wells v. Addison*.

6. An obligation for the payment of the services of a substitute in the Confederate army, is illegal and null. 19 A. 439, *Stewart v. Bosley*; 449, *Wright v. Stacey*; 17 A. 264, *Schmidt v. Barker*; 1 A. 178; 17 L. 132.

7. A contract against good morals, cannot be enforced. Carrying merchandise in and out of the Federal lines, is against good morals. 21 A. 110, *Williams v. Gay*; 23 A. 517, *Glasscock v. Moore & Wells*; 24 A. 304, *Irwin v. Levy & Dieler*.

8. Where a note was given by the owner of a slave, in settlement of the damages supposed to have been caused by the act of the slave in setting fire to his stables; *Held*: That there was nothing illegal in such a settlement, and the payment of the note could not be avoided, unless it was shown that a capital felony had been compounded, by making it a condition of the settlement that the slave should not be prosecuted for the crime of arson, of which he was suspected. 15 A. 176, *Morgan v. Knox*. See D. Nos. 1, 2.

9. The sale of a steamboat by a corporation domiciled in the city of New Orleans, in 1863, for Confederate money, to a party in the Confederate lines, who, in 1867, sells her to other persons for United States notes, do not render the last vendor liable to the company or its debtors for the sum received. 24 A. 384, *Thompson v. New Orleans, Coast and Lafourche Transportation Company*.

10. From the date of the capture of the city of New Orleans by the military force of the United States, commercial intercourse between the inhabitants of that city, and other portions of the State of Louisiana, became illegal. The line of non-intercourse was that of military occupation or control by the forces of the contending governments, and not that of State lines. 17 Wall. 601, *United States v. Lapérié*.

11. A contract made by a foreign consul in New Orleans during the civil war, to protect certain claims within the Confederate lines, by issuing certificates that it belonged to the subjects of a friendly power, was null and void, because contrary to public policy and the law of nations. 7 Wall. 542, *Coppell v. Hall*.

12. The debtor may, in the same transaction, validly sell to his creditor his movables in payment of his debt, and then repurchase the same, giving his note, secured by vendor's privilege on said movables. No delivery is necessary between the parties. 29 A. 122, *Gay & Co. v. Crichtlow & Donelson*.

13. During the civil war, a British subject, domiciled in the city of New Orleans, contracted with a factor and loyal person residing in the city, for the purchase of a crop of sugar belonging to a planter, residing in the parish of Lafourche, within the Confederate lines, and himself an enemy to the United States. The factor had a lien on his crop for advances, and had a right, by special contract, to sell it and pay himself the amount of his claim; *Held*: That the British subject had no title to the sugar in question, because he had purchased it from an enemy, in violation of the laws which always prevail in

a state of war; the circumstances of the *agent* having been a loyal citizen, not altering the nature of the transaction. The factor might, however, have sold his lien, and the debt secured by it, as this would have involved no trading with the enemy. 15 Wall. 395, *Montgomery v. United States*.

14. A warrant issued by the finance committee, of the city of New Orleans, to a wharf lessee, to carry out a stipulation that the lessee was guaranteed the sum of four thousand dollars profit, is null. 20 A. 104, *Patterson v. City of New Orleans*.

15. An obligation to procure the vote of a creditor in favor of the insolvent, cannot be enforced. See INSOLVENCY, III. (a), No. 1.

16. See CONFEDERATE MONEY. CONFISCATION, No. 1.

B. Contracts in restraint of trade and fraud of the revenue.

1. The Federal government does not recognize the validity of a transfer of property deposited in one of its warehouses, before the payment of custom house duties; but the importer is not debarred from disposing of property in the meantime, although it remains in the warehouse for the purpose of securing the collection of duties. 15 A. 438, *Meeker v. Vredenberg*.

2. At the time of the sale of the imported merchandize, the Confederate authorities being in possession of New Orleans, the purchaser is presumed to have known that the duty thereon had not been paid to the United States, and a subsequent seizure thereof for custom dues, will not give rise to an action in warranty against the seller, for eviction. 21 A. 136, *Snodgrass v. Adams*.

3. Payment of duties to the United States collector of customs, whilst acting under the Confederate government, protected the property on which it was paid, and a subsequent seizure thereof by the United States government cannot give rise to an action of rescision of the sale of said property, by reason of non-payment of said duties. 26 A. 235, *Snodgrass v. Adams*.

4. If an importer of foreign goods has so gravely violated the revenue laws of the United States, as to render the goods liable to confiscation, and himself obnoxious to the penalties prescribed by said laws, he will be liable to any innocent purchaser of those goods for the sums paid to the government, to compromise the suit, to confiscate the goods, and the expenses incurred in effecting the compromise. 29 A. 93, *Summers & Brannins v. Clark*.

5. Where by the terms of the revenue law, the penalty for its violation is the forfeiture of the goods without alternative, then the property in said goods vests at once in the government, and no purchaser, however innocent, can acquire any title to them. They remain liable to seizure and confiscation wherever found. 29 A. 93, *Summers & Brannins v. Clark*. See MANDATE, III. (b), No. 7.

6. Delivery may be made before payment of duty. See SALE, III. (b), 1), No. 1.

7. Delivery cannot be made before payment of duty. See *Ib.*, No. 3.

c. Contracts touching legislative proceedings and performance of duty by public officers.

1. Bribery of the members of the legislature cannot be proven. See EVIDENCE, VII. No. 20.

2. Promissory notes given to a member of the city council as the price for a transfer of a city contract adjudicated to him, through an interposed person, cannot be enforced. 30 A. 207, *Cummings v. Saux*.

D. Contracts touching judicial proceedings and those tainted with fraud and usury.

1. The deposit of a sum of money to the surety of the accused to protect him, transferred by the depositor, can be recovered after the release of the bond, and the surety cannot plead that the bond was released by the compounding of a felony. 26 A. 574, *Field & Ponder v. Rogers*.

2. ON RE-HEARING: The compounding of the felony was contrary to good morals, and the money cannot be recovered from the surety. *Ib.*

3. WYLY, J., *dissenting*: The surety received the money and bound himself to return it on his discharge; the condition having happened, he has no concern how it took place. *Ib.*; see A. No. 8.

IV. OF THE RATIFICATION OF CONTRACTS.

1. An obligation which is absolutely null, is not susceptible of confirmation or ratification; a new obligation to be substituted for it is necessary; and where the obligation is susceptible of confirmation or ratification, it is requisite that the acts relied on, as being in confirmation or execution of the defective obligation, should have had in view and have been intended to supply the defects in the obligation which would render it null. 15 A. 569, *Decuir v. Lejeune*.

2. With regard to confirmatory acts, containing an express ratification, and the voluntary execution importing a tacit ratification, the rules are the same so far as the substance is concerned; there is difference only respecting the burden of proof. 15 A. 569, *Decuir v. Lejeune*.

3. The rules of the code have for object, that a party shall not be held to ratify an invalid act, unless it appears that he knew with precision what act he was ratifying, and was aware of the defect he was waiving. C. C. 2272; 23 A. 538, *Knight v. Mentz*.

4. The seized debtor, who, after the sale of his property, applies to rent, from plaintiff who purchased the same, ratifies the title. 29 A. 206, *Jouet v. Mortimer*.

5. See RATIFICATION.

V. OF THE INTERPRETATION OF CONTRACTS.

1. A party should not suffer by an omission from the specification of a contract, when those specifications were drawn up by the opposite contracting party. 15 A. 667, *White v. New Orleans*.

2. A letter, considered as the evidence of an obligation, must be construed according to the ordinary rules of interpretation prescribed for contracts in general, and its contents determined by the meaning of the words in which it is written. 15 A. 691, *Janin v. Pontalba*.

3. The contract should be construed by the manner in which it has been executed by both or by one of the parties, with the express or implied assent of the other. 17 A. 190, *Commercial Bank v. City of New Orleans*.

4. A second agreement, conditioned that if the party fail to comply therewith, the original contract to remain in full force and effect, does not destroy the latter, which is the only one between the parties, by the non-happening of the condition. 18 A. 126, *Huntington v. Legros*.

5. In case of doubt, the clause in the act of mortgage will be construed against the mortgagor. 19 A. 167, *Potts v. Blanchard*.

6. Agreements must be interpreted by construing the clauses together, giving to each the sense which results from the whole instrument. 22 A. 283, *Escoubas et al. v. Louisiana Petroleum Oil Company*.

7. The agreement in a *concordat*, wherein the first mortgage creditors reserved all the rights of action so long as their interest was paid, and where it is further agreed that if any of the payments stipulated should not be made that the property must be seized and sold, one-third cash, and the balance at one and two years credit, does not prevent the first mortgage creditors from selling for cash, and such sale cancels all subsequent liens and mortgages. 26 A. 225, *Fleitas v. Consolidated Association of the Planters*.

8. MORGAN, J., *dissenting*: The first mortgage creditor should have sold according to the terms agreed upon. *Ib.*

9. In doubtful cases the agreement is construed against the obligor. 20 A. 363, *Mithoff v. Byrne, Vance & Co.*

10. A condition that if the work be not satisfactory the obligee shall have the right to annul the contract, is legal and binding. See NEW ORLEANS, II. (c), No. 7.

11. Parties are bound by their own construction. See NEW ORLEANS, II. (c), No. 13.

12. The contractor can only be paid as stipulated. See POLICE JURY, No. 5.

VI. OF THE LAWS GOVERNING CONTRACTS AND THEIR CONFLICTS.

(a) *Laws of the same State.*

1. Contracts entered into, and proof thereof, must be governed by the laws

in force at the time they were made. 18 A. 90, *McDonald v. Stewart*; 7 L. 306.

2. An official bond entered in Louisiana by an officer of the United States, is made in contemplation of the law, at the city of Washington, and the liability of the parties to the bond must be governed by the rules of common law. 6 P. 172, *Cox v. United States*; 7 P. 435, *Duncan v. United States*.

(b) *Laws of different States.*

1) In general.

1. At common law, all contracts not under seal are contracts by parol. 15 A. 197, *Quigley v. Muse*.

2. If a deed be legal by the laws of the country where it is executed, our courts will not interpose, to defeat the possession of the legal holder acquired in that country, although there may be clauses in the instrument which would not have been valid under our law. 15 A. 471, *Rabun v. Rabun*.

3. As a general rule, a contract is to be governed as to its interpretation, nature, obligation, performance, or dissolution, by the law of the place where it is made. 2 Woods, 244, *Morgan v. New Orleans, Mobile and Texas Railroad Company*.

4. The principal exception to this rule is, where the contract is made in one State or sovereignty, to be performed in another; in that case, it is to be governed by the law of the place of performance. *Ib*.

5. But where a contract in one State, to be partly performed there and partly performed in several other States, the contract is to be governed by the law of the place where it is made. *Ib*.

2) Assignment of personal property for the benefit of third persons; and remedial and accessory rights.

1. A citizen of Louisiana, being in the State of New York, executed a deed of trust in conformity to the laws of that State, whereby he conveyed to a citizen of New York a certain sum of money in cash, upon trust, for the use and benefit of other parties; *Held*: That such a contract was not in violation of the laws of Louisiana, since it was made and executed in another State, and admitted to be according to the laws of that State. 15 A. 622, *Hullin v. Fauré*.

2. As a general rule, a personal contract, with its attendant privileges and effects, when made in another State, will be enforced in this State upon movables, according to the *lex loci contractus*; provided such enforcement be not contrary to our policy, or does not violate the order of priorities established under our law; or does not injure the rights of our citizens; and, provided further, that we have, by the *lex fori*, the remedy which is asked. 24 A. 365, *Tyree & Co. v. Sands & Co*.

3. See ATTACHMENT, VII. (d).

3) Contracts relative to immovable property.

1. Where, in the performance of the contracts, conveyances and transfers are to be made of property situated in several States consisting of realty or other property subject to the local law, the conveyances and transfers should be made in accordance with the *lex rei sitæ*. 2 Woods, 244, *Morgan v. New Orleans, Mobile and Texas Railroad Company*.

VII. OF THE EFFECTS OF CONTRACTS AND THEIR OBLIGATIONS.

(a) *As between the parties.*

1) In general.

1. Where a contractor with the city agrees that in case of a failure to perform the work at a proper time, the street commissioner shall cause the work to be done at whatever cost he may be able to obtain the labor and material, and to deduct the expense from the amount due by the city; he is bound by such agreement. 19 A. 7. *Rossally v. City of New Orleans*.

2. Defendant cannot take advantage of his own unlawful acts to annul his contract, where it is not certain the plaintiff was aware thereof. 19 A. 263, *Fee v. Gonegal*.

3. The defendant cannot allege the nullity of his purchase by reason of the confiscation act, to relieve himself from his contracts. 20 A. 167, *Legget v. Goodrich*.

4. In our practice there is no *inscription de faux, faux principal* and *faux incidental*; the party attacking the notarial act introduces the proof, and if the act emanates from him he must bring his direct action. 20 A. 211, *Cox & Co. v. Estates King*; 6 N. S. 512.

5. Where plaintiffs agreed to furnish certain commodities for a fixed price, during a certain time, and by failure to comply with their agreement, defendants incur expenses; *Held*: That plaintiffs may recover for the amount of commodities furnished, and defendants may reconvene for the amount disbursed. 20 A. 220, *Smith & Co. v. Morse & Co.*

6. Where illegal transactions have become accomplished facts, they cannot be affected by any action of the courts. 20 A. 468, *State of Louisiana v. Louisiana State Bank*.

7. Pending a suit for revendication of real estate, plaintiff and defendant agreed to sell to a third party, the cash payment to be made after judgment, and notes to be furnished for the balance; it was further agreed that the whole price should be on interest after a certain date; the litigation lasting several years, the purchaser can be required to pay the cash and interest thereon accrued, and to furnish his notes at the rate of interest stipulated, until maturity. 22 A. 607, *Denton v. Reading*.

8. A contract which has been annulled, cannot be enforced. 24 A. 102, *City v. Moseal*.

9. It is no defense to plead that the plaintiff had said to defendant he would discontinue his suit, if some other creditor would do the same; such an agreement being without consideration, is not obligatory. 25 A. 184, *Broadus v. Nolley*.

10. By agreement of all parties, a suit pending in the district court of Jefferson, wherein a horse had been sequestered, was transferred to the Sixth District Court for the parish of Orleans; one of the plaintiffs disregarding the agreement, obtained judgment against the owner of the horse, before the Fifth District Court for the parish of Orleans, and had the horse, which was also brought in the parish of Orleans, seized by the sheriff of the latter court; *Held*: That the agreement could not be disregarded, and that the seizure was wrongful. 23 A. 53, *Michel v. Sheriff parish of Orleans*.

11. Courts of justice cannot countenance the physical enforcement of what each person may believe to be his rights. 29 A. 513, *Hebert v. Legé*.

12. A factor who fails to carry out his part of the contract, cannot recover a commission on the portion of the crop afterwards sent by the planter to another commission merchant. 30 A. 503, *Nalle & Cammack v. Conrad*.

2) Default as a condition precedent to recovery upon contracts; their rescission or damages

A. In general.

1. Neither party to a contract can maintain an action for damages for its violation, without showing a readiness and ability to comply with his own engagement under the contract. 15 A. 675, *Moore v. Hopkins*.

2. The police jury having failed to construct the levee, as agreed upon, so as to prevent a crevasse, should have been put in default; this was a passive breach of the contract. 16 A. 390, *Lindsey v. Police Jury*.

3. The putting *in mora*, is an essential prerequisite to a suit for damages, whenever the breach is passive. This applies to a reconventional demand as well as to a direct action. 17 A. 33, *Leeds v. Fassman*; C. C. (1927), (1905), *et seq.*; 14 L. 81; 5 L. 414.

4. Defendant, who agreed to furnish plaintiff with materials, and in consideration therefor was to receive other service from plaintiff, in order to put the materials at the risk of plaintiff, should make a tender thereof, else he is

bound to pay for the services rendered to him by plaintiff. 18 A. 23, *Blackman v. Hoey*.

5. No damage can be recovered for want of delivery of the goods sold, unless defendant be put in default. 19 A. 130, *Pratt v. Craft*.

6. The object of putting in default, is to secure the other party in his right to demand damages or a dissolution of the contract, so that the other party can no longer defeat this right, by executing or offering to execute the contract. 20 A. 291, *Pratt v. Craft*.

7. The plaintiff cannot recover damages if he has not put the defendant in default. 23 A. 513, *Dean v. Frellsen*.

8. The stipulation in a contract, that if the obligor did not pay on a particular day, the contract is null, is law between the parties; and if the obligor has been put in default, his subsequent offer to fulfil the terms of his contract comes too late. 24 A. 235, *City v. Rigney*.

9. After being regularly put in default, defendant is liable for the damages occasioned by the non-fulfilment of his contract. 27 A. 176, *Eden v. Lamandre*.

10. For violation of a building contract, see BUILDERS AND BUILDINGS, No. 1.

11. For want of a demand of payment, the suit must be dismissed. See COSTS, III. (b).

12. A depository must be put in default. See DEPOSIT, III. No. 27.

13. For payment of premiums of insurance, see INSURANCE, I. (a), Nos. 2, 3, 6.

14. A lessor must put his lessee in default before leasing the property to a second tenant. See LEASE, I. (b), 1), No. 4.

15. A lessee, before he can recover damages for such an act, must put the lessor in default. See LEASE, I. (b), 1), No. 6.

16. The lessee cannot make repairs at the expense of the lessor, without first putting him in default. See LEASE, I. (c), 1), Nos. 14, 15.

17. Plaintiff who sues for a dissolution of the lease, must tender the unmatured notes to defendant. See LEASE, I. (e), No. 1.

18. When the city of New Orleans fails to carry out her contract, if she be properly put in default, she will be held responsible for the damages suffered by her contractor. 30 A. 264, *Bartley v. City of New Orleans*.

B. When a default is unnecessary.

1. When the vendor refuses to comply with his obligation of delivering the thing sold, he waives, by such refusal, a formal putting in default. 15 A. 247, *Abels v. Glover*.

2. The obligation contracted by the vendor, to cause a mortgage, resting on the property sold, to be erased within a special time, is a condition precedent to the collection of a note given for the price, and it is not incumbent on the vendee to put the vendor in default by a formal demand on him to erase the mortgage. 15 A. 689, *Walker v. Cucullu*.

3. Where there has been an active violation of a contract, the creditor is under no obligation to put the debtor in default in order to entitle him to his action to cancel. 15 A. 518, *Millard v. Farley*.

4. Where the violation of the contract is active, damages are due from that moment, without default. 17 A. 201, *Conery v. Noyes*.

5. The plaintiff who alleges an active breach of the contract, need not make a demand so as to put the defendant *in mora*. 18 A. 573, *Rosenthal v. Baer*.

6. Where a contractor delivers and puts up machinery, as good and loss is occasioned by some defect, it must be viewed as a active violation of the contract, and damages may be recovered without a formal putting in default. 15 A. 212, *Hill v. Penny*.

7. It is not necessary to put defendant in default, previous to recovering from him the money paid for certain machinery he was to manufacture, when, after such manufacture, he pointed the same out as the property of plaintiff, and afterwards sold the same to some third person. 20 A. 384 *Robinson v. Clark*.

8. We must distinguish between a *modus* and a condition, the former is obligatory, and if the party bound be passively violating his obligation, he must be put in default; whilst the latter may be suspensive and potestative, and depends upon the personal choice of the obligee. 22 A. 284, *Escoubas et al. v. Louisiana Petroleum and Oil Company*.

9. It is a vain thing to demand of defendants the doing of something they are under no obligation to do. *Ib.*

10. The pledgees, who dispose of the pledged note, by another pledge for a larger amount than their interest in it, need not be put in default to be held liable for the difference between the amount of the note and the amount due to them. 29 A. 329, *Laloire v. Wiltz & Co.*

11. An adjudicatee, at sheriff's sale, need not be put in default to pay the purchase price.* See EXECUTION, V. (d), 8), A. No. 2; and *contra*, No. 3.

12. The lessor need not put the lessee in default before suing for a dissolution of the lease, for violation of one of the conditions which forfeits the policy of insurance. See LEASE, I. (e), No. 2.

3) Mode of putting in default.

1. An action on an injunction bond is a sufficient putting "*in mora*." 15 A. 465, *Vicksburg R. R. v. Barksdale*.

2. The purchaser cannot be put in default until the vendor complies with his part of the agreement. 19 A. 84, *Provosty v. Putnam*; C. C. (1908); 3 L. 382; 15 L. 282; 5 A. 578.

3. The contracting party who desires to put the other in default, must have complied with his part. 20 A. 505, *Golding v. Petit*.

4. The presentation of the order, to the warehouse keeper, for the delivery of cotton on storage, was a sufficient putting *in mora*, although at the time, a part was delivered. 21 A. 603, *Juillard v. Baer*.

4) Form of contract; extent of obligation; and what is a performance.

1. Plaintiff cannot be allowed to make *extra* charges, when defendant did not consent to a change of the contract, and made no request for *extra* work. 18 A. 205, *Bennett & Lurges v. Robinson*.

2. Defendant who had engaged an employee in France, and agreed that in case the employment should not last three years, that he should furnish the means or procure a passage back to France for his employee, cannot urge as an excuse for non compliance that the port was blockaded by the United States. The means should, in such a case, have been furnished. 19 A. 30, *Jacquinet v. Boutrou*.

3. In a contract made by a corporation, wherein it is stipulated that if the party to whom the right of way is given, failed to complete a street railway within a certain time, the corporation reserved to itself the right to re-sell the privilege and right of way, the corporation, without default and without legal proceedings, cannot annul the contract and sell the cars, mules, etc.; such sale is null and void. 24 A. 53, *Young v. Magazine Street Railroad Company*.

4. Release bonds are considered as conventional obligations in certain cases. See ATTACHMENT, IX. (b), Nos. 6, 7, 8.

5) In execution of conventional obligations.

A. In general.

1. An executed contract will not be set aside on the ground that the agreement was contrary to public policy; the law will leave the parties where they have placed themselves. 22 A. 105; 24 A. 279, *Sloan v. Stevenson & May*.

2. No damages can be recovered for the reasonable length of time required to complete a *job*, when it depended by the agreement, upon the reception of materials from another place. 23 A. 221, *Drummond, Doig & Co. v. Steamer Castro and Owners*.

3. A party cannot be relieved from an executed immoral contract. 24 A. 103, *Dean & Co. v. Marbin & Case*.

4. In a contract to furnish lumber to the city, the following clause: "deliv-

ery to begin within five days after the adjudication of the contract, at the rate of fifty thousand feet per month, if required to be delivered," etc., means that the contractor shall not be called upon to deliver more than that amount, but the whole amount must be accepted or called for within a reasonable delay. 30 A. 264; *Bartley v. City of New Orleans*.

5. See OFFENSES AND QUASI OFFENSES, II. (g).

B Measure of damages and interest.

§ 1 Pecuniary obligations.

1. The act of the legislature, of the 9th of March, 1852, which allows legal interest on all debts from the time they become due, unless otherwise stipulated, does not apply to debts due before its passage. 15 A. 17, *Gordon v. Zacharie*.

2. An agent for the collection of money, is only liable for interest on the money collected from judicial demand, unless it be shown that he employed the money for his own use, or that he was put in default prior to the institution of the suit. 15 A. 17, *Gordon v. Zacharie*.

3. The charge, by commission merchants, according to custom, of two and a half per cent. commission, for the sale of cotton, and the like rate for accepting bills, or indorsing notes for the accommodation of customers and purchase of supplies, do not form any part of the interest on money loaned or advanced, and cannot be said to be usurious charges, as commissions for *advancing money* have been held to be, when claimed in addition to the highest rate of conventional interest. 15 A. 457, *Byrne v. Grayson*.

4. Although the court has often allowed the highest conventional interest, on the account of factors, which were the same for a series of years, by reason of a tacit agreement, yet where the account is rendered to the administrator, only legal interest can be allowed. 16 A. 261, *Succession Yarbrough*.

5. By the acts of 1852 and 1855, all debts bear interest, at five per cent. from maturity. 15 A. 463, *Weaver v. Cox*.

6. In a suit to recover money paid in error, the plaintiff is entitled to five per cent. interest from judicial demand. 15 A. 579, *Smith v. Conrad*.

7. Interest can be allowed by the judgment rendered on the portion of account confessed to be due. 24 A. 18, *Conrad v. Burbank*.

8. Where a judgment on a debt, arising *ex contractu*, decrees interest, but is indefinite as to the time when it commences to run, the interest decreed must be considered as commencing on the day that the suit was instituted. 15 A. 333, *Keenan v. Whitehead*.

9. By the law of Louisiana sums due on contracts, although unliquidated, bear interest from judicial demand. 9 H, 366, *Barrow v. Reab*.

10. When the principal is to be paid at a given time, the law implies an agreement to make good the loss arising from the default, by the payment of lawful interest. 16 Wall. 378, *Insurance Company v. Piaggio*.

11. A plaintiff cannot recover special damages for the detention of money due to him beyond what the law allows as interest. 16 Wall. 378, *Insurance Company v. Piaggio*.

12. In an action on a bond for the recovery of damages, interest cannot be allowed on the amount found by the verdict or judgment. 15 A. 504, *Bonner v. Copley*.

13. Parties are entitled to recover interest from their tutors upon the sums allowed to be due them, from the date of their majority. 15 A. 417, *Guillet v. Juré*.

14. A real tender is unnecessary where the offer to pay the bill is peremptorily refused by the holder. Interest can only be allowed from judicial demand. 26 A. 453, *McStae & Valus v. Warren & Crawford*.

15. WYLY, J., *dissenting*: A real tender was absolutely necessary. *Ib.*

16. One entering into an obligation with a married woman, who, in consideration of certain conditions, executes a mortgage on her property, becomes liable in damages, in case he violates the conditions of his contract. 27 A. N. R., *Taylor v. Goodrich*.

17. WYLY and HOWELL, JJ., *dissenting*: Not where the damages are remote. *Ib.*

18. The purchaser who fails to comply with his bid, owes five per cent. interest per annum on the cash, and not eight per cent. 28 A. 878, *Merrick, Ex. v. D. B. North.*

19. For interest on damages, see OFFENSES AND QUASI OFFENSES, II. (g), 4).

20. A stipulation in a mortgage to pay attorney's fees, in case of suit, is valid. See MORTGAGE, III. (e), No. 4.

§ 2. Other obligations.

1. Where, under a special contract, a certain amount of timber was to be delivered at a certain place, in the event of inability on the part of the contractor to deliver at that point, it was agreed that it should be delivered at another specified point, at a price equal to that if delivered at the first place, the delivery to commence at a certain time, and the contractor commenced the delivery, at the place designated in the alternative, some time before the time specified; *Held*: That the difference in the price could not be claimed for the timber delivered at the time specified in the contract. 15 A. 187, *Roberts v. Powers.*

2. A party, who has violated his contract to erect buildings for another, is not entitled to exact a specific performance, but can only claim the value of his work and materials. 15 A. 220, *McClure v. King.*

3. The measure of damages is the amount of loss the plaintiff has sustained, and the profit of which he has been deprived, with the exception stated in article (1934), (1928), C. C. 17 A. 239, *Smith v. Thielen.*

4. Damages arising from the presumable profits of a speculation which was never made, are too uncertain to be awarded by a court of justice. 25 A. 420, *Bohn v. Cleaver, etc.*

5. TALIAFERRO and MORGAN, JJ., *dissenting*: The plaintiffs abstained from entering into a contract, for fear the ship should not be in port at the designated time, and should recover the profits of which they have been deprived. *Ib.*

6. The defendant, having agreed to ship all his cotton to plaintiff, on consideration of an advance made to him without commission, must pay to plaintiff the regular commission on all cotton shipped to other factors. 24 A. 159, *Thornhill et al. v. Picard & Weill.*

7. One acquainted with the defects of workmanship, should make his complaint known immediately, and not wait until the damages suffered amount to several times what they originally were. He can only recover what it would originally have cost to repair the defect of workmanship. 26 A. 72, *Campbell v. Miltenberger.*

8. A telegraph company, making an error in a dispatch, whereby goods were ordered to Marion station, instead of Macon station, will be held liable for all losses and damages suffered by the false directions, even if the error was committed by another telegraph company with whom they had a contract, and which received the original dispatch. 25 A. 384, *Olympe v. Southwestern Telegraph Company.* See PRESCRIPTION, III. (c), No. 11.

9. Defendants, under their contract, furnished erroneous information to plaintiff of the quotation of the New York gold market, and are bound to repair the loss occasioned by the error. 27 A. 49, *Bank of New Orleans v. Western Union Telegraph Company.*

10. Under the contract with the car driver, it being stipulated that, if the driver received any fare, or failed to cause the same to be deposited in the box, he should be discharged, and forfeit all wages; the railroad company discharged a driver, who sued for his wages, and, notwithstanding the defense setting up the contract, recovered against the company, and sued for damages done to his reputation by the answer; *Held*: That, the company having shown probable cause for the discharge of plaintiff, and having good reason for making that defense, the driver can recover no damages. 28 A. 685, *Richard Hewitt v. New Orleans and Carrollton Railroad; Valcour Hough v. Same, N. R.*

(b) *As to third persons.*1) In general; and stipulations *pour autrui*.

1. Where a party contracted to work for the city, and the materials were furnished by a third person; *Held*: That the notification of the contractor's order upon the controller for a warrant in favor of the furnisher of materials, for a portion of what might be found coming to him (the contractor) when his account should be audited, had not the effect of making the city the debtor, in the place of the contractor. 15 A. 325, *Stewart v. Christy*.

2. A penalty stipulated in behalf of a third party, where the condition or consideration of the contract, is not the advantage sought for the third person, but merely a penalty to enforce the primary obligation, cannot be recovered by such third person. 16 A. 339, *St. Joseph's Association v. Magnier*.

3. In an act of sale, a stipulation for another, by the assumption of his note, as part of the price, gives to the said holder all the rights and privileges which the vendor could exercise. 17 A. 256, *Succession Ferguson*; 17 L. 67.

4. The purchaser of slaves assumed as a part payment thereof, a debt due by the seller to a third person who sued thereon; *Held*: That the obligee was bound to pay, because, as between him and said person, the consideration was not slaves. 22 A. 506, *Fickling v. Marshall*. See III. (c), 1), Nos. 4, 5, 6.

2) Acts and contracts, simulated or in fraud of creditors; revocatory action and action en declaration de simulation.

A. In general; distinction between the two actions and when the revocatory action must be employed.

1. Where a sale is clearly a simulated one, a subsequent, as well as an antecedent creditor, may treat it as a nullity. 15 A. 177, *Davis v. Stern*.

2. Where a promissory note or a judgment has been transferred to a third person, for the purpose of defeating the legal pursuits of creditors, and the transfer is a simulation, a creditor may disregard such transfer and attach, without resorting to the revocatory action and making the transferee a party to the suit. 15 A. 221, *North v. Gordon*.

3. A creditor is entitled to levy upon property, which has been transferred by his debtor, without resorting to the ordinary action, where such transfer is a pure simulation. 15 A. 553, *Holmes v. Barbin*.

4. A direct action need not be brought to have the nullity of a contract entered into between the parties residing in the Confederate and United States jurisdiction annulled; such contracts are absolutely null. 20 A. 241, *Hennen v. Gilman*; 18 H. 114; 18 A. 482, *Marchand v. Coyle*.

5. The seizing creditor can only plead the simulation of a sale set up against his seizure. He must resort to the revocatory action to have the sale, if it be real, but fraudulent, set aside. 19 A. 53, *Kellar v. Blanchard*.

6. A petition alleging the defendant to hold certain property by simulated title, and praying a money judgment for its value, is not action en declaration de simulation. 20 A. 170, *Edwards v. Ballard*.

7. A direct action is indispensable in order to defeat a fraudulent contract, and only in cases of fictitious contracts, or pure simulations, can the creditor cause the property to be seized and sold in utter disregard of the deed of transfer. 15 A. 302, *Van Ostern v. Simons*.

8. A sheriff's sale cannot be considered as a mere simulation, unless the seizing creditor was a party to the transaction. 15 A. 553, *Holmes v. Barbin*.

9. A sale of property not proved simulated, cannot be attacked collaterally by defendant in injunction. 18 A. 166, *McClendon v. Kemp*; 6 A. 688.

10. A real but fraudulent sale of movable property, cannot be attacked collaterally. 21 A. 271, *Schneider & Zuberbier v. Letchford & Co.*

11. Where there is a real contract, although it may be fraudulent, the remedy is by a direct revocatory action, before the seizure can be effected. 20 A. 41, *Collins & Husband v. Schaffer & O'Dowd*; 30 A. 374, *Bass v. Messick*.

12. Fraud as a ground of nullity must be urged in a direct action, where an actual title has passed, accompanied with possession. 23 A. 46, *Austin, Thorpe & Co. v. Da Rocha, Becker & Co.*

13. If the mortgage be recorded after a *real* sale of the property, the creditor can only contest the sale in a direct action, *aliter*, if the sale be simulated. 23 A. 260, *Lane v. Roselius et al.*

14. A sale clothed with the sanction of judicial authority, cannot be collaterally attacked. 23 A. 499, *Dixey v. Mandell.*

15. A recorded title ostensibly valid, cannot be disregarded; it must be attacked directly. 23 A. 772, *Payne v. Graham.*

16. Where the judicial sale is real and not simulated, the sale cannot be disregarded and attacked collaterally. 29 A. 820, *O'Hara v. Booth and Connell.*

17. A title which is duly recorded, followed by possession, and which is not a simulation, cannot be attacked collaterally, although the deed was made in fraud of creditors. 23 A. 175, *Anderson v. Carroll, Hoy & Co.*; 24 A. 224, *Doherty v. Leake, sheriff.*

18. A party in possession, cannot have his property seized and his title disregarded at the suit of a third person, where there is no averment that the same belongs to the defendant, and is held under a simulated title. 25 A. 35, *Chopin & White v. Blanc & Legendre.*

19. Article 1978 C. C., has special application to contracts made in fraud of creditors, and article 2221 C. C., to the parties to the contract. 24 A. 247, *Brewer et al. v. Kelly, administrator.*

20. To revoke a real contract, however illegal it may be, a direct action is necessary. 29 A. 12, *Gaidry v. Lyons.*

21. It is only simulated sales that may be disregarded; actual contracts, though in fraud of creditors, must be attacked in a direct action. 29 A. 112, *Lannes v. Workingmen's Bank*; 13 A. 155; 14 A. 560, 495; 17 L. 517; 6 R. 21, 152; 6 L. 268; 9 L. 542; 4 A. 439; 3 L. 476; 1 A. 297; 4 L. 473; 8 L. 423; 1 L. 491; 11 L. 438; 6 M. 418, 574; 1 N. S. 537, 633; 25 A. 236.

22. For collection of notes given for simulated sales, see **BILLS AND NOTES**, IV. (a), No. 10.

23. For revocatory action, as followed by Federal courts, see **COURTS**, II. (b), Nos. 13, 14.

24. Fraud is never presumed. See **EVIDENCE**, III. (b), No. 1.

25. A fraudulent title cannot be attacked by garnishment process. See **EXECUTION**, V. (a), 3), E. Nos. 2, 3.

26. The transfer of a policy by the ostensible owner, does not affect the real one. See **INSURANCE**, I. (g), No. 2.

27. The judgment homologating the tutor's account cannot be annulled by his creditor, but the amount due by him may be reduced. See **JUDGMENT**, XI. (a), No. 9.

28. The prescription of this action is one year. See **PRESCRIPTION**, III. (c), 6).

29. Possession by the vendor is a presumption of simulation. See **SALE**, III. (b), 4), A. Nos. 2, 4, etc.

30. If a price be not stipulated, the *dation en paiement* will be set aside at the demand of a creditor suing by revocatory action. See **SALE**, IX. No. 12.

31. A sale made for a real price, no matter how fraudulent, cannot be collaterally attacked. 30 A. 84, *Billgery v. Ferguson.*

32. A suit wherein the creditor sues to set aside a transfer made against the will of his debtor, and wherein fraud is not alleged, cannot be considered as a revocatory action. 30 A. 727, *Logan v. Herbert.*

B. Right to sue; acts or contracts that may be declared fraudulent or simulated; the pleadings and parties.

§ 1 In general.

1. Where the ancestor of a party has parted with a slave for the express purpose of defeating the rights of creditors, an action will lie to recover the value of the slave thus sold and removed. 15 A. 293, *Nouvet v. Bollinger.*

2. If no objection be made to the form of proceeding, the sale may be

declared fraudulent in one form as well as the other. 15 A. 531, *Ross v. Pritchard*.

3. In an action by the creditors to annul a simulated sale of the debtor's property, such creditors enjoy privileges which would be denied to the debtor. 15 A. 653, *Nouvet v. Vitry*.

4. The party in possession under a title ostensibly valid, cannot be disturbed and her title attacked collaterally, even though fraud may be alleged. 23 A. 688, *Markham v. O'Connor, sheriff*; 175, *Anderson v. Carroll, Hoge & Co.*; 24 A. 224, *Doherty v. Leake, sheriff*.

5. When the garnishees answer by setting up title in themselves from a settlement previously made with the judgment debtor, their title should be attacked by a direct action, and not by a rule to traverse, having the features of a revocatory action. 19 A. 16; 25 A. 368, *Hodges v. Graham, Hodge & Co.*

6. The payment of a price less than stipulated in the act of sale, does not make the sale simulated. 19 A. 53, *Keller v. Blanchard*.

7. A note given in consideration of a simulated sale, cannot be collected. 24 A. 276, *Succession Pointer*.

8. A final judgment cannot be collaterally attacked by third persons, who purchased property of the defendant subsequent to its rendition. 25 A. 559, *Pipes v. Norsworthy*.

9. In a revocatory action, it must be alleged that the transferrer has not property sufficient to pay his debts. 28 A. 454, *Mrs. Zimmerman v. Fitch*.

10. The seizing creditor is permitted to disregard simulated sales, because they pass no title, and are not subject to the rules of real contracts. 23 A. 46, *Austin & Co. v. Da Rocha*.

11. Unless the seizing creditor has a lien anterior to that of the plaintiff in a revocatory action for the recovery of the same property, a sale thereof pending the proceedings will be null. 20 A. 248, *Weil v. Sheriff St. Helena*; 9 A. 257; 19 A. 357. See PETITORY AND POSSESSORY ACTIONS, II. (d), No. 1.

12. When plaintiff alleges a fraudulent transfer of property to his prejudice, this is sufficient to maintain a suit to annul the transfer. 28 A. 928, *Russel & Hall v. Ellen Keefe*.

13. See ATTACHMENT, IX. (a), No. 7.

14. Fraud and simulation may be proven by any means in the power of the litigant. See EVIDENCE, III. (b), No. 4.

15. If no allegation of the debtor's insolvency be made, none can be proven. See EVIDENCE, VII. No. 15.

16. No evidence is admissible to contest the reality of a judgment rendered before opponent's claim existed. See EVIDENCE, VII. No. 17.

17. Where the purchaser, her son and a third person, concocted a fraud on the vendor, by causing the property mortgaged to secure payment of the price, to be sold by the State tax collector to such third person who obtains the final title of the auditor, obtains a judicial order putting him in possession, all of which is done so quietly that no one on the place was aware of the change of possession, and who sells to the son shortly afterwards for more than paid by him, but for a price ridiculously small as compared with the value of the property, the mortgage creditor may enforce his mortgage without resorting to the revocatory action. The nullity of the tax sale will be decreed on the injunction sued out by the son. 30 A. 688, *Lusk v. Succession Benton*; but see TAXES, III. (d), § 3), Nos. 13, 14.

18. An insolvent merchant who sells to his penniless brother, merchandise not paid for, in payment of the pretended wages he earned as clerk, and worth much more than the amount pretended to be due, and receives in payment the notes of the purchaser, which he gives in payment to another creditor, who takes no action to claim his vendor's lien, will be considered as a simulation. 30 A. 355, *Sattler & Co. v. Marino*.

§ 2 Prerequisites to the action; who must be parties defendant; and defenses they may plead.

1. In a revocatory action, when judgment has already been obtained against the transferrer, he need not be made a party to the suit. 28 A. 928, *Russel & Hall v. Keefe*.

2. Plaintiff, from whose judgment a devolutive appeal has been taken, may nevertheless bring a suit *en declaration de simulation*, to set aside transfers made by his debtor. 22 A. 248, *Duncan v. Brandon*.

3. Where the petition discloses other parties in interest, who are not made defendants in a revocatory action, plaintiffs should be *non-suited*. 26 A. 388, *Vandine v. Ehrman & Lecanu*.

4. Although the vendor intended to defraud his creditors, if the real vendee was not a party to such fraud, the sale, as to him, cannot be annulled. 26 A. 467, *Billgery v. Schnell*.

5. The transferor must be made a party in a revocatory action. 28 A. 454, *Mrs. Zimmerman v. Fitch*.

6. Plaintiff, whose claim is unliquidated, cannot bring a revocatory action. 28 A. 454, *Mrs. Zimmerman v. Fitch*.

7. An assignee in bankruptcy may bring the action, although the claims of the creditors have not been reduced to judgment. 2 Woods, 87, *Barker v. Barker's Assignees*. See § 3, No. 5.

§ 3 Who may sue; and acts done or contracts made, before the creditor's claim accrued.

1. The heirs at law cannot prove simulation in the contracts made by the person from whom they inherit. 15 A. 42 *Collins v. Pratt*. See EVIDENCE, XV. (d), 1; 2); *infra*, Nos. 8 *et seq.*

2. Forced heirs are considered creditors of their ancestor, and as such, may attack his acts as simulated to the extent of their legitime. 18 A. 51, *Succession Weigel*; 12 A. 684, 759; 14 A. 610; 6 A. 494.

3. Heirs who have received the full amount of their legitime, cannot attack sales made by the deceased and offer testimony to prove simulation. 27 A. 266, *Tesson v. Gusman*; 9 R. 29; 12 A. 759.

4. Where the debtor transferred his property for the purpose of injuring his creditors, and actually does injure them, although the sale may not be a simulation, they are entitled to a direct action of nullity to secure themselves. 15 A. 553, *Holmes v. Barbin*.

5. The revocatory action may be instituted by a syndic, or administrator, without regard to the date or origin of the claims of the creditors. 15 A. 582, *Sullice v. Gradenigo*. See § 2, No. 7.

6. The heirs are bound by a compromise between their ancestor and his creditor and cannot attack it collaterally, not even for fraud or error. 16 A. 344, *Adle v. Prudhomme*.

7. A testamentary executor, not claiming to act for the creditors, cannot sue to set aside a simulated sale. 23 A. 205, *Van Wickie v. Calvin*. See Nos. 15, 16.

8. In an action brought by a child to recover property which has been sold by his father, before he can be allowed to prove that his father has defrauded him of his legitime by a simulated sale of his property, simulation must be alleged in the petition, and the simple allegation that defendant knowingly and tortiously detains from plaintiff, without any legal rights, lands which plaintiff has inherited from his father, will not be sufficient. 15 A. 140, *McQueen v. Sandel*.

9. A child and heir of a party to a simulated sale is, only exceptionally, and in a limited sense, entitled to assume the position of a third person in relation to it. His action, to be relieved from it, must be declaratory of the simulation. *Ib.*

10. The forced heirs may claim property placed by the deceased in the name of a third person, to protect it during his absence in the Confederate States. 26 A. 445, *George v. Campbell*.

11. The judgment adjudicating the community property to the surviving husband, having been rendered prior to the origin of appellants' debt, he cannot enquire into the validity thereof, and the court cannot enquire whether it was based on slaves. 22 A. 255, *The Minors Smith v. T. W. Smith, tutor*.

12. The fraudulent transfer being made before the debt accrued, but recorded afterwards, may be attacked by a revocatory action. 28 A. 928. *Russell & Hall v. Keefe*.

13. As a general rule, a voluntary conveyance, made by a grantor in easy circumstances to his wife or children, cannot be impeached at the instance of creditors, who became such long after the execution of the conveyance. 2 Woods, 87, *Barker v. Barker's Assignees*.

14. To impeach a conveyance made under such circumstances, it must be shown to have been fraudulent or made with a view to protect the property conveyed from future debts. *Ib.*

15. An assignee in bankruptcy may bring the action. See § 2, No. 7.

16. The curator of an estate may sue in case of insolvency of the succession. See PLEADING, I. (c), 6), No. 4.

§ 4 Payments; and contracts with creditors giving them a preference or security.

1. When the creditor was in good faith, and in due course of his business, received merchandise from the insolvent in payment of his account, which would otherwise have been paid in cash, and further, when the goods sold by the creditor were delivered by the insolvent to his creditors, the giving in payment will not be set aside. 16 A. 402, *Xiques v. Rivas*.

2. The sale in good faith by the debtor to his creditors, in payment so far as third persons are concerned, is equivalent to cash, and is neither simulated nor fraudulent. 25 A. 517, *McWaters v. Smith*.

3. In a *dation en paiement* by the insolvent debtor to one of his creditors, who knew the fact, the only restitution to be made, is that of placing the parties as they were before the contract complained of was made. 26 A. 297, *DeGrec & Co. v. Murphy, & Gairns et al.*

4. When a national bank, being embarrassed, and in need of assistance, receives a loan of money or other valuable material aid, from a person who knows its embarrassed state, on condition that the party making the loan or giving the aid shall be secured therefor, and the security is accordingly given by pledging a part of the assets of the bank, this is not giving him a preference over other creditors within the meaning of section 5242, R. S. 2 Woods, 77, *Casey, receiver v. La Société du Crédit Mobilier*.

5. Article 1987, C. C., applies exclusively when the act sought to be annulled gives an undue preference to one creditor over another, and article 1994, to all contracts or judgments by which creditors are injured. In the former case, the action must be brought within a year from the contract or judgment, in the latter case, from the day the creditor obtained his judgment against the debtor. 28 A. 652, *St. Germain v. Landry*.

6. For *dation en paiement*, see SALE, IX.

7. For judgment of separation, see MARRIAGE, XIV. (c).

8. One who pays the purchase price after a revocatory action has been brought, to set aside the sale, cannot demand restitution when the sale is set aside. 30 A. 353, *Schmidt & Ziegler v. Sandel et al.*

§ 5 Contracts making a partial distribution among creditors.

1. If a debtor in embarrassed circumstances, enters into an arrangement with all his creditors, to pay them a certain proportion of their claims in consideration of a discharge of their demands, and he privately agrees to give a better or further security to one than to the others, the contract with the other creditors is void. 2 Woods, 204, *Chuck & Bros. v. Mesritz*.

2. For error in such contracts, see III. (b), 3), No. 2.

3. Creditors who knowingly accept a dividend declared under an amicable assignment, are tacitly bound by the terms of the contract. See INSOLVENCY, IV. (b), No. 3.

§ 6 Onerous contracts with persons not creditors.

1. The distinction which is recognized between fraudulent and simulated contracts, limiting in the former case the creditor defrauded, to a direct action in revocation, and in the other instance allowing the creditor to seize the property at once, applies to donations. 15 A. 511, *McCutcheon v. McCutcheon*.

2. Where the contract was not known to the other partner, and was not beneficial to the partnership, the creditors of the partnership may contest the claim. See PARTNERSHIP, III. (a), No. 1.

§ 7 Debtor's renunciation of his rights.

1. A mortgage given by a ward on the whole of a plantation, owned by himself and his tutor, one undivided half each, to secure a mortgage already given thereon by his tutor, cannot be construed as a renunciation of the ward's legal mortgage resting on the tutor's half, at the time. 24 A. 185, *Newell v. Buckner*.

c. Evidence.

§ 1 In general.

1. Parol is admissible to establish simulation in a title to slaves. 15 A. 566, *Smith v. Lambeth*.

2. The law allows an action to recover real estate placed in the name of another for the vendor's protection, but the proof of simulation by the particular kind of evidence the law dictates, should be made. 25 A. 438, *Vinson v. Succession Thompkins*.

3. The object of the suit on the part of the married woman being to obtain the cancellation of the sale, with a right of redemption of a slave made by her to a creditor of her husband, on the ground that this was really a contract of suretyship, she is not confined in her evidence to a counter letter or to interrogatories, but may offer parol evidence to prove such facts. 26 A. 11, *Leblanc v. Bouchereau*; 5 A. 580.

4. When fraud or error is charged, parol is admissible to contradict a written act. 29 A. N. R., *Hewman v. Blades*; 24 A. 210; 26 A. 548; 2 L. 3; 4 A. 441; 9 A. 29; 15 L. 311.

5. In an action of nullity, defendant may offer agreements between plaintiff and other parties wherein the act sought to be annulled is recognized and confirmed. 29 A. 245, *Blake v. Nelson*.

6. The allegation of some ways by which the fraud was committed, does not exclude evidence of other ways. See EVIDENCE, VII. No. 22.

7. For this subject, see also EVIDENCE, XV. (h).

§ 2 Its admissibility; and proof of debtor's insolvency and creditor's claim.

1. Insolvency of a debtor, in a revocatory action, cannot be shown, unless alleged. 19 A. 298, *Abat v. Penny*. For variance, see EVIDENCE VII.

2. Conversations and admissions of one of the parties to a simulation, are admissible in evidence, though made out of the presence of the other party. 29 A. 4, *Gaidy v. Lyons*. See EVIDENCE, XII. (h).

3. Declarations of the parties implicated in a fraud, may be offered by the creditors. See EVIDENCE, X. (a), No. 2.

4. For conflict between creditors of the husband and his wife, see MARRIAGE, XIV. (c).

5. Under an action for simulation, no evidence of fraud impeaching the reality of the contract is admissible. See PLEADING, V. (d), 2), No. 1.

6. The return of a *fi. fa. nulla bona*, is evidence of insolvency. 30 A. 511, *Lovell v. Payne*.

§ 3 Presumption of fraud, or simulation; and burden of proof in relation thereto.

1. Plaintiff may require the judge to charge the jury that, where the vendor continues in the corporeal possession of the thing sold, the sale is presumed to be fraudulent, the burden of establishing the reality of the sale resting on defendant. 15 A. 4, *Bachemin v. Chaperon*. See EVIDENCE, VIII. No. 6.

2. The continued possession by a seized debtor of the property sold under execution, cannot be considered as a badge of simulation as regards the seizing creditor, who is seeking the payment of his claim, and whose claim is satisfied in part by the proceeds of the sale. 15 A. 553, *Holmes v. Barbin*.

3. When a judgment creditor seizes property, as belonging to his judgment debtor, but the title to which stands in the name of another, he assumes the burden of showing simulation. 25 A. 111, *Pierce v. Clark*. See No. 6.

4. Although witnesses may swear that the purchaser had no means, yet he may have had money in his pocket, and the declaration in the act of sale that the cash payment had been presently made, will outweigh their testimony. 26 A. 468, *Billgery v. Schnell*.

5. When the vendor remains in possession for a longer time than is necessary to make a delivery, the presumption of fraud exists as to the transfer. 28 A. 928, *Russel & Hall v. Keefe*.

6. The burden of proof is on the party alleging simulation. See EVIDENCE, III. (c), No. 4.

7. Not in cases of separation of property. See MARRIAGE, XIV. (c).

8. For presumption of fraud and simulation, see EVIDENCE, III. (b).

D. *Judgment and its effect.*

1. A judgment rendered before another creditor's claim accrued, cannot be attacked by him. 22 A. 416, *Hoy v. Scott*.

2. Effect of a judgment of separation of property when attacked by the creditors of the husband. See MARRIAGE, XIV. (c).

VIII. OF THE DIFFERENT KINDS OF OBLIGATIONS.

(a) *Personal, heritable and real obligations.*

1. Where the heirs at law bring a suit to recover from the administrator of the succession of their deceased ancestor, the price paid for the property of the succession, at a sale made by order of court, although in the petition they may claim to be recognized as heirs, yet their action is a personal one. 15 A. 469, *Bennett's Heirs v. Alexander*.

2. In all aleatory contracts permitted by our law, under article 2952 of the Civil Code, the personal qualities of the contracting parties must, more or less, form a material part of the motive to the contract, and the contract is not therefore assignable by one of the parties, without the consent of the other. 15 A. 525, *Grayson v. Whalley*. See ALEATORY CONTRACTS.

3. The obligation arising out of a contract to run a horse race, is heritable. 15 A. 525, *Grayson v. Whalley*.

4. In case the contract is dissolved by the death of the workman, architect, or undertaker, the proprietor shall be bound to pay to their heirs the value of the work that has already been done, and of the materials already prepared, proportionably to the price agreed on, in case such work or materials may be useful to him. It is not therefore the real, but the relative value of the work and materials, that must be compensated. 22 A. 74, *Thomas v. L'Hote et al.* See BUILDERS AND BUILDINGS. LEASE, II.

5. The right to the homestead exemption is personal. See HOMESTEAD, II. Nos. 18, 35.

(b) *Simple, conditional and resolutory condition.*

1. The agent who subscribes a penalty, conditioned upon the non-fulfillment by his principal of a condition of the contract, such as the failure to satisfy a certain judgment or perform a certain award, cannot be rendered liable until the judgment is rendered or award made. 20 A. 536, *Thompson & Co. v. Moulton*.

2. Where the obligor was entitled to the possession of the property until a certain event, and was to pay rent thereafter, although the happening of the condition may take place later than was anticipated, rent cannot be exacted previous thereto. 21 A. 510, *Brown v. Roberts, ad'r.*

3. The clause of warranty on the part of planters that their crop should amount to four hundred bales of cotton, or that their commission merchant, in any event, should be entitled to two thousand dollars commission, inserted in the agreement to furnish supplies, is neither unlawful, nor without consideration. 23 A. 201, *Stewart, Hyde & Co. v. Buard & Dranguet*.

4. An overseer employed by the year, at a salary of eight dollars per hogshead of sugar, if discharged before the expiration of his term, cannot recover until the number of hogsheads is ascertained. 24 A. 109, *Woodward v. Gross & Payan*.

5. A bond furnished by the purchaser, previous to 1870, conditioned that the same shall be exigible when a minor's mortgage shall be erased, can be enforced after January 1, 1870, where the tacit mortgage was not duly recorded. 26 A. 275, *Parker v. Bernard*.

6. A note payable as the lands are sold, may be enforced. See PARTITION, II. No. 8.

(c) *Obligations with a term.*

1. Where the contract cannot be executed, by accident or force, this will relieve the obligor from the forfeiture of his pay for the work done by him, up to the time at which he should have completed the whole. 22 A. 150, *Bietry v. City of New Orleans*.

2. If the suit be brought before the time has arrived, an exception *in limine* must be filed. See PLEADING, VI. (a), 3), No. 6.

3. See PRESCRIPTION, V. (b).

(e) *Obligations, several, joint, and in solido.*

1. There is no provision of law which exempts acceptances from the operation of the maxim that, "an obligation *in solido* is not presumed, but must be expressly stipulated." 15 A. 474, *Shreveport v. Gooch*; C. C. (2088). See BILLS AND NOTES, V. (d).

2. Those who commit torts, or assist, or encourage others in so doing, are bound *in solido* for the damages occasioned by the trespass. 15 A. 583, *Irvine v. Scribner*. See OFFENSES AND QUASI OFFENSES, II. (b).

3. The father and mother of the husband having bound themselves to refund the wife's paraphernal property, in the event of their son's failure in business, became sureties for its reimbursement. This a solidary obligation. 17 A. 233, *Pecquet v. Pecquet*. See MARRIAGE, IX.

4. The surety has the right to demand the division, but until this right is exercised the obligation is solidary. This exception must be specially pleaded. *Ib.* See SURETYSHIP, II. (a), 4), B.

5. Where sub-contractors deliver defective work to the contractor, who receives it in that condition, and it causes damages to another, they will all be held liable *in solido* for the amount of the damages so caused. 17 A. 110, *Carey v. Courcelle*; 7 A. 321.

6. Where the parties are sued jointly, no judgment can be rendered against one without the other. 18 A. 129; *Beale v. Trudeau*. See act of 1871, p. 19.

7. Joint purchasers cannot be condemned *in solido* for the purchase price. 18 A. 291, *Lallande, ex. v. Weintz & Pochelu*; 13 L. 447; 1 A. 432; 3 R. 256. See SALE, IV.

8. If a promissory note be drawn to the order of two persons and indorsed by both, they are jointly liable. 19 A. 202, *Culver, Simonds & Co. v. Leovy et als.* See BILLS AND NOTES, IV. (d), 2).

9. "We or either of us promise to pay," does not create a solidary obligation. 21 A. 127, *Stowers v. Blackburn*. See BILLS AND NOTES, II.

10. "We or either of us," makes a promissory note solidary. 28 A. 837, *Chaffe, etc. v. Thornton*.

11. An obligation whereby the partners bind themselves individually to a third person, to pay to him, in addition to a fixed price, one-third of the profits which would be made over said price, as a consideration of the transfer of his interest to them, will be considered as joint. 21 A. 159, *Lusk v. Graham and Cble.*

12. Persons engaged in the business of common carriers by railroad are only liable jointly; the code limits the solidarity of the obligors to persons engaged in carrying personal property for hire in ships or other vessels. 27 A. 611, *Chaffe & Bro. v. Ludeling et al.* See MANDATE, V. (a), No. 2. CORPORATIONS, VI. (d), No. 4. PARTNERSHIP, I. (b), No. 3.

13. Under articles (2080), (2081) and (2082) of the Civil Code, all the parties to a joint obligation must be made defendants. 12 A. 383, *Hyde v. Marcey*. See acts, 1871, p. 19.

14. Where one partner of an ordinary partnership employs in its behalf an attorney, the one employing him may possibly bind himself for the full amount of fees, as also the partnership, but the other partner is only bound for his virile portion. 24 A. 230, *Hyams & Jonas v. Rogers, tutor, etc.* See PARTNERSHIP, III. (c).

15. The surety on a note, is bound *in solido* with the drawers, and citation on the latter will interrupt prescription as to him. 24 A. 467, *Rogers & Woodall v. Jasper Gibbs*. See PRESCRIPTION, IV. (c), 1). BILLS AND NOTES, III.

16. The members of a commercial firm purchasing a plantation, and binding themselves solidarily on the notes, will be so held. 25 A. 509, *Gantt v. Eaton & Barstow*. See PARTNERSHIP, III. (b), 1).

17. The sureties on judicial bonds are bound *in solido*. 28 A. 676, *Faust Bros. & Co. v. Glynn & Wintz et als.* See SURETYSHIP, IV.

18. The heirs of a surety on a bond, are liable for their virile share of the suretyship. 28 A. 403, *Francis v. Martin*.

19. There was no error in rendering judgment against the minor heirs, declaring that each is liable for his or her proportional share of the father's half of the estate, with benefit of inventory. The legal effect is the same as if the judgment had been against the defendant, as tutrix; nor was there error, in rendering judgment for all the costs against her and the minor heirs *in solido*. 92 U. S. (Otto's), 116, *Kittredge v. Race et al.*

20. Where joint obligors may be sued, see COURTS, II. (g), 3).

21. The husband may be liable for the debts of his wife. See MARRIAGE, VIII. (a), No. 8; VII. No. 3.

22. Law partners are bound jointly. See PARTNERSHIP, III. (c), No. 1.

23. Ordinary partners are bound jointly. See PARTNERSHIP, III. (c).

24. The maker and indorser of a note are liable, each for the whole amount of the debt, although not technically bound *in solido*. 29 A. 63, *Mack v. Fortier*. See BILLS AND NOTES, IV. (d), 2).

25. Commercial partners, who undertake to administer the minor's interest, are bound *in solido*. See PARTNERSHIP, III. (b), 1), No. 4.

26. One of two solidary obligors, who pays the debt, becomes legally subrogated to the creditor's rights which he may exercise as to one-half of the debt against his co-obligor. See PAYMENT, II. (b), 1), No. 8.

27. For subrogation of a joint debtor who pays the whole debt, see PAYMENT, II. (b), 2), No. 4.

28. For pleadings on such obligations, see PLEADING, I. (c), 3).

29. The sheriff is liable *in solido*, with the seizing creditor, for damages. See SHERIFF, II. (b), 3).

30. Owners of a sea-going vessel are responsible *in solido*, for gold taken as freight, and used for expenses. See SHIPPING, IV. (b), 3).

31. There is no distinction between a surety expressly bound *in solido*, and one who has not so expressed his obligation. See SURETYSHIP, II. (a), 1), No. 1.

32. How stockholders may bind themselves *in solido*. See *Ib.*, No. 4.

(f) Of divisible and indivisible obligations.

1. A mortgage, given by joint owners on the whole of the property, is indivisible, and all the joint owners must be made parties, to authorize a judgment to be rendered executory on the property; the share of one joint owner cannot be seized separately. 23 A. 682, *Hughes, administrator v. Patterson et al.* See MORTGAGE, III. (e), Nos. 2, 5, 6.

2. In commutative contracts, where there has been a part performance on one side, from which a benefit has been derived by the other side, the other party is compellable to make compensation to the extent of the benefit which he has received, deducting therefrom all the damages which he has sustained

by the want of an entire performance thereof. But this doctrine is applicable only to cases where the contract is susceptible of divisibility. 16 P. 169, *Hyde v. Booraem*.

3. For divisibility of actions, see PLEADING, I. (e).

(g) *Principal, accessory and penal clauses.*

1. Plaintiff cannot sue for the enforcement of the contract and of the penalty at the same time, except: 1st, when the penalty is expressly stipulated for the mere delay; and, 2d, when by special stipulation the penalty may be exacted if the principal obligation be not. 18 A. 276, *Barrow v. Bloom*.

2. In a penal contract, not containing the two exceptions, plaintiff can only be entitled to nominal damages, or the loss actually sustained by him. *Ib.*

3. The contract and penalty for the delay, may both be exacted. 28 A. 501, *Hunt v. Zunts*.

4. The transfer of a note, secured by mortgage, transfers also the mortgage.

1. Woods, 214 *Ellett v. Butt et als*; 18 A. 192, *Jeckell v. Fried*.

5. The owners of a steamer entered into a contract for the carriage of seventy thousand staves, in which was this stipulation: "we agree to forfeit one thousand dollars if we fail to carry out this contract." The contract was partly performed by the carrying of fifty-seven thousand slaves, and the part performance accepted; *Held*: That the contract provided for a penalty to cover actual damages, and did not provide for liquidated damages, and as no actual damages were shown, none were allowed. 1 Woods, 302, *Taylor et als. v. Steamer Marcella*.

6. A penal clause, stipulated for the benefit of a third person, gives him no right of action for its enforcement. See VII. (b), No. 2.

7. One who assumes to pay certain bonds, is bound for the interest. 95 U. S. (Otto's), 644, *New Orleans v. Clark*.

IX. OF THE EXTINCTION OF OBLIGATIONS.

1. The release of one of several debtors *in solido*, in an obligation arising from a trespass, operates the extinguishment of the debt as to the remaining co-debtors, unless the creditor has expressly reserved his right against the other debtors *in solido*. 15 A. 583, *Irwin v. Scribner*. See OFFENSES AND QUASI OFFENSES, II. (b).

2. The remission of the debt in favor of one of the co-debtors, releases the others, if they are bound *in solido*. 17 A. 118, *Lynch v. Leathers*. C. C. (2203), (2199).

3. The bonds of a corporation are not extinguished, because they were kept in the same safe in which the liquidator of the company had his assets. 21 A. 248, *Clinton & Port Hudson R. R. Co. v. Brown*.

4. In a bilateral contract, if the plaintiff fails to comply with his part of the agreement, the defendant is absolved. 23 A. 466, *Moses v. Howard, Preston & Barrett*.

5. A claimant for services rendered, cannot be defeated by a plea that she was defendant's concubine. See LEASE, II. (c), 1), No. 6.

6. See CONFUSION. COMPENSATION. PRESCRIPTION.

7. A sheriff, who deposits money according to the instructions of the parties, in the hands of commission merchants who fail, becomes bound, by promising to pay. See MANDATE, V. (b), 7), No. 5.

OCCUPANCY.

See THINGS, I. SERVITUDES, II. (b), 1), A.

OCCUPATION.

See POSSESSION. OBLIGATIONS, VII. (b), 2), c. § 3.

OFFENSES AND QUASI OFFENSES.

I. IN GENERAL.

II. OF THEIR SEVERAL KINDS; THE RIGHT TO CLAIM AND LIABILITY FOR DAMAGES, AND THE ACTION FOR THEIR RECOVERY.

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| (a) <i>In general.</i> | (g) <i>Assessment of damages and of what composed.</i> |
| (b) <i>Joint trespassers.</i> | 1) <i>In general.</i> |
| (c) <i>Of the rule volenti non fit injuria.</i> | 2) <i>Injuries inflicted otherwise than by judicial process.</i> |
| (d) <i>Of damnum absque injuria.</i> | A. <i>Personal injuries.</i> |
| (e) <i>Injury inflicted otherwise than by judicial process.</i> | B. <i>Injury to property.</i> |
| 1) <i>In general.</i> | 3) <i>Injury inflicted by judicial process.</i> |
| 2) <i>Personal injuries and violation of relative rights.</i> | 4) <i>Interest.</i> |
| 3) <i>Injury to property.</i> | (h) <i>Damages by those for whose acts others are responsible.</i> |
| (f) <i>Injury inflicted by judicial process.</i> | |

I. IN GENERAL.

1. One who is permitted to occupy a building so as to take care of the property, in the absence of the owner, and who afterwards removes, leaving some effects in said house, carrying the keys, has no cause of action against the owner, who resumes possession by removing the effects to a safe place. The retention of the keys of said building after notification to leave is a trespass. 16 A. 200, *Looram v. Burlingame*; 12 A. 688.

2. The violation of a blockade only affects the vessel and cargo, and unless they are captured *in delicto*, the offense is purged. 20 A. 92, *Szymansky v. Plassan*; 8 Peters, 495, 519.

3. The purchaser of a plantation, with staves, timber, etc., upon it, cut from the land of a neighbor, is not liable in damages on an action in trespass against him, even if, in the act of sale, his vendor warranted him against any claim on the part of said neighbor, and deposited in his hands a certain sum of money, to be kept by him until settlement of said alleged claim. 25 A. 409, *Whitehead v. Dugan*.

4. No suit in damages can be instituted to recover what has been lost in another suit, because defendant falsely answered to the interrogatories on facts and articles. 28 A. 709, *Gusman v. Hearsey and Husband*. See EVIDENCE, XVIII. (d), 1).

5. A wharf, which has been opened to the public, must be presumed to continue so until some notice has been given to those accustomed to use it, that their rights have ended. A steamboat company, by the departure and arrival of their conveyances, give an invitation to all who desire to approach their boats, to pass over their landings. One accustomed so to pass cannot be considered a trespasser in repeating his act after a new wharf has been adopted and the boats have ceased to use the older one; and to exclude the passer's right so as to make him in fault, and to prevent his recovering for the injury sustained by leaving the old wharf in a bad condition, notice must have been given of its changed character and that the rights of passers have terminated, 15 Wall, 649, *Railroad Company v. Hanning*.

6. For damages under the civil rights act, see COLORED PERSONS.

7. For prescription of the action, see PRESCRIPTION, III. (c), 3).

II. OF THEIR SEVERAL KINDS; THE RIGHT TO CLAIM AND LIABILITY FOR DAMAGES AND THE ACTION FOR THEIR RECOVERY.

(a) *In general.*

1. In an action brought to recover the value of cattle killed on a railroad track by the cars, the plaintiff is as much bound to prove the fact of gross negligence and want of care on the part of the company or its agents, as he is to prove the fact of the killing. 15 A. 105, *Knight v. Opelousas Railroad*. See CORPORATIONS, X. (bb), Nos. 1, 2; *infra*, (e), 3), No. 1.

2. A plaintiff, in a case of damages *ex delicto*, must make his case certain; a probable case will not satisfy the exigency of the law. 16 A. 121, *Ranson v. Labranche*.

3. No damages will be allowed on a simple charge of negligence, imprudence or want of skill, unless such negligence, imprudence or want of skill, be conclusively established. 16 A. 121, *Ranson v. Labranche*.

4. Damages arising *ex delicto*, cannot be recovered unless specifically proved. 16 A. 151, *Minor v. Wright*.

5. Petitioner who alleges that *he has suffered* damages, by reason of his son being killed, shows no cause of action. 17 A. 244, *Earhart v. New Orleans Carrollton Railroad Company*.

6. Damages should be proven with some certainty, to be recovered. 21 A. 185, *Lallande v. Ball*.

7. For sufficiency of evidence, see EVIDENCE, XIII. (a).

(b) *Joint trespassers.*

1. In an action to recover damages against a sheriff, for trespass, in the execution of a writ of sequestration, where the defendant excepts to the plaintiff's demand, upon the ground that the latter has no cause of action against him, since he acted in his capacity of sheriff, and in a legal manner, the exception should aver that the acts complained of in plaintiff's petition are the same, and none other than those mentioned in the exception; yet if this averment be not made on the trial, and testimony to show that the acts were the same, be admitted without objection, effect must be given to this testimony. 15 A. 473, *Flournoy v. Milling*. See EVIDENCE, V. (c).

2. One not owning the land upon which a trespass was committed, has no right to any damages. 23 A. 529, *Sorrel v. Carlin*.

3. Co-trespassers are liable *in solido*. 29 A. 213, *Cooper v. Capel*; C. C. (2304), (2324); acts 1844, p. 14. See OBLIGATIONS, VIII. (e).

4. The release of one of the co-trespassers, will release all. See OBLIGATIONS, IX. No. 1.

(c) *Of the rule volenti non fit injuria.*

This maxim is applicable to one who voluntarily binds himself.

(d) *Of damnum absque injuria.*

1. Where an act authorized by law gives rise to damages, it is *damnum absque injuria*. 15 A. 559, *Barbin v. Police Jury*.

2. The railroad company having the authorization to place their track on the banquette, cannot be made liable in damages, if the usefulness of the buildings be destroyed thereby. 27 A. 442, *Koehmel v. New Orleans Mobile and Chattanooga Railroad Co.*

3. WYLY, J., *dissenting*: The grant did not apply to the banquette, and the track should not have been placed so near as to destroy the usefulness of the building. *Ib.*

4. No damage can result from a provisional seizure issued by the lessor, when he has a right to the writ. 28 A. N. R., *Grant v. Sebastien*.

5. If it be not shown that plaintiff could have rented the property, no damages should be allowed for its wrongful detention by a tenant, beyond the time of his occupation. 28 A. 892, *Watrigan v. Dufort*.

6. Cattle killed by the N. O. O. & G. W. R. R. Co., see CORPORATIONS, X. (bb), Nos. 1. 2.

7. One who has the right to demolish a division wall, is not responsible for the value of property left exposed and stolen from his neighbor, who left them exposed. 30 A. 31, *Gettwert v. Hedden*. See SERVITUDES, II. (a), 2), c. No. 15.

8. A planter who erects a levee on his plantation, to protect it from overflow, is not responsible for the damages occasioned to his neighbors from such works. 30 A. —, *E. E. Mailhot v. Robert Pugh*.

(e) *Injuries inflicted otherwise than by judicial process.*

1) In general.

1. The defendant is liable for the damages done by his horse and wagon running away, through his negligence. 23 A. 782, *City v. Heres*.

2. Defendant cannot be held liable for damages caused by his horse and buggy running against plaintiffs, when it is shown that the horse was secured and attended by a boy, where horses are usually tied, but that the running away was caused by a third person, who frightened the horse and caused him to break his fastenings. 24 A. 390, *Shawhan v. Clarke*.

3. Where the railroad company bound themselves to repair all damages done to the plantation, across which they obtained the right of way, they will be condemned on proof of the damages suffered. 28 A. 522, *Becnel, administrator v. New Orleans, Mobile and Texas Railroad Company*.

4. Imprudence of an agent. See MANDATE, V. (a), No. 1.

5. See SHIPPING, VI.

2) Personal injuries, and violation of relative rights.

1. Where an action is brought to recover damages on account of injury done by the accidental falling of a structure, proof that there was no fault or negligence imputable to the defendant, and that there was no original imperfection in the structure, is sufficient to avoid liability on his part. 15 A. 448, *Burton v. Davis*. See No. 17.

2. It is now well settled that, if the party injured might have avoided the accident by a reasonable amount of prudence, he cannot recover damages. 23 A. 264, *Mercier v. New Orleans and Carrollton Railroad Company*; 30 A. 15, *Schwartz v. Crescent City Railroad Company*. See (h), No. 4.

3. Police officers are not the agents of railroads. 23 A. 463, *Knight v. Pontchartrain Railroad*.

4. Where the conduct of plaintiff has, as a matter of fact, contributed to the accident, but such conduct has not been, in a legal sense, imprudent or negligent, he may recover from a defendant in fault. *Ib.*; 17 A. 19.

5. When the conduct of plaintiff has been imprudent, but such imprudence has not contributed to the accident, he may recover from a defendant in fault. *Ib.*

6. Where the conduct of plaintiff has been negligent, and has contributed to the disaster, he cannot recover, even though the defendant be in fault. *Ib.*

7. The more so, if the defendant be not in fault. 23 A. 493, *Hubener v. Carrollton Railroad*; 729, *Klein v. Crescent City Railroad Company*.

8. The plaintiff, who was assaulted and beaten for various offenses, showing pecuniary sufferings and a sense of degradation, should recover damages from defendant. 26 A. 315, *Richardson v. Zunts*.

9. WYLY, J., *dissenting*: Vindictive damages are only penalties for violating the law, and cannot be inflicted in a civil action. *Ib.*

10. Where two roads, one with and the other without danger, are open to plaintiff, and by choosing the former he is crippled, he can recover no damages against the railroad company. 27 A. 55, *Johnson v. Canal and Claiborne Railroad Company*.

11. TALIAFERRO, J., *dissenting*: Not where plaintiff did not contribute by his negligence to the accident. *Ib.*

12. Where there is contributive negligence on the part of plaintiff, he can recover no damages. 28 A. 320, *Laicher v. New Orleans, Jackson and Great Northern Railroad Company*.

13. Although the defendant, who did the shooting, was in fault, yet being provoked by plaintiff, who himself had a pistol, no damages can be recovered for the shooting. 28 A. 710, *M. W. W. Vernon v. Bankston*.

14. No cause of action exists in the children, for "the loss and deprivation of the care, education, assistance and love of their mother," who has suffered and been killed by the fault of the defendant, a druggist, whose clerk made an error in preparing a prescription. 27 A. 716, *McCubbin v. Hastings*.

15. Defendant is responsible to the husband for all expense and damage

which he suffered, subsequent to the offense committed towards the wife. *Ib.*

16. The certificate of the physician that the death was caused by yellow fever, does not release defendant. *Ib.*

17. When the proprietor has no control or supervision of a work confided to a contractor, he is not responsible in damages for an injury done to a workman by the falling of a wall. 28 A. 943, *Gallagher v. Southwestern Exposition Company et als.* See No. 1; also (h), No. 1.

18. The father may sue in damages for the death of his child. 20 A. 25, *Frank v. New Orleans and Carrollton Railroad Company.*

19. If, after a reasonable delay, the city fails to repair a flag stone, destined to span a gutter, and in passing, plaintiff should slip and be injured, the city is responsible in damages. 30 A. 220, *W. O'Neill v. City of New Orleans.*

20. The life insurance company shows no cause of action, when suing the slayer of the insured, to recover the amount of the policy it has paid. 95 U. S. (Otto's), 754, *Insurance Company v. Brame.*

21. An employee on a steamboat, who, by her insolence, insubordination, and threats of personal violence, provokes the captain into an assault, resulting in trifling injury to her, will not be entitled to recover damages. 30 A. 241, *Johns v. Brinker.*

3) Injury to property.

1. Where the railroad company did not employ the usual means of frightening the horses off the track, but increased the speed of the engine to overtake them, they will be liable for the value of the horses killed. 20 A. 158 *Lapine v. New Orleans, Opelousas & Great Western Railroad Co.* See (a), No. 1.

2. The keeping of a floating warehouse, requires a certain skill, and an employment requiring skill and failure to exercise that skill, is gross carelessness. 24 A. 456, *Hamilton & Co. v. Elstner.*

3. Defendant, who by removing his front fence, allowed cattle to get at plaintiff's crop, the custom being not to build any division fence, will be liable in damages. 28 A. N. R., *Daigre v. Payé et als.*

4. The owner having leased his property, adjoining that of plaintiff, the cattle of the neighbors crossing thereon, damaged the crop of plaintiff, held that no damages can be recovered against the defendant, owner. 28 A. N. R., *Morales v. Davidson.*

5. Whenever a defendant sets up that he was an officer or employee of the government, acting under the color of law, it devolves upon him to show that the law which he invokes, authorized the act in question to be done. 16 Wall. 504, *Tweed's Case.*

6. Cattle killed by the New Orleans, Opelousas & Great Western Railroad Co. See CORPORATIONS, X. (bb), Nos. 1, 2.

7. For damages occasioned by crevasses, see CORPORATIONS, X. (r). LEVEES.

(f) Injury inflicted by judicial process.

1. The seizure of A's property under a writ against B, is a quasi offense, and as such prescribed by one year from the date of the seizure, and not from the day on which the final judgment was rendered. 25 A. 414, *Lizardi v. Canal Bank*; 2 N. S. 24; 6 R. 382, *Edward v. Turner*; 9 M. 624; 5 L. 39; 9 A. 490; C. C. 2315, 2316, 3536; 20 A. 151, 214, 323; 16 A. 354, *Mestier v. New Orleans, Opelousas and Great Western Railroad.*

2. One who makes a tortious seizure, will be liable in reasonable damages. 17 A. 21, *Durbridge v. Wentzel*; 8 L. 33; C. C. (2294), (1928), § 3.

3. Damages for a suit cannot be recovered, unless malice be shown. *Sedgwick Measure of Damages*, p. 38; 25 A. 230, *Coco v. Hardie.* See MALICIOUS PROSECUTION.

4. Where a suit has been commenced against a sheriff for seizing plaintiff's property, on execution against a third party, the sheriff should be allowed to allege in his answer, and to prove that the title of plaintiff was invalid, and that the property in question was fraudulently transferred to him, in order to defraud the creditor of the real owner. 16 P. 215, *Hozey v. Buchanan.*

5. Plaintiff who enjoins an unlawful seizure, may claim as damages, attorney's fees as well as any other expense occasioned thereby. 29 A. 572, *White v. Givens*.

6. Necessary allegations in an action for malicious prosecution. See MALICIOUS PROSECUTION, No. 2, *et seq.*

7. When nominal damages only will be allowed for the wrongful seizure of a boat. See SHIPPING, II. No. 1; X. (a), No. 1.

(g) *Assessment of damages and of what composed.*

1) In general.

1. Much discretion must be left to the court or jury in the assessment of damages for offenses and quasi offenses. 18 A. 26, *Rayne v. Taylor*.

2. The jury has discretion to assess the damages for a quasi offense without proof of their exact amount. 19 A. 362, *Pike & Co. v. Doyle & Co.*

3. Where no exact computation of damages can be made, much discretion is left to the judge and jury, in their assessment. C. C. (1928); 17 A. 19, *Choppin v. N. O. & C. R. R.*

4. ON REHEARING: In a suit for damages based upon a malicious arrest, the character, reputation, as well as the actual physical and mental suffering of the injured party, must be taken into consideration. 29 A. 172, *Mary Hardy v. Jno. A. Stevenson*.

5. Unless malice and want of probable cause be shown, actual damages only will be allowed for an injury inflicted by judicial process. See MALICIOUS PROSECUTION, No. 1.

2) Injury inflicted otherwise than by judicial process.

A. *Personal injuries.*

1. Exemplary damages should be commensurate to the nature of the offense, having due regard to the standing of the parties; and when extravagant damages are allowed, they will be reduced to their proper standard. 15 A. 337, *Burkett v. Lanata*. See APPEAL, IX. (b).

2. Exemplary damages should be allowed against trespassers who carry away property held by the lessor in pledge, shoot at him without provocation, and by the use of force prevent him from asserting his rights. 29 A. 213, *Cooper v. Capel*.

3. A mariner who is injured in the service of the ship, is entitled to be cured at the expense of the ship, although no one is in fault, but he cannot recover damages in the nature of extra wages, unless there has been some carelessness or other fault on the part of the officers. 1 Woods, 301, *Brown v. The Bradish Johnson*. See SHIPPING, V. (a), No. 1.

4. The owners of a vessel are not liable to the employee of a stevedore, who has full charge of the unloading of the vessel, for injury to the employee, caused by defective tackle furnished by the vessel, where the defect was not apparent and was unknown to them. 29 A. 791, *Riley v. State Line Steamship Company*.

5. Liability rests only in cases where defendants "might have prevented the act which caused the damage, and have not done it." *Id.*

6. Damages should be awarded for an injury inflicted by fast driving on the streets of New Orleans. 25 A. 235, *Avegno v. Hart*.

B. *Injury to property.*

1. The criterion of damages is the value of the timber at the time it was cut. 28 A. 340, *Schlater v. Gay & Co.*

2. One who knowingly buys land situated on a bayou closed by the police jury, and is aware of the damage which may be suffered by the said land, by overflow, can recover no damages from the police jury for said closing. 29 A. 516, *Lalanne v. Savoy*.

3. A contractor, who unnecessarily cuts trees to lay down the pavement, is responsible in damages to the owner. See NEW ORLEANS, II. (e), 5), A.

4. In computing the amount of damages due by a lessee, who is responsible

for property destroyed by fire, and acquired by the lessor at a confiscation sale, it is necessary for plaintiff to prove his title and the age, habits, health, constitution, etc., of the confiscated, so as to deduce the probable length of the lessor's future enjoyment. 30 A. 487, *Burbank v. Harris*.

3) Injury inflicted by judicial process.

1. Although the absence of malice in an act which has caused damages, is sufficient to prevent the recovery of vindictive or exemplary damages, yet in such a case special damages may be allowed. 15 A. 133, *Perrine v. Planchard*.

2. An action for damages on an injunction bond is not *ex delicto*, but *ex contractu*. 28 A. 817, *Sheppard v. Scheene*.

3. Plaintiff is not responsible for an error of the judge. See EXECUTION, I. No. 8.

4. Where the sheriff went through all the forms for a seizure, excepting the taking of possession, there is no cause for damages. See EXECUTION, V. (a), 6), A. No. 4.

5. The sheriff must indemnify the purchaser for the loss of the thing sold, by reason of the non-fulfilment of the requirements of the law. See EXECUTION, V. (d), 8), B. Nos. 1, 2.

6. When the property of a third person is seized and sold confusedly with other property, and plaintiff prevented a separation, an equitable proportion of the proceeds may be recovered by the owner. See EXECUTION, V. (d), 11), No. 2.

7. Where the defendant had probable cause in making the defense, no damages should be recovered for the charges made in the answer. See OBLIGATIONS, VII. (a), 5), B. § 2, No. 10.

8. Measure of damages as to the sheriff. See SHERIFF, II. (b), 2), A. Nos. 1, 4.

9. His liability to third persons. See SHERIFF, II. (b), 3).

10. An administrator, who asks for the sale of property, when there are no debts to pay, and who, after the sale, with the assistance of the sheriff, ejects the wife from her premises, will be, with the sheriff, liable *in solido* for vindictive as well as all actual damages suffered by the wife. 30 A. 479, *Burton and Wife v. Sheriff*.

4) Interest.

1. Interest on a claim for damages, for trespass, can be allowed only from the date of the judgment liquidating the damages. 18 A. 28, *Robertson v. Brummel*.

2. In a suit on a sequestration bond, to recover damages, for illegally suing out a writ of sequestration in a possessory action; *Held*: That interest could not be allowed on the items of damage found against the defendant. 15 A. 504, *Bonner v. Copley*.

3. See OBLIGATIONS, VII. (a), 5), B. § 1. INTEREST.

(h) Damages by those for whose acts others are responsible.

1. Masters and employers are answerable for the damages occasioned by their servants and overseers, in the exercise of the functions in which they are employed. 17 A. 166, *Wichtreck v. Fasnacht*; 17 A. 19, *Choppin v. N. O. & C. R. R. Co.*; but see II. (e), 2), No. 17.

2. Negligence and want of care in the driver, will render the railroad company liable in damages. 23 A. 180, *Barksdull v. N. O. & C. R. R. Co.*

3. The city of New Orleans is liable for damages done by mobs. 23 A. 507, *Williams v. City*. See No. 9, NEW ORLEANS, II. (a), No. 2.

4. When plaintiff's driver was in fault, by carelessly driving on the railroad track, the railroad will not be held liable for damages. 27 A. 229, *Perkins & Billin v. Morgan*. See (e), 2), Nos. 4, *et seq.*

5. The burning of a building by a laborer, who accidentally threw a lighted match, whilst plowing, does not render his employer responsible for the loss. 27 A. 432, *LeBreton v. Kennedy*.

6. The captain and owners of a boat, cannot be made liable in damages, because the mate of the boat threw a pine knot at a roustabout, and injured him. 28 A. 6, *Dyer v. Riley et als.* See SHIPPING, V. (a).

7. The employer is responsible for the trespass committed by his employees, in cutting timber on the land of his neighbor, although he directed them to be careful and cut on his land, but did not show them the boundary line. 28 A. 340, *Schlatre v. Gay & Co.*

8. The druggist, although not present, when the prescription is prepared by the clerk, is responsible for the errors of the latter. 27 A. 716, *McCubbin v. Hastings.*

9. Municipal corporations are liable for the damages done by mobs or riotous assemblages. 28 A. 936, *Folsom Bro. v. City of New Orleans*; 23 A. 507, *Williams v. City.* See No. 3.

10. New Orleans is liable for damages occasioned by the unsound conditions of her wharves. See NEW ORLEANS, II. (d), 2), No. 11.

11. The principal is liable for the acts, and negligence of the agent, in the course of his employment, although he did not authorize or know of the acts complained of. 15 Wall. 649, *Railroad Co. v. Hanning.*

12. A principal who employs detectives to find out property to satisfy his judgment, is not responsible in damages for the wrongful arrest of the debtor, by the detective, on the charge of selling lottery tickets. 29 A. 828, *Richoux v. Mayer Bro.*

13. The proprietor of a newspaper is liable for the libel published by his employee. See MANDATE, II. (a), No. 5.

14. A minor should not be held liable for the illegal acts of his tutor. See MINORS, VII. Nos. 1, 2.

15. The city of New Orleans is not liable in damages, because the firemen were at the fair grounds during a fire. See NEW ORLEANS, II. (d), 1), No. 4.

16. The city is liable for the destruction of the Pontchartrain Railroad Depot. See NEW ORLEANS, II. (d), 1), No. 5.

17. She is not liable for the wounding of a policeman while on duty. See NEW ORLEANS, II. (d), 1), No. 6.

OFFICE AND OFFICER.

1. A member of the police jury is not an officer, in the intendment of article 122, of the State constitution of 1858; there is no reason, therefore, why a party who holds a civil office of emolument, should not be at the same time a police juror. 15 A. 597, *Voorhies v. Fournet.*

2. A public officer, appointed by the governor during the recess of the senate, and afterwards confirmed, dates his term from the original appointment. 16 A. 134, *Sheperd v. Haralson.*

3. The secretary of state must authenticate a commission officially presented to him, without questioning the same. 17 A. 156, *State ex rel. Bienvenu v. Wrotnowski, etc.*

4. An assessor who was removed from office by the military authorities, before the expiration of his term of office, cannot recover the whole amount of his salary. 17 A. 299, *Fassey v. City of New Orleans*; 12 A. 662; C. C. (1960).

5. Act No. 6, of 1870, creating the office of division superintendent, authorized his removal upon certain contingencies, and the fact of his removal is presumptive evidence that it was made properly. 19 A. 210; 25 A. 74, *State ex rel. Richardson v. Graham.*

6. Where the city passed an ordinance offering five per cent. commission on the value of all real estate belonging to the city and of which there was no record in the books of the city, which would be discovered, and the then city surveyor, on whom this duty was not imposed by law, discovered such real estate, not from information derived from the records of his office, becomes entitled to the commission. 19 A. 274, *Pilié v. City of New Orleans.*

7. Where the recorder, duly elected, sworn and commissioned, has not attained the age required by the city charter to fill the office, his office will be declared vacant. 20 A. 115, *State ex rel. Staes v. Gastinel.*

8. The divesting of a recorder of the city of New Orleans of his office, on the ground that he is ineligible, does not, *ipso facto*, give the office to his competitor. The common council, by joint action of both boards, must fill the vacancy. 20 A. 115, *State ex rel. Staes v. Gastinel*.

9. Officers of the city of New Orleans, who received their appointment from the military authorities during the time that the city was under military control, have no claim against the city for salary for the term fixed by law for such office, if they have been dismissed by the military, before the term of office expires. 21 A. 9, *Mandell v. City*.

10. When the salary is fixed by law, no action lies for additional compensation for alleged extra services. *Ib.*

11. Officers of the city of New Orleans, appointed by the military authorities, were removable at pleasure. 21 A. 9, *Mandell v. City*; 428, *Hire v. City*.

12. The right to an office cannot be tested, on an application for a writ of mandamus. 21 A. 18, *State ex rel. v. Lagarde*.

13. The judge of a court cannot be removed from office, unless by impeachment, or address of the legislature, or by proceedings under the intrusion act. 21 A. 490, *State v. Towne*.

14. If the court be abolished, he is entitled to his salary. 30 A. 861, *State ex rel. T. Wharton Collens v. Jumel, auditor*. See COURTS, II. (e), Nos. 13. 14.

14. The title of act No. 27, of 1868, to determine the mode of filling vacancies, is sufficient. 21 A. 538, *State ex rel. v. Leovy*.

16. Parish judges are entitled to a salary, and such fees as are allowed to clerks of district courts in all cases of appeals from justices' of the peace. 21 A. 563, *Harley v. Barlow*; 694, *Edwards v. Dupuy*.

17. Persons prohibited from holding office, under the fourteenth amendment of the constitution of the United States, can hold no State office. 21 A. 631, *State ex rel. Sandlin v. Watkins, judge*.

18. A constitutional officer, who has been suspended from his functions by the governor "until the legislature shall act upon the suspension," is entitled to resume his office immediately after the adjournment of the next general assembly, if no action has been taken on the suspension during the session. 24 A. 595, *State ex rel. Bovee v. Herron*.

19. Neither the constitution, nor any statute, sanction such suspension. *Ib.*

20. A police juror is not a legislator. 25 A. 140, *Gorham v. Montgomery*.

21. The Warmoth commissions, issued before the promulgation of the election returns, were null and void. 25 A. 253, *Kemp v. Ellis*.

22. The court does not examine who received the largest number of votes; this duty belongs to the political branch. 25 A. 263, *Knoblock v. Collin*; but see ELECTION BY THE PEOPLE, Nos. 22, 23.

23. The courts cannot reverse the action of the returning board. 25 A. 267, *Bonner v. Lynch*; but see ELECTION BY THE PEOPLE, Nos. 22, 23.

24. WYLY, J., *dissenting*: An officer derives his title by his election, and not his commission. The duties of the returning board are ministerial, and the legality of their canvass can be examined into by the courts. *Ib.*

25. A suit in plaintiff's own name for the office of sheriff, is unauthorized by act No. 41, of 1873. 25 A. 364, *Breaux v. Lejeune*; 21 A. 655, 710; 23 A. 784. See INTRUSION IN OFFICE, No. 3.

26. Where officers claim an office created under the law, which provides for the removal of the incumbent by the governor in certain contingencies, the officer having the least ancient commission will be recognized as entitled to the office. 25 A. 396, *Dayries v. Foist*. See TAXES, III. (c), 1), Nos. 9, 10.

27. A clerk and sheriff, commissioned by Governor Warmoth, on the fourth of December, 1872, before the promulgation of the returns of the election by the returning board, and whilst he was suspended from his office by being impeached by the house, and who recognized the McEnery government, cannot be considered as *de facto* officers, even when in full exercise of their offices, and all acts done by them and bonds received, will be null and void; nor is it necessary, for decision of this question, that said officers should be made parties to the proceedings. 25 A. 548, *State v. McFarland*.

28. WYLY, J., *dissenting*: The bond was received by *de facto* officers, and

was valid. Their right to office cannot be enquired into collaterally. 25 A. 671. *Ib.*

29. A district judge, who discharges the duty of committing magistrate, is entitled to no compensation from the parish, and all warrants he may draw on the police jury are null. 27 A. 321, *Babbington v. Parish of St. Charles*.

30. Act No. 60 of 1874, amending sections 6 and 10 of act No. 92 of 1869, does not repeal section 9, which provides that the office of police surgeon of the metropolitan police district shall be held during good behavior. Under act 60 of 1874, however, the said officer, and any other, may be discharged "to the end of reducing expenses," but not otherwise or for any other cause. 27 A. 333, *State ex rel. v. Schumaker*. See METROPOLITAN POLICE.

31. It is the duty of the auditor to warrant for all valid claims for which appropriations have been made. 28 A. 47, *State ex rel. Mentz v. Clinton*. See MANDAMUS, I. (b), No. 28.

32. It is the ministerial duty of the auditor to issue a warrant where the legislature has made the appropriation, even if the money be not in the treasury. In such a case a mandamus may properly issue. 28 A. 72, *State ex rel. New Orleans Republican Printing Company v. Chas. Clinton, auditor*.

33. The capacity of the acting mayor cannot be questioned in a suit brought by him, to recover a claim due to the corporation. 28 A. 274, *Mayor of Natchitoches v. Redmond*. See SHERIFF, I. (a), Nos. 2, 3. ACTIONS, No. 3.

34. Tenure of office of the city administrators cannot be enquired into in a suit for collection of taxes. 26 A. 493, *City v. Klein*. See No. 33.

35. When the legislature made an appropriation, in 1875, to pay a debt of 1870, the warrant should be drawn by the auditor, and payment thereof made whenever there might be funds in the treasury. 28 A. 132, *Buffington v. Clinton*.

36. The board of engineers had no authority to enter into the contract authorized by act 1868, p. 72, for the improvement of the Red River. The contract should have been made by the commissioners appointed by said act. 28 A. N. R., *State ex rel. Eager, Ellerman & Co. v. Chas. Clinton, auditor*.

37. Whether the oath of office was taken and recorded in the office of the secretary of state, does not authorize the governor to treat the office as vacant. 27 A. 541, *State ex rel. Leonard v. Jackson*; 21 A. 490.

38. The vacancy and appointment having occurred when the senate was not in session, the governor has the right to appoint any person he pleases at the next session, without regard to his former appointment. 27 A. 569, *State ex rel. Meyer v. Tromp*.

39. The suspension of an officer is not sufficient to authorize the governor to release his sureties. This can be done only in case of resignation, death or dismissal, or by the expiration of his term of office. 29 A. 82, *Rochereau v. Jones*.

40. The first bond of a public officer is not cancelled when he furnishes a new bond duly accepted, as required by law. The first bond can only be cancelled by following the provisions of law. 29 A. 82, *Rochereau v. Jones*.

41. Where the condition of the bond of a collector of customs was, that he should faithfully discharge the duties of his office according to law, the law referred to was any law that was on the statute book at the date of the bond, or that might be passed during the collector's term, prescribing the powers and duties of his office. 2 Woods, 92, *United States v. Gausson, executor*.

42. Where duties not required by law to be performed by him were imposed on a collector by the superior officers of the treasury department, he was still required to discharge his duties according to law, and the sureties on his official bond were liable for his failure to do so. *Ib.*

43. Where the duties and responsibilities of a collector of customs were changed by law, subsequent to the execution of his official bond, but the nature and general duties of his office remained the same, the sureties on the bond remained liable. *Ib.*

44. Act No. 26, of 1873, providing for removal of constitutional officers from office, in case of conviction, is unconstitutional. See CONSTITUTION, II. (c), 5), No. 1. *Per contra*, SHERIFF, I. (a), No. 4.

45. For power of courts in certain cases of removal by the governor, see CONSTITUTION, II. (d), No. 7.

46. Appointments during the session of the senate, of no effect until confirmed. See CONSTITUTION, II. (d), No. 9.

47. An officer who is punished by the Supreme Court, for contempt, cannot consider his right to the office as determined. See ESTOPPEL, No. 23.

48. An officer who abandons his title to the office, in favor of another claimant, can recover no salary. See ESTOPPEL, No. 27.

49. The court will not take judicial notice that the appointment has been confirmed. See EVIDENCE, II. No. 8.

50. The presumption is in favor of the last commission. See EVIDENCE, III. (a), No. 3.

51. And that the officer has been properly removed. See *Ib.*, No. 4.

52. One who took certain oaths is ineligible. See INTRUSION IN OFFICE, No. 7.

53. The officers appointed under act No. 27, of 1868, must be confirmed by the senate. See INTRUSION IN OFFICE, No. 10.

54. A failure to take the test oath within the time limited by act No. 39, of 1868, does not, *ipso facto*, vacate the office. See INTRUSION IN OFFICE, No. 12.

55. A commission issued in error, does not deprive the incumbent of his office. See INTRUSION IN OFFICE, No. 14.

56. The presumption is that the military authorities who made the appointment, accepted the bond. See JUSTICE OF THE PEACE, No. 3.

57. Section one of act No. 27, of 1868, requiring vacancies in municipal offices to be filled by the governor, is constitutional. See NEW ORLEANS, II. (b), No. 2.

57. Tenure of office by police jurors. See POLICE JURY, No. 13.

59. The right to the office of district attorney, *pro tem.*, cannot be passed upon on a rule to rescind an *ex parte* order, recognizing one of the claimants as entitled to prosecute a suit for the police jury; the order will be rescinded, leaving the parties to take proper action. 30 A. 64, *Police Jury Plaquemines v. Foulhouze et als.*

60. The failure of an officer to qualify within thirty days from the date of his commission, does not, *ipso facto*, vacate his office. 30 A. 280, *State, ex. rel. Lisso v. Peck*; 1878, p. 43, section 2.

61. The governor authorized to grant leave of absence, 1871, p. 191; officers of charitable corporations not to be employed by the corporation, 1877, No. 9; bonds of officers, how accepted and recorded, 1877, No. 14; how cancelled, 1877, No. 15; sureties not discharged by a change of fees, 1877, No. 12; bonds of tax collectors, by whom accepted, 1877, p. 68; officers appointed by the governor may be removed by him, 1877, E. S., p. 80; amended, 1877, E. S., p. 194; proceedings in contestation for judicial office, 1873, pp. 51, 78; when the judge is interested, 1877, E. S., 197; plaintiff may discontinue, 1873, p. 80; bonds tested, 1878, p. 39; all officers required to take an oath and give bond, 1878, p. 43; crime to mutilate their records, 1878, p. 47.

OPENING.

See COURTS, II. (d), 2). DONATIONS, I. (a); VI. (c). NEW ORLEANS, II. (e), 5). SUCCESSION, VIII. (f), 7).

OPPOSITION.

1. Of third persons. See PLEADINGS, VIII. (e).
2. To the account of administrators, etc. See INSOLVENCY, III. (c). XII. (b). MINORS, I. (c). III. (f), 4). SUCCESSION, VII. (a), 2). VIII. (f), 4). JUDGMENT, XV. (c), 2).

3. For other matters, see MONITION. MORTGAGE, VI. (c), 2). NEW ORLEANS, II. (e), 5), c. PARTITION, III. (c).

ORDINANCE.

See NEW ORLEANS, II. (f).

OUACHITA.

Trenton incorporated, 1870, p. 81; wards, 1870, E. S., p. 212; Ouachita City, 1877, No. 8.

OVERSEER.

See LEASE, II. (c), 1); 2). PRIVILEGE, III. (e).

OWNERSHIP.

1. See THINGS, II. (b), 1). MARRIAGE, IX. (b), No. 2.
2. To decide a question of title, all parties in interest must be before the court. See JUDGMENT, I. No. 11. PLEADING, I. (c), 4), No. 2; V. (a), 3), E. No. 2. SALE, VI. (c), No. 14.
3. They may be joined in the same suit. See PLEADING, II. (c), No. 6.
4. Ownership not provable under the general issue. See PLEADING, V. (b), 5), c. Nos. 3, 6.
5. Joint owners cannot, without mutual consent, erect buildings. See QUASI CONTRACTS, I. No. 12.

OYER.

See PLEADING, V. (b), 2).

OYSTERS.

Regulating fishing of, 1870, p. 43; 1871, p. 207.

PACT.

See MORTGAGE, VI. (c), 6).

PARAPH.

Liability of a notary and his sureties for paraphing forged notes. See NOTARY, No. 10.

PARENT AND CHILD.

I. OF LEGITIMATE CHILDREN.

II. OF ILLEGITIMATE CHILDREN.

III. OF ADOPTION.

I. OF LEGITIMATE CHILDREN.

1. The terms father and mother, used in article (1481,) of the Civil Code, refers only to the *legitimate* father and mother of the disposer. 15 A. 516, *Wood v. January*.

2. A husband's declaration of the illegitimacy of a child when his marriage with the child's mother has been proved, is not sufficient to rebut the presumption of the child's having been lawfully begotten, until this presumption is disproved by evidence, showing the want of access between the husband and his wife. 6 H. 550, *Patterson v. Gaines*.

3. If a man marry a woman in good faith, believing her free to marry him on account of the invalidity of a previous marriage, such a marriage has its civil effects, and children born of it, are legitimate, and can inherit their father's estate. 6 Wall. 642, *Gaines v. New Orleans*.

4. Where a parent declares in a will that a child is legitimate, it will be presumed to be so until the contrary is shown. It is even sufficient to raise a presumption of legitimacy, if the child be mentioned in the will as the testator's offspring, but is not referred to as the natural child. 24 H. 553, *Gaines v. Hennen*; 6 Wall. 642, *Gaines v. New Orleans*.

5. Where the fact of marriage has been proved, the presumptions of law are in favor of the good faith of the parties. 6 Wall. 642, *Gaines v. New Orleans*.

6. Heirship and relationship may be proved by parol. See EVIDENCE, IX. (a), Nos. 9, 10.

7. See also LEGITIMACY. EVIDENCE, III. (a). MARRIAGE, IV.

II. OF ILLEGITIMATE CHILDREN.

1. A white man may acknowledge his natural children by a colored woman, by an act before a notary public and two witnesses. No other proof is allowed in such a case. 21 A. 435, *Casanave v. Bingaman*.

2. Evidence is admissible to prove the illegitimacy of the legatee, who is the testator's child. See EVIDENCE, VII. No. 12.

3. See LEGITIMACY.

III. OF ADOPTION.

1. For custody of adopted minor, see MINORS, I. (a), Nos. 1, 5.

2. For capacity of adopter to appoint a testamentary tutor, see MINORS, I.

PARISH.

1. The parish of Red River is attached, not to the eighteenth judicial district, as provided by act of February 27, 1871, but to the eleventh, as provided by act of March 2d, 1871. 24 A. 470, *Bryden v. Gillespie*; 495, *Cushing v. Robinson*. See RED RIVER.

2. Parish taxes may be collected in incorporated towns not expressly exempt therefrom. See TAXES, II. (b), 1), No. 4.

PARISH JUDGE.

See COURTS, II. (f). PROVISIONAL SEIZURE, No. 11. RECUSATION; required to keep their offices at the parish seat, 1878, p. 46. OBLIGATIONS, III. (a), No. 17.

PARK.

Public park in New Orleans, 1870, E. S., p. 196; 1871, p. 194; park tax, 1875, p. 104; commissioners of the New Orleans Park, abolished, 1877, E. S., p. 126.

PARTITION.

I. IN GENERAL.

II. OF THE RIGHT TO A PARTITION AND WHEN IT IS NECESSARY; THE PARTIES AND THEIR CAPACITY.

III. OF THE PROCEEDINGS.

(a) *In general.*

(b) *Sale.*

(c) *Homologation and ratification of the proceedings and the opposition thereto.*

IV. OF ITS EFFECT AND RESCISSION.

I. IN GENERAL.

1. A party may legally make a partition, either of the whole, or of a portion of his estate, among his descendants, during his lifetime, by a notarial act; such a partition is, however, subject to all the formalities and conditions of *donations inter vivos*. 15 A. 585, *Martin v. Martin*. See DONATIONS, V.

2. A partition must be considered as one act, although it contains many dispositions, and it cannot subsist for one while it is annulled for another. 15 A. 585, *Martin v. Martin*.

3. In actions of partition, involving a settlement of claims, or accounts, no prescription is applicable except that which is a bar to the partition itself. 16 A. 170, *Chapman v. Woodward*; 14 A. 740. See PRESCRIPTION, III. (a).

4. An action of partition may be maintained, whether plaintiff be in possession or not of the property. 19 A. 356, *Denton v. Woods*.

5. A partition cannot subsist for one, and be annulled for another. 20 A. 358, *Gay v. Marrienneaux*; C. C. (1450).

6. Where the succession has been closed, and the co-proprietors seek to partition lands of greater value than five hundred dollars, the parish court is without jurisdiction. 25 A. 143, *Provost v. Provost*.

7. A judgment creditor has no interest to enjoin proceedings by the heirs to partition the property of the debtor. 26 A. 440, *Labauve v. Woolfolk*. See INJUNCTION, II. (b), 1).

8. For collation, see SUCCESSION, V. (c), 2).

9. For partition of confiscated property, see CONFISCATION, No. 4.

10. Before what court to be brought. See COURTS, II. (f), Nos. 8, 16. SUCCESSION, V. (c), 3).

11. Partition of the movable property mentioned in each lot of a succession, cannot be proved by parol. See EVIDENCE, XIV. (a), 1), No. 5.

12. Partition of real estate may be proved by parol, if it be received without objection. See EVIDENCE, V. (c), No. 12.

13. For buildings erected by one of the co-proprietors, see QUASI CONTRACTS, I. Nos. 11, 12, 13.

14. Where no loss is likely to occur, a receiver cannot be appointed. See RECEIVER, No. 1.

15. In what cases an agreement to make an extra judicial partition will not prevent an administration, see SUCCESSION, VII. (a), 1), No. 9.

II. OF THE RIGHT TO A PARTITION AND WHEN IT IS NECESSARY; THE PARTIES AND THEIR CAPACITY.

1. Where the representative of a succession claims a partition of property in which minors are interested as beneficiary heirs, whether residents or non-residents, they should be made parties or represented according to the rules prescribed for partitions. 15 A. 250, *Savage v. Williams*.

2. In an action for the partition of the effects of an ordinary partnership, brought by the surviving partner as administrator, where the deceased has left minor heirs, they cannot properly be represented by an attorney for absent heirs, and it is not competent for such administrator and attorney, without other parties, to obtain a valid decree for a partition, and they are not proper parties to represent the succession in a sale to effect such partition. 15 A. 250, *Savage v. Williams*.

3. A debt due by the heirs to the ancestor, not yet matured at the death, may be at once partitioned. 16 A. 298, *Leblanc v. Bertaut*.

4. Beneficiary heirs cannot sue for a partition before the closing of the administration. There is no presumption that no debts exist. 19 A. 293, *Westholz v. Westholz*.

5. The children, whose rights have never been, and cannot be ascertained until a settlement of their mother's succession, must first provoke its settlement and then sue for a partition. 25 A. 215, *Moreau v. Moreau*.

6. An extra-judicial partition between five heirs, when there are others, is a mere nullity, vesting title in no one. 18 A. 579, *Wright & Williams v. Cane*.

7. An executrix, also tutrix of her minor children, in presenting a petition in New Orleans, for the sale of property in said city, alleging that the major heirs had become clamorous for their rights, and obtaining in the parish of Avoyelles the consent of a family meeting, which also fixed the terms of sale for the minor's share, is plaintiff in an action in partition, and as such cannot represent her minor children. The action is null for want of proper parties. 21 A. 712, *Succession Schuttler*.

8. A note given to a party with whom speculations in land are carried on, for one-half the costs of said land, and payable as the lands purchased are sold, or otherwise disposed of, gives the right to the owner of one undivided half of the lands unsold, and the holder of the note to sue for a partition and be paid out of the proceeds of the property sold. 24 A. 180, *Breaux v. Love & McCall*.

9. A judgment of partition rendered without making all of the heirs parties, is invalid. 25 A. 532, *Miguez v. Delahoussaye*.

10. A suit in partition by the surviving husband, against the administrator of his wife's estate, should be dismissed, if the heirs of the wife are not made

parties to the suit. 26 A. 606, *Veazy v. Trahan*. See MARRIAGE, XIII. (a), No. 4.

11. At the death of the father, a child of the first marriage has the right to demand a partition of the separate property of his father, as against his step-mother and his half brothers and sisters. 22 A. 219, *Succession Wilder*.

12. The succession being without a representative, and the minors' interest therein not ascertained and secured, a suit in partition by the appointment of a *curator ad hoc* is irregular. 25 A. 467, *Malone v. Casey et als.*

13. Where the judgment of partition was rendered in a case where a minor is interested, and a tutor *ad hoc* is appointed to represent "*Aline*" instead of "*Helena*," the judgment is a nullity; the sale made thereunder follows the same fate. 27 A. 463, *Succession Porée*.

14. When the under-tutor should represent the minors in a partition, see MINORS, II. No. 6.

15. An administrator cannot provoke a sale by an action in partition. See SUCCESSION, VIII. (e), 2), B. No. 6.

16. An executor is neither a necessary nor proper party to a partition. 30 A. 182, *Boutté v. Boutté*.

III. OF THE PROCEEDINGS.

(a) *In general.*

1. The mere absence of the tutor and under-tutor at the taking of an inventory of a property, held in common between a minor and another party, for the purpose of effecting a partition by sale, after they have been duly notified to attend, or their refusal to sign the proces-verbal without a formal protest, can afford no ground upon which to annul the sale. 15 A. 697, *Gernon v. Bestick*.

2. The omission to make a formal inventory within twelve months preceding the action in partition, as directed by article (1248) C. C., is not fatal. 22 A. 394, *Barnett v. Bernstein*.

3. The succession property having been sold on the petition of the administrator for the main purpose of effecting a partition, and he having settled with some of the heirs, a suit in partition cannot be had afterwards. There remains only an adjustment of the amount respectively to be paid or received, in order to make the partition definitive. 23 A. 351, *Womack, ad'r v. Womack et al.*

4. In the partition of a succession, where there are minor heirs, if they have opposite interests to each other, although represented by the same tutor, there should be appointed to each of them a special tutor, or tutor *ad hoc*. But in a partition by roots, where the minors form but one root, their interests *inter se* do not clash, but, on the contrary, are alike, and the necessity for the appointment of special tutors does not then arise. 15 A. 394, *Hagan v. Grimshaw*.

5. The under-tutor may represent the minor in an action in partition, where the interest of the tutor is opposed. 23 A. 386, *Succession M. Young*.

6. It is unnecessary to appoint a tutor *ad hoc* to each minor, if no conflict of interest between the tutor and the minors is shown. 23 A. 763, *Emmer v. Kelley*. See MINORS, II. No. 6, *infra* No. 9.

7. Where a partition is prayed for by an heir who is the tutor of his co-heirs, the latter are properly represented by their under-tutor. 24 A. 175, *Peyroux v. Peyroux*.

8. The judgment of partition may be amended on the petition of the administrator, to have his name inserted to make the sale, in place of the auctioneer named therein by the court, and this does not invalidate the judgment. *Ib.* See JUDGMENT, VI.

9. It is unnecessary to appoint a tutor *ad hoc* to each minor, at the inception of the suit; his duty begins at the partition before the notary. 25 A. 55, *Succession Pinniger*.

10. A creditor of the deceased cannot intervene in a suit for partition, between the heirs, to claim his debt. C. P. 364, 389, 396; 12 R. 215; 2 A.

463, 25 A. 215, *Moreau v. Moreau*. See PLEADING, VIII. (d). *Per contra*, EXECUTION, I. No. 9.

11. After rendition of the judgment in partition, and before the return of the act by the notary, to be homologated, creditors of the co-proprietors cannot proceed to claim their rights from their debtors' share. 30 A. 146, *Woolfolk v. Woolfolk*.

(b) *Sale*.

1. In a partition by licitation, the whole property in the thing sold, including the adjudicatee's share, passes to him by the force of the decree. 15 A. 588, *Breaux v. Carmouche*.

2. Where a minor is interested, the judge, if satisfied that the property cannot be divided in kind, should not only decree the sale of such property, but should likewise order the convocation of a family meeting to fix the terms of sale, as to the share of the minor. 15 A. 697, *Gernon v. Bestick*. See MINORS, III. (g); VI.

3. The judge should require proof that the property cannot be divided in of equal value, without the cantling of tenements to an injurious extent, parts before ordering a partition by licitation. 15 A. 697, *Gernon v. Bestick*.

4. It is only upon the proof that the property is not divisible in kind, that the judge has authority to order a partition by licitation. 18 A. 282, *Keller v. Judson*.

5. A purchaser, at a sale made to effect a partition, has no interest in raising the question as to the form or mode of making the partition. 23 A. 386, *Succession M. Young*.

6. The acts of 1869, authorizing a partition sale to be made by private sale, does not conflict with article 1339 C. C., ordering partition sales to be made at public auction in certain cases. The two provisions might be incorporated in the same law. 24 A. 155, *Durand v. Dubuclet*. See SUCCESSION, VIII. (e); *infra*, No. 13.

7. If, after service of a petition for partition, on a *curator ad hoc*, to represent the absent defendant, and after answer, and the filing of the report of the experts, the plaintiff files a petition asking for an inventory and a sale on terms of credit, and the curator consents to and joins in the prayer of the petition, the purchasers at such a sale acquire a valid title. 28 A. 713, *Succession McCull*.

8. WYLY and MORGAN, JJ., *dissenting*: The curator could give no consent; this was a consent sale, and the purchasers acquired no valid title. *Ib.*

9. A mortgagee, claiming to be paid out of the proceeds of sale, renounces his mortgage on the property. See MORTGAGE, VI. (a), No. 2.

10. For judicial sales, see SALES, X.

11. For succession sales, see SUCCESSION, VIII. (e).

12. When property has been sold in a succession other than that of the real owner, heirs who have not accepted the succession, are not liable in warranty. See PETITORY AND POSSESSORY ACTIONS, I. No. 1.

13. The minor's property may be sold at private sale. 1869, p. 207; reproduced in sections 1500, 2667, 3719, R. S., and amended by act 1878, p. 47.

(c) *Homologation and ratification of the proceedings and the opposition thereto*.

1. The act of partition in kind being duly signed and homologated, the parties may be compelled by rule to sign the acts necessary to divide the mortgage debt, the mortgagee's consent being given. 21 A. 709, *Heirs of Wilder v. Petty*.

2. A suit by the heir who was not a party to the extra judicial partition made between his co-heirs, to recover from one the proportion of the share which would accrue to him, having been dismissed, does not ratify the partition. 18 A. 579, *Wright and Williams v. Cane*. See RATIFICATION.

IV. OF ITS EFFECT AND RESCISSION.

1. Error in the description of the property is not a sufficient cause of nullity, where no injury has been suffered and the error was committed by the complainant. 15 A. 273, *Winn v. Dickson*. See NULLITY, I.

2. An heir who has alienated his share in a partition or a part of it, is not permitted to bring the action of rescission against such partition where there has been no fraud, violence, nor lesion. 15 A. 585, *Martin v. Martin*.

3. A partition cannot be corrected by the appointment of an administrator. 26 A. 158, *Succession Poret*.

4. A partition effected without written evidence is good if the parties went into possession by virtue thereof, and remained in such possession, more than thirty years. 26 A. 160, *Johnson v. Labat*.

PARTNERSHIP.

I. OF ITS CONSTITUTION, NATURE AND SEVERAL KINDS.

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|--|---|
| (a) <i>In general.</i> | (c) <i>Distinction between partnership and other contracts; and partnerships as to third persons.</i> |
| (b) <i>Distinction between the several kinds of partnership.</i> | |

II. OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AS BETWEEN THEMSELVES.

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|---|----------------------------------|
| (a) <i>In general.</i> | (d) <i>Partnership property.</i> |
| (b) <i>Their diligence and services; accounts they must keep; and their share in the profits, losses, and expenditures.</i> | |

III. OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AS TO THIRD PERSONS.

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|------------------------------------|---|
| (a) <i>In general.</i> | 2) Contracts relative to immovable, and alienation of movable property. |
| (b) <i>Commercial partnership.</i> | (c) <i>Ordinary partnerships.</i> |
| 1) <i>In general.</i> | |

IV. OF THE PARTNERS' RIGHT OF ACTION INTER SE, AND THE ACTION OF SETTLEMENT; THE DISSOLUTION AND ITS CONSEQUENCES.

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|---|---|
| (a) <i>In general.</i> | (e) <i>Liquidation.</i> |
| (b) <i>When and for what the partners may sue.</i> | 1) <i>In general.</i> |
| (c) <i>Mode of dissolution; and continuance of the partnership after a partner's death.</i> | 2) <i>Appointment, duties and powers of liquidators.</i> |
| (d) <i>Effect of dissolution on the powers and liabilities of the partners; and notice to be given.</i> | 4) <i>Distribution of individual and partnership assets among individual and partnership creditors.</i> |

V. OF PARTNERSHIP IN COMMENDAM.

I. OF ITS CONSTITUTION, NATURE AND SEVERAL KINDS.

(a) *In general.*

1. The members composing the partnership, are each distinct from the partnership. 22 A. 503, *Succession Arick*.

2. A contract by which one superintends and advances money for the repairs of a boat, belonging to another, furthermore, acts as captain and pilot, on a salary, and has one-half of the net earnings, and is to be reimbursed the advances, constitutes a partnership. 27 A. 69, *Radovich v. Frigerio*.

3. A partnership implies a community of goods and a proprietary interest in the goods, not merely a community of profits and losses. 27 A. 104, *Belden v. Read & Hunt*.

4. A commercial partnership cannot exist between husband and wife. See *MARRIAGE*, VI. No. 3.

(b) *Distinction between several kinds of partnership.*

1. When the profits and losses are to be divided, this constitutes a partnership. When the business carried on is principally that of buying lumber in

the rough state, planing and dressing it, and selling it in that condition, this constitutes a commercial partnership. 22 A. 411, *Grant v. Hyatt et al.*

2. The nature of the business determines the character of the partnership. Partners engaged in the business of common carriers are commercial partners. 19 A. 326, *Conery v. Hayes*. See CARRIERS. SHIPPING. OBLIGATIONS, VIII. (e).

3. The partnership to carry on a railroad being an ordinary one, as distinguished from those which are commercial, each partner is only bound individually for his share of the partnership debts; but to that extent a debt contracted by one partner, even without authority of the others, binds them, if it be proved that the partnership was benefitted by the transaction. 91 U. S. (Otto's), 134, *Beauregard v. Case*. See OBLIGATIONS, VIII. (e), No. 12.

4. See *infra*, (c), No. 8.

(c) *Distinction between partnership and other contracts; and partnership as to third persons.*

1. If one suffers his name to be used as an ostensible partner, although he be no partner, he becomes liable for the partnership's debts. 18 A. 631, *Grieff & Byrnes v. Boudousquie & Fortier*.

2. Where a party advertises for the purchase of cotton, in the name of a well known commercial firm, and proclaims himself a member thereof, the presumption is that the cotton is purchased for the firm. 20 A. 391, *Hamilton v. Eimer & Co.*

3. Plaintiff having introduced defendant as his partner to a commission merchant, who made advances on the faith of such representation, and received the cotton raised on a plantation alleged to be carried on by the partners, cannot recover the proceeds of such cotton, which was applied to the satisfaction of the advances. 22 A. N. R., *Bryce v. H. Ware & Son*. See ESTOPPEL.

4. An employee, who receives a certain portion of the crop to be made, irrespective of profits or losses, is not a partner. 28 A. 230, *Jeter v. Penn.*

5. Paying an employee a certain portion of the profits in compensation of his services, does not make him a partner of the employer. 29 A. 85, *Miller v. Chandler*.

6. Contracts relative to boats, etc. See I. (a), No. 2.

7. Where several persons agree to buy merchandise on speculation, the one to furnish the money, the other to make the purchases in his own name, the profits and losses to be equally divided, they are not commercial partners as to third persons, so as to render them liable *in solido* for the purchases. 29 A. 176, *Chaffraix & Agar v. Price, Hine & Tupper*; see V. No. 4; 30 A. 631, *Same v. Lafitte & Co.*

8. WYLY and HOWELL, JJ., *dissenting*: The one making the purchases, is either the agent or partner of the other, and in either case the responsibility of the other exists. *Ib.*

9. An agreement, provided that the party of the first part should obtain in his own name, but for the joint account of himself and the parties of the second part, a lease of a railroad, and manage the same at a designated salary for their mutual benefit, and that the parties of the second part should furnish the money necessary to carry out the enterprise, to be reimbursed with interest out of the annual profits, and then declared that after the payment of the capital thus invested, and interest, the annual profits should be equally divided between all the parties, and that all losses should be equally borne between them; *Held*: That the agreement constituted a partnership. 91 U. S. (Otto's), 134, *Beauregard v. Case*.

10. An agreement whereby the owners of several boats, associate themselves to carry passengers and freight, and to divide the profits and losses in fixed proportions, creates a commercial partnership, although it is distinctly mentioned in the agreement that the association is not to be considered a partnership. 29 A. 345, *Cooley v. Broad et als.*

11. No partnership is created by an agreement whereby one person furnishes the raw material to refiners, who, after the sale of the refined articles, are to

receive a fixed proportion of the profits. 28 A. 93, *Coleman v. Fairbanks, Gilman & Co.* See PRIVILEGE, III. (a).

12. A refiner, who receives two-thirds of the net profits on sugar to be refined by him, owned by another, is not liable to be seized for the refiner's debts. See EXECUTION, V. (a), 3), c. § 1, No. 7.

13. Where parties purchased on joint account, and for speculation, a lot of goods, with the understanding that they shall share equally the profits and losses, this is a partnership. See II. (b), No. 1.

II. OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AS BETWEEN THEMSELVES.

(a) *In general.*

1. There is nothing which prevents a partner from purchasing the interest of his co-partners in the partnership assets, and pay in part with the money due to him by the partnership. 22 A. 571, *Christen v. Ruhlman*.

2. A note given by one of the partners to plaintiff, who drew up the articles of co-partnership, in order that the drawer might comply with his agreement to furnish a certain capital in the partnership, cannot be enforced against the other partners. 24 A. 178, *Wells v. Siess*.

(b) *Their diligence and services; accounts they must keep; and their share in the profits, losses and expenditures.*

1. Where parties purchase on joint account, and for speculation, a lot of goods, with the understanding that they shall share equally the profits and losses which may result from the sale thereof, the advances and expenses are to be first paid, before there can be any division of the profits. It partakes of the nature of a partnership. 15 A. 350, *Doane v. Adams*.

2. The mere fact that the one or the other of the partners, acted as the cashier of the firm, would not, as a general rule, charge him with the funds he might receive and disburse in due course of business; otherwise if fraud be charged. 16 A. 93, *Walpole v. Renfree*.

3. A partner who receives partnership funds, is bound to account therefor, to his co-partner. 26 A. 247, *Wallis v. Wheelock*.

(d) *Partnership property.*

1. In the absence of an express stipulation to the contrary, the owners of a steamboat employed in carrying persons and merchandise for hire, bring the use only, and not the property of the boat into the partnership, they are joint owners of the boat. 15 A. 22, *Owens v. Davis*.

2. When one of the partners was authorized to sell at his discretion, for a good price, the partnership property which stood in his name, the property once sold, cannot be recovered, although the seller acted in his own name. 19 A. 503, *Bellocq v. Dhones & Penent*.

III. OF THE RIGHTS AND OBLIGATIONS OF PARTNERS AS TO THIRD PERSONS.

(a) *In general.*

1. Where an agreement was made in writing, by one partner signing the name of the firm, in which it is agreed that the firm should pay to the brother of the partner making the agreement, a salary for services to be rendered by him, and the evidence shows that the party thus employed was unfit to discharge the duties imposed upon him by the agreement, and the agreement was kept from the knowledge of the other partner; *Held*: That under such circumstances, no effect should be given to the agreement, as an evidence of indebtedness against the creditors of the partnership. 15 A. 55, *Beste v. His Creditors*.

2. Factors who accept a mortgage from an ordinary planting partnership, but open an account in the individual name of one of the partners who owns a plantation for his individual account, but who employs the greatest part of

the advances made to him for the benefit of the partnership, are not mortgage creditors of the partnership, although they may claim, under the equitable doctrine of article (2845) C. C., to be the ordinary creditors of said partnership. 16 A. 194, *Lallande v. McRae*.

3. Defendant, who sent plaintiff a draft, is not estopped from denying plaintiff's title to the interest of a partner who had previously died. 16 A. 248, *Skipwith v. Lea*.

4. The knowledge of one partner is the knowledge of his co-partner. 19 A. 257, *Huck v. Haller Bro.*

5. When a member is added to a partnership, the old firm is changed and becomes a new one, with different parties, interest and liabilities; the creditors and debtors of the old firm do not become creditors and debtors of the new firm, and *vice versa*. 19 A. 290, *Abat v. Penny*; 10 A. 479, 482.

6. The plaintiff loaned her money, to be used as the capital of one partner in the firm; the agreement of partnership gave control of the funds to the partner, and, having withdrawn it at the expiration of the partnership, the firm is not liable to plaintiff for her loan. 23 A. 656, *Dowd v. Elsner, Kinsworthy & Co.*

7. One who becomes a partner after signature of the lease and notes, and who does not assume the obligations thereof, in writing, is not bound. 26 A. 512, *Silliman v. Short, Martin & Hall*.

8. The individual notes given by each partner, as his share of the capital of the partnership, unless expressly assumed by the other partner, remain their individual debt. 27 A. 172, *Wild v. Erath*.

9. Promissory notes, executed by one of the members of a commercial firm, in the name of the firm, for his own benefit, without the knowledge of the other partners, out of the usual business of the firm, the whole, to the knowledge of the holder, who sues thereon, cannot be enforced against the other members. 28 A. 941, *Vredenburg v. Lagan & Mackinson*.

10. A foreign creditor, who transacts business under the name and firm of "and company," or "and Co.," and who alone composes the firm, does not fall within the prohibition of the law of Louisiana on the subject, and may seek relief in the courts of Louisiana. 29 A. 711, *Succession Bofenchen*.

11. Although it is generally true that partnership creditors are to be preferred in the distribution of the property of the partnership, and may follow it, if necessary, when one of the partners attempts to appropriate it to the payment of his individual debts; yet a mere simple contract creditor cannot maintain a suit for this purpose, unless the partnership has in some manner gone into liquidation, or its property has been subjected to a trust for payment of debts, as where an assignment has been made in fact, or in law. 1 Woods, 125, *Case, receiver v. Beauregard et als*.

12. The partnership is not dissolved by the forced sale of one partner's interest. See EXECUTION, V. (a), 3), B. No. 5.

(b) Commercial partnerships.

1) In general.

1. Oral testimony will be received to establish a commercial partnership. 17 A. 9, *Villa v. Jonte*.

2. Defendant, partner in a commercial transaction made for the benefit of the partnership, is liable for the debt thereby created, although the credit seems to have been given to one partner alone. 19 A. 86, *Roth & Deblieux v. Moore*.

3. A commercial partnership is not liable for obligations contracted by one of the partners previous to the formation of the partnership. 19 A. 516, *Mousseau v. Thebens & Reynolds*.

4. Commercial partners who undertake to administer the minor's interest, create the relation of creditor and debtor and are bound *in solido*. 20 A. 549, *Fitz v. Reichard*. See OBLIGATIONS, VIII. (e).

5. A tutrix who, before receiving the property of the minors from the partnership, dissolved by the death of their father, enters, with the surviving

partners, into a new partnership, furnishing nearly the same capital, has not thereby received the interest of the minors and the surviving partners are not discharged towards the minors. 26 A. 459, *Netter v. Herman & Levy*.

6. In a commercial partnership, every member may bind the others, by drawing or indorsing commercial paper, although by contract *inter se* a different agreement has been made; provided the third party had no knowledge of the agreement. 27 A. 128, *Cottam v. Smith & Co.*

7. See OBLIGATIONS, VIII. (e), No. 16, for solidarity of a note.

2) Contracts relative to immovable, and alienation of movable property.

1. By the laws of Louisiana, a commercial partnership cannot own immovable property; the partners are joint owners. 3 L. 394; 23 A. 419, *McKee v. Griffin*; 10 L. 420; 7 M. 244.

2. Particular partnerships, having for their object the acquisition of real estate, should be in writing, and made according to the rules prescribed for the conveyance of real estate, and recorded. C. C. 2836 (2807); 21 A. 668, *Pecot v. Armelin*; 355, *Slocumb v. Lizardi*; 2 A. 822.

(c) Ordinary partnership.

1. A law partnership is an ordinary one, and the partners are bound jointly, but not *in solido*. 15 A. 415, *Jones v. Caperton*.

2. Defendants who are not commercial partners, cannot be bound *in solido*; solidarity cannot be presumed. 19 A. 135, *Turnage v. Wells*; 24 A. 230, *Hyams & Jonas v. Rogers*. See OBLIGATIONS, VIII. (e), No. 14.

3. The crop of cotton having been delivered to the commission merchant for his supplies, by two of the partners, the third cannot recover the cotton so delivered, because the partnership was not settled. 22 A. 482, *McFarland v. Connell*.

4. Planting partners are only liable each for half of the debt of the partnership. 23 A. 495, *Dupré v. Boyd & Allen*.

5. In an ordinary partnership, each partner being bound for his virile share, the whole debt cannot be collected from one, unless it be on a written promise to pay. 24 A. 325, *Hill v. Atwater & Co.*

6. In an ordinary partnership, if one partner contracts without authority from the other, and the partnership is benefitted, all partners will be bound jointly. 27 A. 353, *Lagan & Mackinson v. Cragin*.

7. A planting partnership may be proven by parol. See EVIDENCE, IX. (a). No. 12.

8. The judgment against the partner, not cited, is absolutely null. See JUDGMENT, XI. (a), No. 10. PLEADING, I. (c), 7), No. 4.

IV. OF THE PARTNER'S RIGHT OF ACTION INTER SE, AND THE ACTION OF SETTLEMENT; THE DISSOLUTION AND ITS CONSEQUENCES.

(a) In general.

1. A partner cannot sue his co-partner for a specific sum of money, even in a special partnership. 18 A. 283, *Crottes v. Frigerio*.

2. Partners have no cause of action *inter se* for a specific sum resulting from a partnership transaction, until there has been a settlement of the partnership. 21 A. 3, 7, 582; 22 A. 430; 24 A. 391, *Stanton v. Buckner*; 10 M. 433; 11 A. 509; 8 N. S. 281; 19 A. 194, *Baer v. Coppler*; 21 A. 4, *Succession Dolhonde*.

3. Between partners the only action allowable, is one for the settlement of the partnership. 27 A. 69, *Radovich v. Frigerio*.

4. In a suit for settlement of partnership, all partners must be made parties. 21 A. 265, *Francis v. Lavine*.

5. The partners of a commercial partnership, entered into for a single transaction, having, by mutual consent, made a partition between them, may enforce their respective claims against each other, without bringing suit for a settlement of partnership. 21 A. 597, *Jenkins v. Howard*.

6. Plaintiff who claims a part ownership of a boat and her earnings, does

not thereby become a partner, and need not sue for a general settlement of partnership. 25 A. 488, *Labit v. Francioni*.

7. A defendant who pleads a settlement in full with plaintiff, cannot be compelled to plead payment to prove what the settlement was. 25 A. 279, *Job v. Heuer*. See EVIDENCE, VIII. No. 13.

8. Plaintiff, who sues his partner for a specific amount, alleging a final settlement of the partnership, cannot go beyond his allegations and demand an investigation and adjustment of the affairs of the partnership. *Ib.*

9. A settlement between partners is subject to correction. 26 A. 614, *Pool v. Fontelieu*.

10. Where a third person is induced to purchase one of the partner's interest, on false representations made by some of the other partners, without making an indemnity for the injury sustained thereby, they cannot hold such purchaser liable for a reimbursement of a portion of the money expended by one of the other partners above his share. 16 A. 419, *Freligh v. Miller*.

11. In an action of settlement, a sequestration is the only conservatory writ to be used. See SEQUESTRATION, II. (a), No. 5.

(b) *When and for what the partners may sue.*

1. In an action for the settlement of partnership accounts, where it appears that the parties have kept books of their daily affairs, they should not be permitted to recover beyond the same, for a matter which ought to have been entered regularly every day. 15 A. 290, *Parker v. Jonte*.

2. When the master of two boats agree to go to the assistance of a ship that is grounded, for the purpose of getting her off, and to share the profits of the expedition equally between them, but before they reach her, discover her afloat, and one of them turns back, and the other, pursuing her course, accidentally discovers passengers belonging to the distressed vessel and affords them relief; *Held*: That the adventure terminated when the first boat turned back, and that her demand for the division of salvage in this case should be rejected. 15 A. 77, *Marcy v. Chambers*.

3. In a joint purchase of stocks which became depreciated, and were sold by the pledgees at a loss, the partner who advanced all the money for the transaction is entitled to recover the proportion of the loss from the other partners. 23 A. 177, *Tuyes v. Avegno & Willoz*.

(c) *Mode of dissolution and continuance of the partnership after a partner's death.*

1. A partnership existing between a citizen of the Confederate States and a loyal citizen, was dissolved by the war. 5 Wall. 377, *The William Bagaley*.

2. The forced sale of one partner's interest does not dissolve the partnership. See EXECUTION, V. (a), 3), B. No. 5.

(d) *Effect of dissolution on the powers and liabilities of the partners, and the notice to be given.*

1. As to persons who have not dealt with the partnership, notice in a public newspaper of the place where the partnership business is carried on will be sufficient, but as to persons previously in the habit of dealing with the firm, actual notice should be brought to them, such as addressing them a circular; but such notice will not be inferred when published in a newspaper to which the creditor subscribed. 16 A. 31, *Reilly v. Smith*.

2. At the death of a partner his interest in the firm is vested in his heirs at law, and the surviving partners can only acquire that interest by transfer of assignment from the heirs. 16 A. 247, *Skipwith et al. v. Lea*.

3. Where a new firm is formed by the addition of new partners, and all the assets and charges of the old firm are transferred to the new partnership, the latter had an interest to discharge the acceptance of the old firm; the payment extinguished the original obligation, but the mortgage granted to secure the old firm against contemplated acceptances, immediately covered said payment, which otherwise would have been an ordinary claim against the drawer. 16 A. 293, *Spiller & Allen v. Their Creditors*; 9 R. 436.

4. A retiring partner of a commercial firm is not exonerated from responsibility for subsequent engagements made in the name of the partnership with persons previously in the habit of dealing with the firm, unless special notice of the withdrawal be given them. A general notice in the newspapers is not sufficient. 19 A. 9, *Marsh, Denman & Co. v. Dosson et als.*

5. Where plaintiff, who had previously done business with the ordinary partnership, was never notified of its dissolution, but continued to furnish the supplies; both partners will be held liable jointly for the supplies furnished. 21 A. 173, *Schorten v. Davis.*

6. Even if a partner could shield himself from responsibility by publishing to the world that he will not be responsible for debts contracted by his co-partners in the interest of the firm (?) such notice must be brought home to the contracting party. 25 A. 645, *Drumm v. Hanna, Hitchcock & Sewell.*

7. One of the members of a firm, after its dissolution, signing the firm's name to a note, binds himself and not the partnership; the more so if, after maturity, he acknowledges his liability, and promises to pay the note. 26 A. 712, *Peet, Yale & Bowling v. Riley & Co.*

8. A minor who withdraws from the partnership, is not liable in certain cases. See MINORS, IV. No. 3.

(e) Liquidation.

1) In general.

1. A settlement and receipt in full, given by a partner, in closing a partnership, is conclusive, unless made in error, or obtained through fraud. 24 A. 318, *Wells v. Erstein.* See PLEADING, I. (a), No. 2.

2. The right of a surviving partner, under arts (1131), (1152), and (1136), C. C., to administer the partnership effects, and to dispose of the same in the ordinary course of trade, is not an absolute right, but depends on the consent of the heir present, or represented in the State, capable of accepting the succession purely and simply. 15 A. 637, *McKowen v. McGwin.*

3. To settle a partnership, the assets each partner has contributed must be ascertained; they should be made equal in this respect, and then the balance must be distributed. 20 A. 351, *Frigerio v. Crottes.*

2) Appointment; duties, and powers of liquidators.

1. A seizing creditor of one partner's interest cannot have a receiver appointed. See EXECUTION, V. (a), 3), B. No. 5.

2. Our courts cannot appoint, *ex parte*, a receiver. 16 A. 237, *Martin v. Blanchin & Giraud.*

3. The partnership is dissolved by the *cessio bonorum* made by one of its members, and the solvent partner, being bound *in solido*, has a right, but not an exclusive one, to liquidate its affairs. The partnership debts may not be greater than the assets, and if there be a surplus, it goes, in proper proportion, to the individual creditors of the insolvent member, whose syndic has a concurrent right to the administration and settlement of the affairs. 17 A. 75, *Saloy, syndic v. Albrecht*; 9. R. 372.

4. A new firm, composed of the liquidator, appointed by the court to liquidate a dissolved partnership, have no right to carry on their business in the books of the liquidating firm, and when called upon by a new liquidator, are bound to deliver the books to him. 16 A. 197, *Succession Andrews.*

5. The liquidating partner, who collected the assets, in Confederate notes, is liable to the heirs of his deceased partner, for the amount due them in settlement, in lawful money. 21 A. 371, *Succession Wilder.* See CONFEDERATE MONEY.

4) Distribution of individual and partnership assets among individual and partnership creditors.

1. The partnership property is the common pledge of the partnership creditors, who must be paid out of it before the individual creditors of the members; and, if not fully paid, they may pursue either partner, but with no higher rights upon his individual property than his individual creditors have. 17 A. 75, *B. Saloy, syndic v. Albrecht.*

2. The debts contracted by the partnership formed between the tutor and a third person, must be paid before the debts of the minor. 21 A. 187, *Tutorship Scott*.

3. Partnership assets pledged to a partnership creditor, cannot be seized by garnishment process, for an individual debt of one of the partners. 22 A. 51, *Ursuline Nuns v. John Connelly*.

4. The liquidator of a partnership is not entitled to a salary. 27 A. N. R., *Succession Thos. H. Patterson*.

V. OF PARTNERSHIP IN COMMENDAM.

1. A partner in commendam does not become responsible for the liabilities created by the active partner, after the expiration of the term of the partnership in commendam. 21 A. 361, *Slocomb v. Lizardi*.

2. A dormant partner may retire without notice, and does not incur any of the liabilities contracted afterwards. 24 A. 84, *Noble v. Frost & Weber*.

3. A dormant partner need not be sued by the creditors of the partnership; they may seize the property of the partnership without notifying him. 25 A. 169, *Boudreaux v. Martinez*; 5 A. 255. See No. 4.

4. Although the real owner may permit the one carrying on the business, to hold himself out to the world as the owner of the establishment, and divide the profits and losses with him, yet the contract being express between them, and the seizing creditor being notified of the same, became responsible in damages for the wrongful seizure of the stock. 23 A. 489, *Benner & Ranlett v. Michel & Gallaher*. See I. (c), No. 7.

PASSAGE AND PASSENGER.

See LEASE, II, (b). OFFENSES AND QUASI OFFENSES, II. (e), 2); (g), 2), A. SERVITUDES, II. (a), 2), B.; (b). SHIPPING, IX. THINGS, I. (a).

PATENT.

See PUBLIC LANDS, III. (c); IV. (b). SALE, III. (a), No. 6.

PAVING.

See NEW ORLEANS, II. (e), 4). PLEADING, I. (c), 9), No. 13. QUASI CONTRACTS, I. No. 17.

PAWN.

See PLEDGE, I.

PAYMENT.

I. IN GENERAL.

II. OF PAYMENT WITH SUBROGATION.

(a) *Conventional subrogation*.

1) In general.

(b) *Legal subrogation*.

2) Effect and extent.

III. OF THE IMPUTATION OF PAYMENTS.

IV. OF TENDERS OF PAYMENT AND CONSIGNMENT.

V. OF THE MODE AND VALIDITY OF PAYMENT.

VI. OF THE EVIDENCE OF PAYMENTS; AND OF RECEIPTS.

I. IN GENERAL.

1. Plaintiff who, being harassed by suit, paid under protest money claimed in violation of a city ordinance, is entitled to an action for repetition. 15 A. 296, *Laterrade v. Kaiser*.

2. Payment of a judgment rendered and executed on the basis of a judgment from another State, may be recovered if the foreign judgment be afterwards reversed. See JUDGMENT, XIII. No. 6.

3. One who, under duress, returns to the city moneys which he has earned and which was paid to him, may reclaim the same. 19 A. 274, *Pilié v. City*.

4. A voluntary execution of the judgment does not entitle appellant to a repetition, even if the judgment be reversed on appeal. See *APPEAL*, VII. (c), No. 1.

5. An attorney's receipt is not binding on his client, unless he actually received the money. 20 A. 250, *Davis v. Lee*; 19 A. 172, *Railey & Campbell v. Bagley & Co.*

6. Payments of dividends of stock to a person not authorized, will not protect the company from a second payment. 20 A. 381, *St. Romes v. Levee Steam Cotton Press Company*.

7. A payment received under duress, in Confederate notes, is null, although the one making it did not exercise the violence; the identical notes received being tendered back, payment will be enforced in lawful currency. 18 A. 134, *Emerson v. Lee*. See No. 8. CONFEDERATE MONEY.

8. When a payment, made in Confederate notes, has been indorsed on a promissory note, the court cannot interfere. 19 A. 473, *Luzenburg v. Cleveland*.

9. The plaintiff cannot evoke the illegality of a payment because he went through the Confederate lines and received it in Confederate money, so as to revive the liability of the indorsers on the notes. 25 A. 564, *Rogers & Woodale v. Gibbs*.

10. The vendor having accepted stock of the company in payment of the price of sale of his patent, although no share was delivered to him, cannot recover the patent as against a seizing creditor of the company. 27 A. 118, *Edwards v. Bringier Sugar Extracting Company*. See CORPORATIONS, VI. (d).

11. The employer cannot set up that he is exonerated from any payment, because the employee's succession is insolvent. Payment to the executor will discharge the debt. 27 A. 295, *White & Tomkins v. Louisiana Levee Company*.

12. The mortgage note is not extinguished where the drawer paid the debt for which the note was pledged, with money borrowed from one to whom the pledged note was to be given as security, and where the first pledgee delivered said note to the second pledgee. 27 A. 647, *Mechanics' and Traders' Bank v. Powell et als.*; 21 A. 5.

13. Payment to the widow, who was the partner in a concern, where the minor's property was invested, without ever having qualified as tutrix, is binding on the minor. 28 A. 100, *C. Ryan v. C Kohn*.

14. In common parlance, especially among merchants, to liquidate a balance, means to pay it. 8 Wh. 338, *Fleckner v. Bank of the United States*.

15. A third person who demands no subrogation, may tender a creditor payment, and compel him to accept. 29 A. 787, *State ex rel. John Klein v. Pilsbury*.

16. Payment must be alleged to be proved. See EVIDENCE, VII. No. 7.

17. The burden of proof is on the party alleging payment. See EVIDENCE, VIII. No. 7.

18. For *dation en paiement*, see SALE, IX.

19. For payment of notes, see BILLS AND NOTES, XIII.

20. For deposit on check against Confederate money, see CONFEDERATE MONEY, No. 13.

21. Heirs who have been deceived, are not bound by their receipts. See ESTOPPEL, No. 67.

22. For presumption of payment, see EVIDENCE, III. (e).

23. Defendant need not set forth every circumstance of time and place of payment. See PLEADING, V. (c), 1), No. 5.

24. For the restitution of what has been unduly received, see QUASI CONTRACTS, II.

II. OF PAYMENT WITH SUBROGATION.

(a) *Conventional subrogation.*

1. The conventional subrogation must be made at the time of the payment. 15 A. 400, *Seawall v. Howard*.

2. An express subrogation is necessary to enable a purchaser of a tract of

land to exercise against the party from whom the title was acquired, the rights of his vendor, arising out of a deficiency in the quantity of the land, which would have entitled his vendor to the action of *quantum minoris*. 15 A. 713, *Chamblais v. Miller*.

3. A draft drawn with the special agreement that the payee will take up the drawee's mortgage notes, and that they are to be subrogated to the rights of the holders, is sufficient to subrogate the payees, if the holders accept the condition of the draft. 19 A. 468, *Levy & Dieter v. Boer*.

4. The subrogation cannot be made subsequent to the payment, because the creditor has no longer any rights he can transfer. C. C. 2160; 24 A. 471, *Mullin v. Beauchamp*.

(b) *Legal subrogation.*

1) In general.

1. Subrogation cannot take place, by effect of law, beyond the amount actually disbursed. 15 A. 705, *Shropshire v. His Creditors*.

2. The drayman having delivered the cotton to the ship, was not responsible for the loss of one bale, and if he paid his employer the value, he has no cause of action against the ship. 18 A. 705, *Roth v. Capt. Harkson*.

3. A surety, by paying the debts of his principal, becomes subrogated to all the rights of the creditor. 20 A. 199, *Davidson v. Carroll, Hoy & Co.*

4. A mortgage creditor who is interested in paying the mortgage which precedes his, becomes subrogated by law to the rights of the creditor whose debt he has paid. 20 A. 359, *Ventress v. His Creditors*.

5. Accounts due by a succession, and paid by the relatives of the deceased, who are not his heirs, are extinguished as to the estate, and the relatives cannot recover the amount so paid. 20 A. 375, *Lavillebeuvre v. Heirs Frederic and Casse*. But see QUASI CONTRACTS, I. No. 3.

6. An insurance company paying for merchandise destroyed by fire, *in transitu*, is not subrogated to the right of the shipper, and has no cause of action against the carrier. 26 A. 447, *Carroll v. New Orleans and Jackson Railroad*. See No. 10.

7. TALIAFERRO and WYLY, JJ., *dissenting*: The insurers were bound to indemnify the assured, and by payment became subrogated to the rights of the shipper. *Ib.*

8. One of the solidary obligors on a note, who pays it, becomes legally subrogated to all the rights of the holder to the one-half of the debt, and may exercise all the remedies pertaining thereto. 25 A. 80, *Durac v. Ferrari*.

9. One who loans money by authentic act to the mortgagor, to pay a mortgage, and who pays the money so loaned to the sheriff, taking the private receipt of the sheriff, with subrogation, and the seizing mortgage creditor accepts the money from the sheriff, in payment of his debt, acquires no subrogation. 26 A. 114, *Durac v. Ferrari*; C. C. 2160, § 2.

10. Where insured property was committed to the custody of a common carrier for transportation, and was lost, and the insurance company paid the owner the value of the property; *Held*: That the insurance company could maintain an action against the carrier, although it was not legally bound to indemnify the insured for the loss. 1 Woods, 72, *Insurance Company v. The "C. D., Jr."* See No. 6.

11. Subrogation takes place of right in favor of the creditor who pays a debt which has a preference over his. 30 A. —, *Raymond v. Union Bank, etc.*; 30 A. —, *New Orleans National Bank, etc. v. Jos. Billgery*.

12. One who, believing himself to be the owner, pays the taxes due on the property is not subrogated to any privilege, but he has the right to be refunded from the real owner. 16 A. 132, *Succession Erwin*.

13. By funding the bonds issued to the consolidated association of the planters, the State becomes subrogated to the rights of the holders. 30 A. 611, *Lessassier & Binder v. The Board of Liquidation*.

2) Effect and extent.

1. Where property, upon which a privilege exists, has been purchased at

sheriff's sale, and after the privileged creditor has obtained judgment against the former owner of the property, and a recognition of his privilege, the purchaser pays the amount of the judgment; *Held*: That by Art. 679 of the Code of Practice, he was bound to extinguish the judgment, and the fact that he was the vendor of the property, and that it was sold at his suit to pay the purchase price, would not release him from the obligation, and that his payment does not give rise to any subrogation, by operation of law, to the rights of the judgment creditor against the former owner of the property. 15 A. 285, *Sturges v. Taylor*.

2. When, by the contract of lease, the lessee undertakes to pay the taxes, to be thereafter assessed upon the property leased, if he fails to do so, the lessor, having an interest, as owner, in discharging the debt, would, upon paying the same, become legally subrogated to the rights of the State or city, against such lessee. 15 A. 381, *Succession of Will*.

3. But where the lessor, thus legally subrogated, has failed to prosecute his rights, until, by the lapse of time, the privilege of the State or city has been lost, he would have no privilege, since he cannot claim a higher right than theirs. 15 A. 381, *Succession of Will*.

4. Where parties are liable jointly as principal debtors, and one of them discharge the debt, subrogation takes place only for the share of his co-debtors. 15 A. 705, *Skropshire v. His Creditors*.

5. A second accommodation indorser, who pays the judgment against himself and first indorser based on the note, has a right, without further formality, to issue execution against the first indorser. 6 L. 63, *Sprigg v. Beamen*; 5 A. 313, *Scott v. Featherston*; 16 A. 109, *Conelly v. Bourq*.

6. Plaintiffs obtained a judgment expropriating certain lands, and deposited in court the amount of expropriation, out of which a large amount of costs and charges were paid. This judgment was subsequently annulled, and a subsequent judgment of expropriation was rendered, the money deposited in court, and plaintiffs prayed to be entitled by preference to the costs and charges disbursed, and this was accordingly ordered, for the reason that plaintiffs were legally subrogated to the creditors, being a purchaser of real estate. 25 A. 64, *Mississippi and Mexican Gulf Ship Canal Co. v. Noyes et als*.

III. OF THE IMPUTATION OF PAYMENT.

1. The holder of several notes, of the same maker, has a right to impute a practical payment made on them, to parts of the notes, and is not bound to make the imputation to all *pro rata*. 15 A. 59, *Blackman v. Leonard*.

2. Where there is a question of imputation of payment, the payment will be imputed to the debt bearing a mortgage, rather than to the one which does not. 15 A. 174, *New Orleans Insurance Co. v. Tio*.

3. The imputation made by the creditor, must be accepted by the debtor, to be binding on him. 15 A. 526, *Slaughter v. Millings*.

4. Where a planter was indebted to his merchant, for acceptances which had fallen due and been paid, and also on a promissory note; *Held*: That before the maturity of the note, credits of the planter, where no imputation has been made, should be imputed to the payment of the acceptance, because they were first due, though less burdensome, and the credits, *after the maturity of the note*, must be imputed to its payment, because the debtor *had at the time most interest in discharging it*. 15 A. 457, *Bryne v. Grayson*.

5. The debtor has the right to declare when he makes a payment, what debt he intends to discharge; and if he do not make the imputation of payment, the law makes it for him, and declares that the payment must be imputed to the debt which it was most to his interest to discharge of those debts equally due, otherwise to the debt which has first fallen due. 15 A. 526 *Slaughter v. Millings*.

6. In the absence of any agreement, the payments are to be imputed to the debt, the debtor had most interest to discharge. 16 A. 294, *Spiller & Allen v. Their Creditors*; C. C. (2162); 2 A. 817; 25 A. 315, *Radovitch v. Seward*.

7. The imputation is made rather to the debt, for which the debtor has given

security, than to that which he owes simply. 16 A. 375, *Miller v. Steamer Trabue*.

8. The sureties cannot control the debtor in his imputations of payment. 18 A. 544, *Robson & Allen v. McKoin*.

9. Where the credit is given, before the account is made, the moment the creditor became indebted to his debtor in the amount of the credit, compensation took place. This is not a case of imputation of payment. 22 A. 291, *Moore v. Gray*.

10. The payments must be applied to the debt lawfully due, that is, the principal, not to the usurious interest which was forfeited under the act of 1854, under which the contract was made. 22 A. 420, *Duncan v. Helm*.

11. A note was given by an heir who purchased slaves and land, at the sale made for a partition; a partial payment was made in 1865, which must be imputed to the payment of the land, according to the jurisprudence then existing, and plaintiff cannot recover the balance, the consideration being slaves. 22 A. 426, *Gillard v. Huval*. See OBLIGATIONS, III. (c), 1), No. 6.

12. If the payments were made prior to emancipation, they must be regarded as discharging the debt *pro tanto*. 22 A. 427, *Conrad v. Callery*.

13. If the payments, on the notes, given for land and slaves, were made before the adoption of the constitution of 1864, they must be imputed ratably, if made thereafter, they must be applied to the land. 22 A. 450, *Thompson v. Simmons*.

14. The law imputes payment to the most onerous debt. 24 A. 472, *Mullin v. Beauchamp*.

15. A mortgagee, who is a factor, should be paid first, the advances for supplies to raise the crop, and the surplus should be applied to the mortgage. 26 A. 651, *Richardson v. Dinkgrave*.

16. No conventional imputation having been made by the parties, the law will impute the payments to the debt for which the property was sold, with the right of redemption, rather than to the advances made. 28 A. 235, *Newell v. Shaffet*. See SALE, VI. (a).

17. Any surplus of the payment made, over the interest due *at the time*, must, in the absence of special agreement, be imputed to the principal. 20 A. 569, *Johnson v. Succession Robbins*.

18. The general rule is that a creditor shall calculate interest to the time when a payment is made; to this interest the payment is first applied, and any excess diminishes the principal. 13 P. 359, *Story v. Livingston*.

19. Payments by a tenant, imputed by his consent to his new lease, cannot be claimed by the surety, on a former lease, as satisfaction of the rent due on the first. 29 A. 844, *Hill & Co. v. Bourcier et als*.

20. All payments made by the husband, after dissolution of the community, on an account due at the date of the dissolution, will be imputed to its extinguishment. See MARRIAGE, XIII. (b), 1), No. 8.

21. The proceeds of the crop will be imputed to the factor's privilege, rather than a pre-existing indebtedness. See PRIVILEGE, III. (d), 1), No. 4.

IV. OF TENDERS OF PAYMENT AND CONSIGNMENT.

1. If the drawer of the note, which has been lost, wishes to avoid interest and costs of litigation, as well as attorney's fees, fixed by the act of mortgage, he must make a real tender of the amount when due. 27 A. 106, *Citizens' Bank v. Baltz*. See TENDER. INTEREST.

2. The object of depositing the real tender, is to exonerate the debtor from further liability and risk, and the failure to make it does not defeat the legality of a tender. 27 A. 210, *Alter v. Shepherd*.

3. No formal tender is necessary, when the offer to pay the note is refused by the creditor. 27 A. 111, *Teutonia National Bank v. Loeb & Co*.

4. Money deposited with the clerk of court is no payment. See CLERKS OF COURT, No. 11.

V. OF THE MODE AND VALIDITY OF PAYMENT.

1. *Repetitio nulla est ab eo, qui suum recepit*. 17 A. 154, *Sientes v. Odier & Co*.

2. Payment by an insurance company to the United States quartermaster, under a military order, releases its liability to the insured. 24 A. 295, *Slocomb v. Merchants' Mutual Insurance Company*; *Ib.*, 266, *Grivot v. Louisiana State Bank*. See MILITARY AUTHORITY.

3. Payment by the drawers to the payee and holder of the note, whom they might believe to be the owner, is valid. 24 A. 465, *Baker v. Kinsworthy & Co.*

4. Where the bank paid a check to the collector, who was in the habit of making such collections, with the knowledge of the employers, the bank cannot be made liable, if the collector fails to account for the funds thus collected. 28 A. N. R., *Commercial Press v. Union National Bank*.

VI. OF THE EVIDENCE OF PAYMENT, AND OF RECEIPTS.

1. A receipt in full, given by a bank clerk to one of several debtors *in solido*, who pays his portion of the debt left with the bank for collection, does not release him from the balance. 29 A. 345, *Cooley v. Broad et als.*

2. Defendant who pleads a settlement in full, cannot be compelled to plead payment. See PARTNERSHIP, IV. (a), No. 7.

3. See RECEIPTS. EVIDENCE, III. (e).

4. A payment of more than five hundred dollars may be proved by one witness. See EVIDENCE, XIII. (a).

PENALTY.

See FINE. LAWS, II. (h). OBLIGATIONS, VIII. (g).

PENITENTIARY.

Lessees of, 1870, p. 84; no convicts to be employed outside, 1875, p. 54; settlement of accounts, 1878, p. 222.

PENSION.

Of veterans, 1870, p. 172; 1873, p. 125; Mexico, 1876, p. 90.

PERSONAL.

See LAWS, IV. OBLIGATIONS, VIII. (a). OFFENSES AND QUASI OFFENSES, II. (e), 2); (g), 2), A. THINGS, II. (a).

PERSONS.

1. See ABSENTEES. ALIEN. CITIZEN. CORPORATIONS. DOMICILE. DONATIONS, I. and II. INTERDICTION. LEASE, II. MARRIAGE. MINORS. OBLIGATIONS, III. (a). OFFENSES AND QUASI OFFENSES, II. (h). PARENT AND CHILD. PARTNERSHIP. PLEADING, I. (c), 1); 2); 4), 8). PRESCRIPTION, V. (d). SLAVES. SUCCESSION, VII. (a), 2), B.

2. A person of color, was a citizen. See CITIZEN, No. 1.

3. For civil rights, see COLORED PERSONS.

PETITORY AND POSSESSORY ACTIONS.

I. IN GENERAL.

II. OF THE PETITORY ACTION.

(a) *In general.*

(b) *Possession requisite to maintain the action; and defendant's disclaimer of the title.*

(c) *Sufficiency of title to authorize a recovery; and impeachment of title.*

1) *In general.*

2) *Defendant's title.*

3) *Defendants with title; those holding under plaintiff or his author; and a party's impeachment of his own title.*

(d) *Judgment and incidental rights of the parties.*

III. OF THE POSSESSORY ACTION.

- | | |
|---|--|
| (a) <i>In general.</i> | 1) <i>In general.</i> |
| (b) <i>Disturbance and possession requisite to maintain the action.</i> | 2) <i>Nature of the possession as affected by the title.</i> |
| | (c) <i>Evidence; and admissibility of title.</i> |

I. IN GENERAL.

1. In a petitory action to recover property, which has been sold under a judgment of partition, as belonging to the succession of one brother, when in reality it belongs to that of another, the parties plaintiff being the legal heirs of both, will not be held to have warranted the title of the purchaser, when the record does not show that they even accepted the succession, or did any act of heirship which would make them responsible. 15 A. 273, *Winn v. Dickson*. See PARTITION, III, (b). PLEADING, VIII. (c), 1).

2. The right of action given by article 69 of the Code of Practice to the mortgage creditor, against the third possessor of the mortgaged property, depends, first, on the giving of notice to the third possessor of the "amicable demand," and secondly, on the non-payment of the hypothecary debt by the third possessor, for the space of ten days, to be computed from the service of the note. These two conditions must be accomplished before a right of action can be completely vested in a mortgage creditor against the third possessor, and, consequently, any action instituted against the third possessor prior to the expiration of the ten days delay, is premature, and subject to legal exceptions. 15 A. 564, *Taylor v. Pearce*. See MORTGAGE, VI. (c), 6).

3. The general rule of law is, that the plaintiff in an action of revindication must make out his title, or the possessor will be discharged from the demand. As against a mere naked possessor or trespasser, however, the plaintiff is not bound to show title in himself, good against the whole world, in order to recover. But in a petitory action he is bound, even against a naked possessor, to produce a title anterior in date to the possession of the defendant, in order to establish ownership in himself and repel the presumption of ownership in the defendant, resulting from his possession. 15 A. 454, *Young v. Chamberlin*. See EVIDENCE, III. (c); VIII. *Infra*, II. (a), No. 1; (c), 1), No. 1; 2), No. 5.

4. A party cannot controvert the title of one under whom he claims. 15 A. 684, *Girault v. Zunts*. See *infra*, II. (c), 3). ESTOPPEL, No. 20.

5. Where parties claim title to lands acquired from the United States, after the general government has parted with its title, the court will decide their rights under the law, without reference to the action of the officers of the land office. 20 A. 435; 20 Howard, 7, *Garland v. Winn*; 1 Peters, 212, *Comegys v. Vosse*; 14 Howard, *Cunningham v. Ashley*; 14 A. 134; 25 A. 189, *Walsh v. Lallande*. See PUBLIC LANDS.

6. The defendant is not estopped from disputing plaintiff's claim to the property, because he did not, at the time of his bankruptcy, surrender the property to his creditors. 23 A. 669, *Ware & Son v. Morris*.

7. Defendant's title, which was acquired under a judgment and execution, will be upheld until a direct action is brought setting forth and proving specifically its defects. 24 A. 445, *Lacroix & Cordeviolle v. White*.

8. The plaintiff must tender to defendant, who has purchased his property, at a judicial sale, the purchase price disbursed in paying the incumbrances which existed on the property, to be able to maintain his action. 24 A. 324, *Barelli v. Gauche*. See EXECUTION, V. (d), 13), Nos. 3, *et seq.*; TENDER. *Infra*, No. 9.

9. The defendant has no right to claim a tender of the price, if he received the same from the sheriff in satisfaction of his writ, by virtue of which the property was sold to him. 24 A. 473, *Houston, administrator v. Childers et als*. See No. 8.

10. Plaintiff's allegation of title as sole heir of his father, annexing to his petition an order of the proper court recognizing him as such, and that the property belonged to his father, who was in possession at the time of his death,

is sufficient to maintain the action against an exception of vagueness. 25 A. 76, *Chavanne v. Frizola*. See PLEADING, V. (a), 3), E.

11. No petitory action can be brought by the defendant in a possessory action, until he has executed the judgment for possession rendered against him. 28 A. N. R., *Hayes v. Vidou*.

12. The vendee of one who has recognized the title of his adversary, is bound. See ESTOPPEL, Nos. 11, 12; *infra*, III. (b), 1), No. 3.

II. OF THE PETITORY ACTION.

(a) *In general.*

1. Although, in a petitory action, the plaintiff must recover on the strength of his own title, yet when the defendant has no title at all, he cannot, as a trespasser, take advantage of any defect in the muniments of title shown by the plaintiff; in such a case, a title, apparently good, is sufficient to maintain a petitory action. 15 A. 76, *Zeringue v. Williams*. See I. No. 3; (c), 1), No. 1; 2), No. 5.

2. In a petitory action, it is sufficient, prior to the call in warranty, to make service of interrogatories upon the defendant, who cannot object to their introduction in evidence against him. 15 A. 451, *Pagett v. Curtis*. See EVIDENCE, XVIII.

3. A prayer that petitioner's title be recognized, and that he be put in possession, renders the action petitory. 18 A. 196, *Millaudon v. Ranney*. See PLEADING, V. (a), 5). *Infra*, III. (c), No. 1.

4. To screen the property from his creditors, the debtor purchased in the name of his minor children; when he died, the property was sold in his succession, and the minors' suit to recover the same was dismissed. 23 A. 624, *Stewart v. Looney*; 6 A. 728; 18 A. 49.

5. TALIAFERRO and WYLY, JJ., *dissenting*: The minors' title was not a simulation; they should recover. *Ib.*

6. A purchase made by a married woman, in her name, will be considered as community property, hence she cannot maintain a petitory action, unless she avers herself to be separate in property, or the property to be paraphernal. 24 A. 295, *Sulstrang v. Betz*. See PLEADING, I. (c), 1), A.

7. Where plaintiff is in possession of the land sold to him, although the rear line is mentioned to run on a certain boundary line, which, if true, would include defendant's property, he cannot recover. 28 A., N. R.; *Palao v. Cooley*. (N. B. This was the portion of the Arrowsmith tract, situate on Canal street, between the original, incorrect survey, and the corrected later one.)

8. The defendant whose property has been divested by judicial proceedings, cannot recover the same on a simple petitory action. He is estopped by his warranty from setting up his title. 23 A. 18, *Tregre v. Baudry*. See (c), 1), Nos. 4, 5.

9. All who claim ownership may be joined in the same suit. See PLEADING, II. (c), No. 6.

10. The petition need not describe the property with strict accuracy. See PLEADING, V. (a), 3), E. No. 1.

(b) *Possession requisite to maintain the action, and defendant's disclaimer of title.*

1. When a defendant, in his answer, disclaims title, and does not deny any of the allegations of plaintiff's petition, they are taken by the court for confessed. 19 A. 462, *Clapp & Co. v. Phelps & Co.*

2. Plaintiff, who alleges that he never paid for the property, and, therefore, the same belongs to his vendor, does not disclaim title. 30 A. 590, *Pendergast, administratrix v. George Schantz*.

(c) *Sufficiency of title to authorize a recovery; and impeachment of title.*

1) *In general.*

1. An action of revendication may be defeated by proof of an outstanding title in a third person; for the plaintiff in such an action must succeed by the

strength of his own title. But such proof might be rebutted by proof of disclaimer of title by such third persons. In the same manner, a title derived from a person pretending to act under a power of attorney, which did not confer the authority to make the title, is valid, if it be proved that the mandator has ratified the act of his agent. 15 A. 628, *Baines v. Burbridge*; 454, *Young v. Chamberlain*. See I. No. 3; II. (a), No. 1; (c), 2), No. 5. EVIDENCE, III. (c); VIII; *infra*, Nos. 2, 7.

2. Plaintiff must show a title which can be traced back to another who had in himself the right of property in the thing sold; an act of partition between heirs is not sufficient; the title of the *de cuius* must also be produced. 15 A. 169, *Brown v. Brown*.

3. A party claiming property must recover on the strength of his own title, rather than on the weakness of his adversary. 22 A. 57, *Pritchett v. Coyle*.

4. Under a petitory action, a judicial sale cannot be annulled. 23 A. 331, *Barbee v. Perkins*. See (a), No. 8.

5. The defendant became adjudicatee under a junior mortgage, for a sum less than the first mortgage; the plaintiff also became adjudicatee of the same property, afterwards sold to satisfy the first mortgage, which contained the clause *de non alienando*; Held: That plaintiff could recover under petitory action. 23 A. 339, *Bullier v. Huppenbauer*. See EXECUTION, V. (d), 3).

6. Defendant, in a petitory action, may enquire into the validity of the judgment under which plaintiff acquired title. 27 A. 121, *Cronan v. Cochran*; 22 A. 20, *Surgi v. Colmer*; 8 N. S. 105; 5 A. 678; 11 A. 761.

7. The petitory action corresponds in character with the action of ejectment at common law; it is a proceeding at law for the recovery of property, and can be maintained in the courts of the United States only where the right of possession can be shown. The petitioner therefore, in a petitory action, must recover on the strength of his title, and this must be a legal, as contradistinguished from an equitable title. 10 H. 257, *Gilmer v. Poindeexter*.

8. The purchaser cannot contest the title of his vendor. See ESTOPPEL, No. 20.

2) Defendant's title.

1. The lessee is without capacity to stand in judgment as to the question of title; nothing but the right of possession can be determined on the trial of the case between the lessee and plaintiff. 15 A. 454, *Young v. Chamberlain*.

2. Before the lessee's possession can be disturbed, in a petitory action, the plaintiff must show a good and perfect title in himself, as required by article 44 of the Code of Practice. *Ib.*

3. No distinction can be made, as to the capacity to stand in judgment, in a petitory action, between an agent in possession of land, with full power of attorney to manage and superintend, and to sell, mortgage, lease, and hire the same, upon such terms as may seem to him proper and advantageous, and a lessee of the land. *Ib.*

4. As against a mere possessor, without title, a joint heir, or a joint owner, can maintain a petitory action. 26 A. 367, *Gordon v. Fahrenberg & Penn.*

5. Even if the defendant be regarded as a naked possessor, the plaintiff must fail, if he does not establish a title anterior to the possession of the defendant. 23 A. 274, *Patterson v. Litton*. See I. No. 3; II. (a), No. 1; (c), 1), No. 1.

6. A mere trespasser cannot question the title of one possessing as owner. 29 A. 513, *Hebert v. Légé*.

3) Defendants with title; those holding under plaintiff or his author; and a party's impeachment of his own title.

1. Where an action has been brought to recover property, and at the time of the commencement of the suit one of the plaintiffs had no interest in the title, having previously transferred his rights, but subsequently acquired interest by an act of retrocession; Held: That the want of interest at the time of the institution of the action, is a good ground for a judgment of non-suit, and that the act of retrocession thus passed after the commencement of the suit, is not admissible in evidence. 15 A. 116, *Dugas v. Truxillo*.

2. Where parties undertake to disturb third persons in the possession of real estate acquired at public sale, at a time when the pretensions of such parties were either unknown or considered as wanting in validity, they must make their case legally certain. 15 A. 410, *McConnell v. New Orleans*.

3. Where plaintiff acquired the land in 1849, and remained in possession until 1862, when he left in consequence of the war, he must recover in a petitory action against defendant, who entered in 1866, and sets up title founded on a Spanish grant, and a probate sale made in 1871, this last deed showing said land to have been previously sold for taxes. 21 A. 169, *Ernst v. Montigudo*.

4. If the proceedings assailed in a petitory action be not absolute nullities, the parties thereto should be cited. 21 A. 730, *Haggerty v. Philips*.

5. In a petitory action, the defendant may enquire into the validity of an order of seizure and sale, the basis of plaintiff's title, and if the formalities have not been observed in making the sale, the title of the sheriff will be declared null. 22 A. 20, *Surgi v. Colmer*.

(d) *Judgment and incidental rights of the parties.*

1. A sale during the pendency of a real action does not affect the rights of plaintiff, who may nevertheless have himself put in possession. 16 A. 281, *Barelli v. Delassus*. See OBLIGATIONS, VII. (b), 2), B. § 1, No. 11; act No. 3 of 1878, regulates this subject.

III. OF THE POSSESSORY ACTION.

(a) *In general.*

1. The lessee is without capacity to stand in judgment as to the question of title; nothing but the right of possession can be determined. 15 A. 454, *Young v. Chamberlain*.

2. In a possessory action against co-trespassers, the defendants are not allowed to attack the title of plaintiff or establish it in themselves. C. P. 53; 21 A. 541, *Frazier v. Hardee*.

3. Article 55 of the Code of Practice, forbids the cumulation of petitory and possessory actions, except by consent of parties. 25 A. 166, *St. Amand v. Long*.

4. The possessory action cannot be used by a third possessor to test the right to enforce a mortgage or regulate the validity of the proceedings. 26 A. 363, *Dahlgreen v. Duncan*.

5. The proceeding under act No. 47, of 1873, by a purchaser at a tax collector's sale, to be put in possession, is not a possessory action. 30 A. 175, *Fix v. Succession Dierker*.

(b) *Disturbance and possession requisite to maintain the action.*

1) *In general.*

1. A party who has not been in possession of the property, cannot maintain a possessory action. 24 A. 176, *Deuchatel v. Robinson*.

2. In a possessory action, proof of title is not admissible. 21 A. 559, *Lott v. Mills*; 26 A. 685, *Chaffe v. Abercrombie*; 25 A. 166, *St. Amand v. Long*.

3. Defendant cannot change the action into a petitory one. 25 A. 166, *St. Amand v. Long*. See I. No. 11.

2) *Nature of the possession as affected by the title.*

1. In a possessory action, only actual damages can be recovered for the wrongful possession. 19 A. 478, *Means et als. v. Hyde & Mackie*.

(c) *Evidence and admissibility of title.*

1. In a petitory action to recover property, the defendant cannot object to the introduction in evidence of the answers to interrogatories, upon the ground that the plaintiff, at the time of the service of the interrogatories, alleged ownership simply, without setting forth the particulars of the title, so as to

enable him to make a cross-examination of the witnesses when the petition and such interrogatories sufficiently inform the defendant of their object. 15 A. 451, *Pagett v. Curtis*. See PLEADING, V. (a), 5).

2. The plaintiff in a petitory action has no right, on the trial of the case with the lessee, to offer evidence to establish that the lessor derived his title from the same common source as himself; but in such a contest he must recover the possession on the strength of his own title, and not on the weakness of the lessor's, as shown by the evidence, in a case to which the lessor is no party. 15 A. 454, *Young v. Chamberlain*.

3. See EVIDENCE, III. (c); VIII.

4. The widow and heirs, plaintiffs, need not prove that the administration is closed. See PLEADING, V. (b), 5), B. No. 6.

PHYSICIAN.

1. The city may employ a physician to attend the wounded policemen. See NEW ORLEANS, II. (d), 1), No. 8.

2. Testimony of, 1877, E. S., p. 177.

PILOT.

1. See NEW ORLEANS, II. (g), 2).

2. A master not bound to answer interrogatories as to whether his vessel had been piloted by one, not a branch pilot. See EVIDENCE, XVIII. (d), 1). No. 1.

3. A Pilot cannot act without a license, 1877, E. S., p. 103.

PLAQUEMINES.

See TAXES, II. (b), 2), A. No. 8; court house removed, 1870, E. S., p. 68; 1871, p. 48; bonds, 1874, p. 58; repealed, 1876, p. 91.

PLEA.

1. A plea in equity, is the alleging of a certain fact not contained in the bill, which destroys complainant's action.

PLEADING.

I. OF ACTIONS.

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|---|--|
| (a) <i>Right of action.</i> | 3) Obligations several, joint and in solido. |
| (b) <i>In whose name to be brought.</i> | 4) Corporations and quasi corporations. |
| (c) <i>Joinder of parties; their capacity; and against whom maintainable.</i> | 5) Slaves and statu-liberi. |
| 1) Husband and wife; and suits relating to the community. | 6) Insolvency and succession. |
| A. <i>In general.</i> | 7) Partnership. |
| B. <i>Wife's authorization to sue or be sued; evidence thereof; and effect of its omission.</i> | 8) Public persons. |
| 2) Tutor and minor. | 9) In other cases. |
| | (d) <i>Death or change of parties.</i> |
| | (e) <i>Divisibility of actions.</i> |
| | (f) <i>Other matters.</i> |

II. OF CONSISTENT AND INCONSISTENT DEMANDS AND PLEAS; AND CUMULATION OF ACTIONS.

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|--|--|
| (a) <i>In general.</i> | 1) In general. |
| (b) <i>Effect of inconsistent demands; their waiver and election; payment; prescription and general issue.</i> | 2) Payment, prescription and general issue. |
| | (c) <i>Demand by, or against, several parties.</i> |

IV. OF THE DEMAND OF LESS THAN IS DUE.

V. OF THE PETITION; ANSWER; AND EVIDENCE UNDER THE PLEADINGS.

(a) *Petition.*

- 1) In general.
- 2) Names, description and residence of parties.
- 3) Certainty of demand and cause of action.
 - A. *In general.*
 - B. *Cause of action to be disclosed.*
 - C. *Matters officially noticed by the court, or in anticipation of the defense.*
 - D. *Matters of evidence; those implied by the allegations; and surplusage.*
 - E. *Description of property and the title thereto; and items of account.*
 - F. *Error or fraud; and actions of nullity, rescission, or injunction.*
- 4) Annexing documents and swearing to petition.
- 5) Prayer and signature, and character of the action.

(b) *Answer.*

- 1) In general.
- 2) Prayer for oyer.
- 4) Waiver and admissions by answer.
- 5) Matters that must be specially pleaded, general issue, and evidence under it.

A. *In general.*

D. *Plaintiff's proof under the general issue; and what he need not prove unless specially denied.*

C. *Defendant's proof under the general issue; and what he cannot prove unless specially alleged.*

(c) *Admissibility of evidence under the pleadings.*

- 1) In general.
- 2) Evidence to repel new matters pleaded or proved by the adverse party.
- 4) Matters of inducement or aggravation; subordinate facts substantially within the allegations; and evidence of the extinction or diminution of the obligation.
- 5) Error, fraud or simulation; and actions of nullity, rescission or injunction.

(d) *Relevancy of evidence.*

- 1) In general.
- 2) Fraud and simulation; actions of nullity; and evidence of character.

(e) *Variance.*

VI. OF EXCEPTIONS.

(a) *Dilatory exceptions.*

- 1) In general.
- 2) Misnomer, non-joinder and residence of parties.
- 3) Authority or capacity of parties; prematurity of the action; and generality of the averments.

- 2) Plea to the jurisdiction.
- 3) Plea of lis pendens.

(c) *Peremptory exceptions.*

- 1) In general.
- 2) *Res judicata.*
- 3) No cause of action disclosed.
- 4) Prescription.

(b) *Declinatory exceptions.*

- 1) In general.

(d) *Exceptions in general.*

VIII. OF INCIDENTAL DEMANDS.

(a) *Compensation.*(b) *Reconvention.*

- 1) In general.
- 2) Right to plead in reconvention.

(d) *Intervention.*

- 1) In general.
- 2) Right to intervene; and when an intervention may be ordered.

(c) *Warranty.*

- 1) In general.
- 2) Right to call in warranty.

(e) *Opposition of third persons.*

IX. OF AMENDMENTS.

(a) *In general.*(b) *At what time allowable.*(c) *Admissibility as affecting the issue, demand, or previous allegations.*

- 1) In general.
- 2) Amendments as affecting the demand.
- 3) Amendments affecting the defense.

(d) *Admissibility to change parties or allege subsequent matters.*

I. OF ACTION.

(a) *Right of action.*

1. All parties interested, such as the heirs of the deceased, have a right to set up the nullity of a legacy to a concubine of the deceased. 16 A. 246, *Carmena v. Blaney*; 15 A. 599. See DONATIONS, III. (a), No. 2; *infra*, No. 6.

2. Where the account has been closed and settled, no suit can be maintained contrary to the balance, without alleging error or fraud in the settlement. 29

A. 350, *Hailes v. McGehee, Snowden & Violet*; 24 A. 278; 23 A. 178. See PARTNERSHIP, IV. (e), 1), No. 1.

3. To test bonds of the State, see BONDS, No. 3.

4. A clerk has no right to compel the institution of suits in his court. See CLERKS OF COURTS, No. 7.

5. Courts cannot entertain a suit relative to a fund created for the purpose of corrupting legislators. See COURTS, I. No. 8.

6. Who may sue to annul a donation to a concubine. See DONATIONS, I. (d), No. 1; see *supra*, No. 1.

7. The sheriff who has completed the adjudicatee's deed, cannot afterwards sue him for a compliance with certain conditions omitted. See EXECUTION, V. (d), 13), No. 2.

8. Any party interested may sue to revive a judgment. See JUDGMENT, XVI. No. 5.

9. If minors have rights, they must have an action. See MINORS, III. (f), 1). No. 2.

10. See ACTIONS.

11. Who may sue for the nullity of contracts made in fraud of creditors. See OBLIGATIONS, VII. (b), 2), B. § 3.

12. When individual corporators may sue to revendicate a public thing. See THINGS, I. (b), No. 1.

13. The donor cannot set aside a donation reprobated by law. See DONATIONS, III. (a), No. 3.

(b) *In whose name to be brought.*

1. Under a stipulation that the contractor shall be subrogated to all the rights of the city, and under the general rule that one who has the right to sue in his own name may sue for the use of another, the contractor may institute a suit in the name of the city for his benefit. 20 A. 503, *City v. Wire*. See (c), 9), Nos. 4, 5, 6, 8, 9.

2. The holder of a promissory note, pledged before maturity, to secure the payment of a pre-existing debt, has a right to sue for and recover the whole amount. 21 A. 3, *Succession of Dolhonde*. See PLEDGE, I. (b), No. 3. SALE, VIII. (c), No. 2; *infra*, II. (c), No. 2.

3. One who is out of the State may institute a suit in his own name. 28 A. N. R., *Mrs. Delacroix v. Mrs. Nash*.

4. While the estate is under administration, the heirs have no right to sue for debts or damages due to the estate. 24 A. 280, *Sloan v. Stevenson & May*. See I. (c), 6).

5. The assignee of an account, or other *chose in action*, may sue in his own name in the courts of Louisiana. 21 H. 394, *Martin v. Ihmsen*.

(c) *Joinder of parties; their capacity; and against whom maintainable.*

1) Husband and wife; and suits relating to the community.

A. *In general.*

1. A married woman may sue for damages arising *ex delicto*, where her husband is a party to the suit. 15 A. 492, *Cade v. Redditt*. See No. 12.

2. Where the husband of the plaintiff is not a party to the suit, his authorization to bring the suit should be shown. 15 A. 303, *Schurer v. Klein*.

3. The death of the wife dissolves the community, and with it ceases the right of the husband to stand in judgment, without the authorization of the court, in matters affecting the community property. 15 A. 636, *Poutr v. Bistes*. See MARRIAGE, XIII. (e), 4), c.

4. The husband may be sued for a debt of the community, whether his wife be dead or not. 28 A. 624, *Bienvenu v. Fournet*; 26 A. 690.

5. A contract, whereby the father and mother of the husband agreed to pay to the wife a certain sum of money, in consideration of the advances made to the wife by her father and mother, in case of failure, bankruptcy or death of the husband, may be enforced by an action in the name of the wife. 17 A. 224, *Pecquet v. Pecquet*. See OBLIGATIONS, VIII. (e), No. 3.

6. Even after separation, the wife cannot sue her husband to reimburse her the rent and expenses paid since his abandonment of the common dwelling; to pay her certain amounts not included in the settlement of the community; to receive her under a roof without his concubine and to pay her alimony. 18 A. 41, *Bourdette v. Her Husband*. See No. 7.

7. A married woman cannot sue her husband for alimony, except incidentally, in a principal demand for separation from bed and board or divorce. 18 A. 613, *Moore v. Moore*. See MARRIAGE, II. (b), No. 2.

8. The husband may act alone to recover the dowry of his wife, but with his authorization she may sue for the same. 21 A. 227, *Lapice v. Lapice*. See MARRIAGE, IX.

9. The husband may sue in his name, on a note drawn, payable to his wife for lands, her paraphernal property, sold by her; the suit implies administration by the husband of the wife's paraphernal property. 25 A. 592, *Morton v. Copeland*.

10. The husband or wife alone can complain that the wife was not authorized to contract. 27 A. 461, *Jumonville v. Sharp*; 6 A. 360. See OBLIGATIONS, III. (a), No. 14.

11. Where the wife is sued, judgment cannot be rendered against the husband. 28 A. N. R., *City of New Orleans v. Mrs. J. W. Cannon*.

12. Actions for personal wrongs to the wife, or for injury to her paraphernal property not administered separately by her, should be brought in the name of the husband alone, the joinder of the wife, however, in such actions, does not destroy the action. 29 A. 213, *Cooper v. Capel*; 12 A. 333; C. C. (2373), (2404). See No. 1.

13. Capacity to appeal. See APPEAL, I. (e), 2).

14. For pleadings in suits for separation of property, see MARRIAGE, XIV. (c).

15. How citation against husband and wife, co-defendants, may be served. See CITATION, II. No. 7.

B. *Wife's authorization to sue or be sued; evidence thereof and effect of its omission.*

1. A married woman is without power to file an answer and stand in judgment, without being authorized by her husband or the judge; a judgment by default rendered against her before she is so authorized, produces no effect. 15 A. 182, *Rills v. Hamilton*. See No. 3.

2. A married woman who is a minor, when duly assisted and authorized by her husband, as also any minor, who is duly represented by his tutor, is competent to stand in judgment in an action against the administrator of a succession, to set aside as absolutely null and void the adjudication of property to himself, while acting in the double capacity of auctioneer and administrator. 15 A. 581, *Dugas v. Gilbeau*. See SUCCESSION, VIII. (e), 6).

3. A wife who has a default set aside to file her answer, and who does not appear to be authorized by her husband or by the court, is not properly before the court. This defect will be noticed *ex officio*, by the court. 19 A. 148, *Champlin v. Lee*; 1 A. 260; 6 R. 78; 9 R. 193; 3 A. 619; 10 A. 412; 12 A. 146. See No. 1.

4. Where plaintiff marries, pending the suit, the supplemental petition making her husband a party, need not be served on her. 21 A. 168, *Flynn v. Flynn*.

5. The allegation that the plaintiff, a married woman, is "joined and authorized" by her husband, who has made no appearance, and where no evidence of the authorization is shown, is not sufficient. 21 A. 576, *Succession Pomeroy*; 2 A. 140, 879; C. C. (123); 1 R. 230, 468; C. P. 106, 107, 118.

6. The objection that plaintiff, a married woman, was not properly authorized to prosecute the action, must be specially pleaded in the court below. 21 A. 665, *Taylor, Wife, etc. v. Littell*; 10 A. 140.

7. The husband must appear with his wife, or she must exhibit her authorization, before proceeding to trial on the merits. The signing of the appeal bond, and the filing of an assignment of error in the Supreme Court, will not

cure the defect. 22 A. 204, *Tutorship Jane Stokes*; 21 A. 576, *Succession Pomeroy*.

8. A married woman cannot stand in judgment as garnishee, unless her husband, or the court, authorize her to appear. 23 A. 192, *Delacroix v. Hart*.

9. It is sufficient to make both, husband and wife, defendants. 21 A. 692, *Monition Hall, Opposition Lawrence*.

10. Where a married woman is authorized to contract a loan, and give a mortgage as surety, when sued, she need not be authorized by the judge to appear and defend herself. 23 A. 84, *Adèle Gernon v. D. C. McCan*.

11. The wife being authorized by the judge to prosecute her suit, the presumption is, that the husband failed or refused to authorize her. 24 A. 172, *Jamison v. Barrow*. See MARRIAGE, VIII. (b).

12. A purchase made by a married woman will be considered as community property; hence she cannot maintain a petitory action, unless she avers herself to be separate in property, or the property to be paraphernal. 24 A. 295, *Sulstrang v. Betz*.

13. The judge cannot authorize the wife to defend a suit, if the husband be not absent, or interdicted, and does not refuse to authorize her. 24 A. 141, *Delacroix v. Hart*; 11 A. 69; *Jones v. Henry*, N. R., O. B. 46.

14. If the petition be in the name of the husband and wife, this is a sufficient authorization to the latter. 28 A. N. R., *Mrs. Delacroix v. Mrs. Nash*.

15. The wife is sufficiently authorized when the husband joins her as co-plaintiff. 24 A. 248, *Evans v. D'Lisle*.

16. When the husband joins the wife in the petition, this is a sufficient authorization. 25 A. 202, *Succession Payne*. See No. 26.

17. A married woman, to be sued, should be authorized by her husband, or the court, even if she be a boarding house keeper; this occupation not being that of a public merchant. 25 A. 38, *Moussier v. Gustine*.

18. Where the husband has not appeared with his wife, she must show his authorization, otherwise than by her own averments or those of her counsel. 25 A. 193, *Sommers v. Schmidt*.

19. A married woman alleging, need not prove her authority to sue, unless specially denied in *limine litis*; a general denial is insufficient. 26 A. 541, *DeBlanc v. Levasseur*; 4 R. 172; 5 R. 96; 2 R. 1.

20. The suit having been commenced by the wife, assisted by her husband, citation of appeal to her was sufficient. 26 A. 542, *Deblanc v. Levasseur*; 28 A. 442, *Thezan v. Thezan*.

21. The authorization of the husband, at any time before trial on the merits, is sufficient. 26 A. 590, *Succession McDonald*.

22. The authorization of the husband, given before trial, of the exception of want of authority in the wife, is sufficient. 26 A. 609, *Succession of Pierre Cabrol*.

23. A married woman, who enters into a commercial partnership, with the consent and authorization of her husband, has the right, with the same consent, to sue for a settlement of the partnership. 26 A. 640, *Mangrum v. Norsworthy*.

24. The husband having signed the injunction bond, this was sufficient authorization for his wife to sue. 26 A. 707, *Lewis v. Winston, Morrison et al.*

25. The petition, praying that the husband be cited to assist his wife, who is sued, and the answer being made without reserve, it cannot be objected that the wife is not authorized. 27 A. 248, *Riley v. Heirs of Riley*.

26. The wife is sufficiently authorized when her husband appears with her as co-defendant. 29 A. 749, *Jordan & Co. v. Anderson*. See No. 16.

27. The appearance on the part of the husband to authorize his wife to institute the suit, is sufficient. 27 A. 461, *Jumonville v. Sharp*.

28. Married women, who give their procurator, with the authorization of their husbands, may be represented in court by their agent, without further authorization. 28 A. 743, *Succession Bougère*.

29. A judgment by default, against the wife alone, is binding on her, when she has been regularly cited, and her husband also, but only for the purpose of authorizing her. 28 A. 403, *Richard Francis v. Marie Louise Martin*.

30. The proper practice is to make the husband, who authorizes his wife, a co-litigant with her. 29 A. N. R. *Jones v. Henry*.

31. Married women are not bound by a confession of judgment in certain cases. See JUDGMENT, X. Nos. 1, 7, 8.

32. For pleadings, evidence and judgment in suits for separation of property, see MARRIAGE, XIV. (c).

33. The wife need not allege whether she be separate in property by contract or judgment. See PLEADING, V. (a), 3), A. No. 4.

2) Tutor and minor.

1. A suit properly brought by the tutor for a minor, may be prosecuted by the minor after attaining majority, without any new citation or formal change in the pleadings. 15 A. 598, *Martel v. Richard*.

2. The tutor represents the minor so completely, that when he has once brought a suit for him, or answered an action for him, no further petition or answer can be required on the part of the minor; and a judgment rendered in the name of his tutor, so long as the tutorship lasts, is a judgment for or against the minor himself. 15 A. 598, *Martel v. Richard*.

3. The capacity of defendant, sued as natural tutor, being specially put at issue by the answer, should have been proven. 20 A. 64, *Stilley v. Stilley*.

4. A minor is without interest to enjoin the foreclosure of a mortgage on her natural tutrix's community half. 24 A. 285. *French, under-tutor v. Thompson*.

5. The under-tutor has no right to represent the minors in an action against third parties, holding their property, the tutor is the proper party. 26 A. 458, *Netter v. Hernandez & Levy*.

6. See MINORS, II. PARTITION, III. (a).

3) Obligations; several, joint, or in solido.

1. All the joint obligees should be joined as plaintiffs, to maintain an action on an obligation in their favor. 16 A. 6. *Alling v. Woodruff*; 33, *Nicholson's Heirs v. D. N. Hennen*; but see C. C. (2085), and acts 1871, p. 19.

2. An obligation, incomplete for want of the signatures of some of the joint obligors, cannot form the basis of an action. 16 A. 29, *Fish v. Johnson et als*.

3. Suit may be brought by the creditor against the heirs, jointly, at the domicile of the succession, when the estate has been partitioned without providing for the debt. 21 A. 278, *Lee v. Goodrich*. See No. 1.

4. See for such obligations, OBLIGATIONS, VIII. (e).

5. Joint obligors may be sued separately. 30 A. 397, *Mitchell v. D'Armond*.

4) Corporations, and quasi corporations.

1. The right of the United States to sue in our courts, cannot be considered an open question. 18 A. 305, *United States v. Murdock*; 733; 4 N. S. 317; 5 N. S. 567; 5 R. 120; 8 R. 262; 11 R. 418; 7 A. 185.

2. Plaintiff, who sues to be recognized as owner of certain stocks, cannot be recognized as the owner, in a suit against the company, unless the alleged transferee be made a party. 20 A. 382, *St. Romes v. Levee Steam Cotton Press Company*. See JUDGMENT, I, No. 11. *Infra*, V. (a), 3), E. No. 2. SALE, VI. (c), No. 14.

3. The mayor and majority of councilmen, may represent the city of Carrollton before the courts. 21 A. 447, *Carrollton v. Metropolitan Police*.

4. By acts of 1835, creating the faculty of the Medical College of Louisiana, etc.; and 1847, creating the University of Louisiana; the constitution of 1852; the acts of 1855, re-enacted in 1870, the corporate capacity of the "medical department" of the university is sufficient to maintain the suits of their creditors against them. 28 A. 104, *Mrs. Stone v. Faculty of the Medical Department of the University of Louisiana*.

5. The corporation may sue on a bond given in favor of the president and board of directors to fulfill the duties of paying teller. 28 A. 736, *New Orleans National Bank v. Wells*.

6. A corporation not properly organized, cannot sue. See CORPORATIONS, X. (jj).

7. New Orleans may sue. 1877, E. S., p. 127.

5) Slaves and *statu-liberi*.

See SLAVES, I. (b), 5).

6) Insolvency and succession.

1. Where a creditor seeks to have annulled, as alleged, an order of court accepting a surrender of property by an insolvent, the proper method is to proceed by direct action in the same court which rendered the order contradictorily with the ceding debtor, and also with the creditors, by notice to the syndic elected by them. 15 A. 19, *Jeffries v. Belleville Iron Works Company*.

2. Testamentary executors, after being finally discharged by a judgment, from their trust as such, have no authority to institute a suit to enforce provisions of the will. 15 A. 180, *Rost v. Doyal*. See No. 10; (d), No. 3.

3. A foreign administrator, who has qualified in a court of competent jurisdiction, has the right to sue for property brought into this State, belonging to the succession which he administers. 15 A. 243, *Crawford v. Graves*.

4. The curator of an estate, as the representative of the creditors, has the right to attack a sale of property made by the deceased, as being simulated, where the succession would be insolvent if such property is abstracted from the mass. 15 A. 582, *Sullice v. Gradenigo*.

5. An assignee in bankruptcy may sue. See OBLIGATIONS, VII. (b), 2), B. § 2, No. 7.

6. A testamentary executor cannot bring such a suit. See OBLIGATIONS, VII. (b), 2), B. § 3, No. 7.

7. An administrator has no authority to sue for the recovery of a debt beyond the limits of the State where he was appointed, although he may claim possession of property belonging to the estate under his charge, and of which he was dispossessed. 19 A. 42, *Mason v. Nutt's Executor*; 8 L. 508; 17 A. 15; 2 N. S. 20; 15 A. 405, *Henderson v. Rost*; 23 A. 23.

8. An administrator may sue for debts due to the estate as long as he continues to be administrator. It matters not if the succession owes no debt. 28 A. 591, *Labit v. Perry*; 14 A. 349; 27 A. 37.

9. A natural, legal or dative tutor, may administer the succession as such, so long as not opposed by creditors; a seizure and sale of succession property, contradictorily with him, is valid. 19 A. 523, *Vincent, adm'r v. D'Aubigne*; 2 A. 465; 5 A. 197. See SUCCESSION, VIII. (e), 8).

10. The executor being once discharged, cannot be sued in his official capacity. 24 A. 293, *Norris v. Collins, ex'r*. See No. 2.

11. If the judgment discharging an administrator from his trust be not utterly null, the administrator, as such, has no standing in judgment. 26 A. 222, *Succession Decuir*; 20 A. 35; 23 A. 178.

12. The judgment removing the previous administrator, and appointing the public administrator to administer the estate, offers *prima facie* proof of the capacity of the latter to stand in judgment. 25 A. 214, *Morse v. Griffith*.

13. Whilst the succession is under administration, the heirs have no right to sue the debtors of the succession. See (b), No. 4.

14. For powers of foreign administrators, see SUCCESSION, IX.

15. Where the only creditor of the community is barred from contesting the transfer made by the surviving husband, during his administration, the administrator who succeeds the husband, has no right to sue to set aside these transfers; he does not represent the minor heirs, who alone can object thereto. 30 A. 576, *Ledoux v. Burton*.

16. A petition of the widow and tutrix, alleging that the public administrator is proceeding to sell the property of her husband's succession, for the purpose of paying a judgment rendered without citation and for a prescribed debt, shows a sufficient cause of action to enjoin the sale. 30 A. 160, *Bienvenu v. Parker*.

7) Partnership.

1. Where a suit was brought in the name of certain persons, as composing a commercial firm, and the defendant excepts to the petition, upon the ground that all the members of the firm had not been joined in the action; *Held*: That where it was shown that the name of one of the persons used in the style of the firm was omitted, the burden of proof was on the plaintiffs to show that they alone composed the firm. 15 A. 509, *Rugely v. Gill*. See EVIDENCE, VIII.

2. In a suit to cancel a contract, where it would require a liquidation between the parties in order to ascertain their respective rights, the plaintiff is not bound to refund what he has received before he can be allowed to institute his action. 15 A. 518, *Millard v. Farley*. See TENDER.

3. One of the two partners composing a commercial firm, having died after the institution of the suit, the proper course is not to dismiss the suit, but to continue it for the purpose of making the legal representatives of the deceased, parties. 16 A. 162, *Todd & Co. v. Young*; 1 R. 519.

4. After dissolution of the partnership, service of citation must be made on the member intended to be sued. 27 A. 237, *Anderson v. Arnette et als*; 17 L. 42; 14 A. 870. See No. 7. JUDGMENT, XI. (a), No. 10.

5. All the partners must sue to enforce a partnership claim. 18 A. 260, *Gallot v. McCluskey*; 9 R. 149; 4 A. 179; 3 L. 358.

6. An individual member of a firm cannot sue for a partnership debt, but the note being indorsed by the firm, was transferred to the holder, who may sue in his name. 20 A. 27, *Dorr v. Jouet*. See 9), No. 7. PLEDGE, I. (b), No. 3.

7. The supplemental answer of one of the partners, duly cited, in which he claims as liquidating partner, judgment against one of the partners who was not cited, does not authorize judgment against said partner. 27 A. 237, *Anderson v. Arnette et als*. See No. 4.

8. A partner *in commendam*, has a share in the profits, and may therefore sue to liquidate the partnership. 29 A. 280, *Latting v. Fassman, Bryant & Co.*

9. For judgment obtained after the death of a partner, see ATTACHMENT, IX. (a), No. 8.

8) Public persons.

1. The State is but a trustee of the lands, or their proceeds granted by Congress, for the benefit of the inhabitants of the township; and where notes are made payable to the State treasurer, he may stand in judgment for the rescission of the sale for non-payment of the price. 16 A. 130, *Hunter v. Williams*; *acts of Congress, 15th February, 1843*.

2. A State tax collector may sue to recover a tax or license due the State. 21 A. 201, *State v. King*.

3. Under act 121 of 1861, the school directors have a right to sue for a dissolution of a sale of school land for non-payment of the price. 28 A. 739, *School Directors v. R. K. Anderson*.

4. The capacity of plaintiff, who sues as an officer, cannot be collaterally questioned. 29 A. 652, *Mayor of Monroe v. Hoffman*. See ACTIONS, No. 3.

5. Suit against the governor to enforce a contract with the State, cannot be maintained. See CONSTITUTION, II. (e), 2), No. 4.

6. See OFFICE AND OFFICER.

9) In other cases.

1. Plaintiff cannot question the capacity of defendant, to stand in judgment. 17 A. 251, *Baker v. Michinard*.

2. The father may sue for damages by reason of the death of his child, occasioned by the negligence or want of skill of the defendant. 20 A. 25, *Frank v. New Orleans & Carrollton Railroad Co.* See OFFENSES AND QUASI OFFENSES, II. (e), 2).

3. The levee commissioners, whose appointment by the governor was ratified by the act of 1866, approved February 17th, have no power to intervene in a suit for the State. 20 A. 431, *Gastel v. McGenty*.

4. The practice of suing for the use of another, is based upon the ground, that whoever has the legal title, and can sue for himself, may sue for the benefit of whom he pleases in the same manner, that he might dispose of the funds after judgment, if he sued in his own name. 18 A. 484, *Moore & Browder v. Bres*; 19 L. 207. See (b), No. 1.

5. In such a case, the party bringing the suit, who afterwards discontinues, leaves no one before the court. *Ib.*

6. Where, from the petition, it appears that the suit, although brought for the use of another, is really brought for the benefit of plaintiff, and that the third person is only incidentally interested, the suit will be maintained. 19 A. 533, *Moore & Browder v. Bres*; 18 A. 483, *Same v. Same*. See Nos. 5, 8, PRESCRIPTION, IV. (c), 1), No. 21.

7. The agent may sue in his own name on a note. 19 A. 526, *Hunt v. Stone*; 2 L. 264. See 7), No. 6. PLEDGE, I. (b), No. 3.

8. Where plaintiff is neither transferee nor agent of the one to whom the claim belongs, the suit must be dismissed. 20 A. 426, *Lanata v. Macera*. See Nos. 5, 6, 7; (b), No. 1. PRESCRIPTION, IV. (c), 1), No. 21.

9. An action cannot be maintained by one person, for another, without proper authority. 28 A. 413, *Guilefont, for the use of Kentzel v. Parish of Ascension*. See No. 8.

10. Under act of March 18, 1858, no one but the attorney general can urge the forfeiture of a bank's charter. 18 A. 677, *Riggin & Co. v. Union Bank of Louisiana*. See CORPORATIONS, VII.

11. An action cannot be brought by one, as agent, without mentioning the name of his principal. 24 A. 18, *Willard, agent v. Lugenbuhl*.

12. Lessees, who have contracted with an agent, cannot deny his authority when sued. See ESTOPPEL, No. 31.

13. Proceedings *in rem* as in case of an unknown owner, are null, if the owner be present, and the privilege under which plaintiff proceeds is prescribed. 27 A. 122, *Cronan v. Cochran*. See NEW ORLEANS, II. (e), 4). JUDGMENT, XIV.

14. An action, which is, and should be brought by the State, should not be dismissed, because another party has joined in the petition. 28 A. N. R., *State v. Laresche*.

(d) *Death or change of parties.*

1. Where a suit has been brought by a bank, to recover the price of property sold, and during the pendency of the action, a third party is subrogated to the rights of the bank, such third party will be competent to stand in judgment as intervenor, although the deed of sale under which he claims was not accepted by him, until after the expiration of the bank's charter, provided the legality and sincerity of the transaction, is not otherwise questioned. 15 A. 271, *Union Bank v. Bowman*.

2. Whenever the plaintiff in action dies, after an answer has been filed, the suit must be revived by the appearance of the legal representatives, but this is not a new suit, and when the executor files an amended petition, merely for making himself a party to the proceedings, the defendant, although entitled to notice, cannot claim the legal delays allowed for answering the original petition. He has the right to file an answer to the amendment, but it must be done immediately, unless the amendment be of such a nature as to induce the court, upon his motion, to grant further time for answering the same. 15 A. 508, *Woodman v. Richardson*.

3. In a suit against an administrator, where it is shown that a final account has been filed, homologated, and the administrator discharged, the cause should be continued to make the heirs parties. 16 A. 321, *Jones v. Britton*. See (c), 6), Nos. 2, 10.

4. To make an heir party to a suit, the notice required by article 120, C. P., should be served on him. 18 A. 40, *Bradford v. Shelton*.

5. The trial on the merits, is a waiver of the proof of death and qualification of the administrator, when the litigant died during the pendency of the suit. Such proof should be required at the time of making the proper parties. 18 A. 549, *Bond v. Bishop*.

6. No judicial proceedings can be carried on in the name of a dead man, nor can the property he leaves be taken from his heirs and legal representatives without proceeding against them, as directed by law. An execution without such proceedings is a nullity. 22 A. 23, *Surgi v. Colmer*.

7. The vague and indefinite report of the death of one of the parties will not be sufficient to continue the case, to make parties. 25 A. 564, *Rogers & Woodale v. Gibbs*. See CONTINUANCE.

8. Where the term of office of the State officer who appeals from a mandamus against him has expired, the case cannot proceed without making his successor a party. 29 A. N. E. *State ex rel. Clay v. Johnson, auditor*.

9. See APPEAL, V. (c).

10. For judgment after the death of a partner, see ATTACHMENT, IX. (a), No. 8.

11. A supplemental petition to make a party, the husband of plaintiff, who married since the institution of the suit, must be served only on her husband. See (c), 1), B. No. 4.

12. The minor, when of age, may continue the suit without new citation. See (c), 2), No. 1.

13. When one of the commercial partners dies, the suit should be continued to make his legal representatives parties. See PLEADING, I. (c), 7), No. 3.

(e) Divisibility of actions.

1. In order to determine what amount is due by the owner to the contractor, it is necessary to make the contractor a party in a suit between the workmen and the owner. 26 A. 221, *Baker & Thompson v. Pagaud*. See BUILDERS AND BUILDINGS.

2. For closed account, see *ante*, I. (a), No. 2. Also, ACCOUNTS.

3. Community property must be partitioned in one suit. See PLEADING, II. (a), No. 7.

4. For divisible and indivisible obligations, see OBLIGATIONS, VIII. (f).

5. All parties claiming ownership in part or in whole, may be joined in the petitory action. See *infra*, II. (c), No. 6.

(f) Other matters.

1. Plaintiff, who had no interest in the suit at its institution, but afterwards acquires such, should be non-suited. See PETITORY AND POSSESSORY ACTIONS, II. (c), 3), No. 1.

II. OF CONSISTENT AND INCONSISTENT DEMANDS, AND PLEAS AND CUMULATION OF ACTION.

(a) In general.

1. It is not a cumulation of inconsistent demands, for a party seeking to recover his slave, to ask his value in the event of not being able to recover the slave himself. 15 A. 293, *Nouvel v. Bollinger*.

2. There is no objection to the cumulation of a demand in separation of property by the wife, with an action to enjoin the seizure of certain property claimed by her as her separate property, and seized under execution by the creditors of her husband. 15 A. 491, *Atkinson v. Atkinson*.

3. A party may cumulate separate actions in the same demand, when the one is not contrary to the other, nor precludes it, even though they arise from different contracts. 15 A. 621, *Médart v. Fasnacht*.

4. There is no law which prevents a party from claiming ownership to property under different titles. 16 A. 230, *Alderson v. Sparrow*.

5. There is no inconsistency to claim in the alternative the whole succession by effect of law, and reduction of such legacies as intrench upon the legitime, should the succession be testamentary. 16 A. 335, *Hollingshead v. Sturges*.

6. A tender of the thing demanded is inconsistent with an averment that the thing is not due. Nor can the tender be withdrawn so as to affect any acquired rights. 17 A. 104, 105, *Davis v. Millaudon*; 1 R. 546; 3 R. 48.

7. Plaintiff cannot bring a multiplicity of suits for the division of property belonging to the community. 18 A. 601, *Judice v. Provost*.

8. It is not a cumulation to claim in the petition the ownership, and aver the simulation of a sale. 22 A. 476, *Brown v. Brown*.

9. Plaintiff may sue to be recognized as heir, ask for an account of administration, and for property in the hands of the curator. 20 A. 577, *Louisa Miller v. Rougieux*.

10. Plaintiff, alleging several causes of action distinct and separate against several defendants, between whom there is no privity of contract, cannot sue them in the same action. 24 A. 614, *Surgi v. Mathews*.

11. Plaintiff may join in his suit all the demands which are not inconsistent the one with the other. 29 A. 507, *Tertrou v. Durand*.

12. The defense to a suit to erase a mortgage, being that the property did not belong to the mortgagor, but to a succession of which he is executor and universal legatee, and in case it should be found to belong to the mortgagor, that the mortgage is valid, are not contradictory pleas where the mortgagee was a special legatee under the will, and it was to secure the same that the mortgage was given. 25 A. 186, *Northern Bank of Kentucky v. Police Jury Pointe Coupée*.

13. A plea that the transfer made by plaintiff is null and void, is inconsistent with an allegation that plaintiff is not the owner. 25 A. 558, *Pipes v. Norsworthy*.

14. Allegations that the mortgaged property was sold, part cash and on terms to secure the unmatured notes, are inconsistent with a plea that the mortgage became extinct by the sale. 26 A. 173, *Chaffraix & Agar v. Packard*.

15. Interveners, who claim as commission merchants, agents and factors, cannot afterwards set up ownership in the cotton seized. 26 A. 185, *Delop & Co. v. Windsor & Randolph*.

16. In an action for libel, a plea of justification and general denial, are inconsistent. 28 A. 238, *Harrison v. Jurglewicz*.

17. In an action for libel, the general denial, followed by the words, "except in so far as they may be hereinafter admitted," and then by a plea in justification, is controlled by the special defense, and proof is admissible to substantiate the same. 29 A. 134, *Hawkins v. New Orleans Printing and Publishing Co.* See NEW TRIAL, III. (a), No. 2.

18. Writs of mandamus and injunction cannot be joined. 29 A. N. R., *Klein & Co. v. Herwig*.

19. A claim in the alternative, as partner or employee, is not inconsistent. 29 A. N. R., *Succession Byerly*.

20. A denial of the plaintiff's employment, and if so, an averment of his discharge, for cause, is not improper. See EVIDENCE, VII. No. 10.

21. The claim of the widow, as heir, and as creditor for the homestead, are not inconsistent. See HOMESTEAD, I. No. 18.

22. A judgment cannot be pleaded as *res judicata*, and its nullity averred at the same time. See JUDGMENT, XV. (e), No. 2.

23. Two judgments against the same defendant, and in favor of the same plaintiff, may be revived in the same petition. See JUDGMENT, XVI. No. 8.

24. A petitory and possessory action cannot be cumulated without consent. See PETITORY AND POSSESSORY ACTIONS, III. (a), No. 3.

(b) *Effect of inconsistent demands; their waiver and election; payment, prescription, and the general issue.*

1) In general.

1. A tender of the thing claimed, is inconsistent with a denial that it is due. The tender cannot be withdrawn so as to affect any right of the other party. 17 A. 97, *Davis v. Millaudon*.

2. Pleas of payment and want of consideration are not inconsistent. 20 A. 249, *Davis v. Lee*; 4 N. S. 492.

3. An act of sale cannot be treated as simulated, and at the same time as

interrupting prescription. 24 A. 242, *McLean, ex'r v. Keegan et al.* See PRESCRIPTION, II. (b), 2), No. 1.

4. The demands having been brought in the alternative, plaintiff could not be made to elect. 27 A. 98, *Smith v. Donnelly*.

5. If the allegations of the petition be inconsistent, the right of defendant is to require plaintiff to elect, or to object to the evidence at the proper time. 28 A. 312, *Kerwin et als. v. Hibernia Insurance Company*.

6. The admission of the marriage does not exclude an averment of its nullity. See ESTOPPEL, No. 9.

2) Payment, prescription, and the general issue.

1. Pleas of payment and prescription are inconsistent. 18 A. 651, *Elmore v. Robinson et al.*

2. The plea of payment admits the existence of the debt, if defendant does not make good his plea. 3 N. S. 273; 12 L. 397; 14 A. 54; 25 A. 182, *Landry v. Delas, Lorio & Co.*

3. Pleas of payment and discharge, by reason of extension granted to the principal, are inconsistent. 25 A. 182, *Landry v. Delas & Co.*

4. Without disavowing the authority of his attorney, defendant cannot, two years after pleading payment, withdraw the plea to deny the debt. 26 A. 630, *Gervin v. Beaird*.

5. Pleas of defective citation and prescription, are inconsistent; the former is waived. 27 A. 432, *Nicholson & Co. v. Jennings*. See CITATION, IV.

6. A plea of payment is not inconsistent with any other averment that the debt is extinguished. 29 A. N. R., *Voinché v. Voinché*.

(c) Demands, by or against, several parties.

1. The law abhors a multiplicity of actions against the same person, and does not favor the collection of a multiplicity of actions against different and distinct persons in the same suit. 15 A. 310, *Leverich v. Adams*.

2. A commercial firm cannot demand, in the same suit, the payment of two promissory notes, although they are dated at the same place, and on the same day, and both payable to the firm, under its firm name, where it is shown that such firm was composed of different persons when the indebtedness was created, which formed the consideration of one note, from those persons who composed the firm when the indebtedness was incurred, which formed the consideration of the other note. It would be a case of distinct creditors joining in the same action their separate and distinct demands against the debtor. 15 A. 502, *Dyas v. Dinkgrave*. See I. (b), No. 2; BILLS AND NOTES, XII. (a), Nos. 2, 3, 4; (e), 1), No. 6; MARRIAGE, XII. No. 3.

3. In an action to enforce the performance of a contract, all parties thereto should be made defendants. 16 A. 273, *Gillis v. Nelson*. See SERVITUDES, II. (b), 1), B. 1.

4. A suit may be brought and distinct judgments rendered against a defendant, as administratrix of her deceased husband, as widow in community and as tutrix of her minor children. 92 U. S. (Otto's), 116, *Kittredge v. Race et al.*

5. Suit may be brought against the surety alone, without joining the principal. 6 H. 279, *United States v. Hodge*.

6. Plaintiff may join in the same petitory action, all parties who pretend to own any portion of the tract sought to be recovered. 28 A. 644, *Derbès v. Duplessis Romero*.

7. Separate holders of the same series of mortgage notes, may be joined as plaintiffs to enforce payment. See MORTGAGE, III. (a), No. 5.

IV. OF THE DEMAND OF LESS THAN IS DUE.

1. A wife who claims from her husband a certain sum, cannot be permitted, in a second suit, to claim a considerable amount over her first demand, when the whole existed prior to the first suit. C. P. 156; 14 L. 140; 2 R. 207; 14 A. 316; 25 A. 223, *Stafford v. Stafford*.

V. OF THE PETITION; ANSWER AND EVIDENCE UNDER THE PLEADINGS.

(a) *Petition.*

1) In general.

1. An allegation that no formality of law has been observed in the seizure and sale of property, is so vague that it amounts to nothing. 26 A. 618, *Stevens v. Pinneo*.

2) Names, description and residence of parties.

1. In case of the omission of one of the names appearing in the style of the firm, the defendant is not bound to state in his exception the name of the partner not joined in the action. 15 A. 509, *Rugeley v. Gill*.

2. The capacity of plaintiff, who sues as a fiduciary, as well as his name, should be averred. 23 A. 136, *Succession of Amanda Hatcher*.

3. The failure of plaintiff to allege his residence does not vitiate the petition; such a defect may be amended instanter and without service of an amended petition. 28 A. 837, *Chaffe, Bro. & Son v. Thornton, etc.*

4. The want of defendant's full name must be pleaded in *limine litis*. See VI. (a), 2).

3) Certainty of demand, and cause of action.

A. In general.

1. Where a defendant desires to avail himself of admissions contained in the original petition, he should except to the amended petition filed for the purpose of explaining the admissions, instead of answering the same. When an answer is made to the amendment, and the case tried, both petitions are to be taken as a whole and construed together. 15 A. 510, *Turner v. Madden*. See IX. (c), 2).

2. Plaintiff, who alleges that his clerk lost his money by gambling, and prays for judgment against defendant for the amount won, shows no cause of action. 27 A. 117, *Steamboat Carrie Converse v. Feitig et als.*

3. The court will not examine a cause of action arising from the distribution of a fund to corrupt the members of a legislature. 27 A. 676, *Durbridge vs. Crescent City Live Stock and Slaughter House Company*.

4. It is sufficient for plaintiff to aver that she is separate in property from her husband, without alleging whether by judgment or contract. 28 A. N. R., *Mrs. Delacroix v. Mrs. E. E. Nash*.

5. An allegation that the formalities of law have not been observed, is too vague. See V. (a), 1), No. 1.

6. For proper allegation of title in a petitory action, see PETITORY AND POSSESSORY ACTIONS, I. No. 10.

7. And in injunction suits, see INJUNCTION, IV. No. 3.

B. Cause of action to be disclosed

1. Plaintiff in execution has no right to sue for the nullity of a sale made at his instance; whatever be the defects, he is bound in warranty. 15 A. 548, *McIlhenny v. Barbin*; 23 A. 18, *Tregre v. Baudry*.

2. The policy being annexed to the petition controls the allegations, and when the loss alleged is covered by the memorandum, the petition will be dismissed on an exception of no cause of action. 18 A. 101. *Goss v. Citizens' Insurance Company*.

3. An allegation that plaintiff is a creditor of the executrix will not suffice to maintain an action to remove her. 21 A. 561, *Carroll, Hoy & Co. v. Eliza Huie*.

4. Where the petition in damages for injuries received does not allege that the defendants were present aiding and abetting, or that they inflicted the injuries, there is no cause of action. 26 A. 743, *Spaulding v. Kreider*.

5. A party may allege the consideration of a promissory note as the cause of action rather than the note itself, and in such a case the note may be used

as evidence of the amount demanded, not as the foundation of the suit. 4 Wall. 572, *Newell v. Nixon*. See **BILLS AND NOTES, XII.**

6. Where the petition discloses that, the defendant received more votes, see **ELECTION BY THE PEOPLE, No. 6.**

C. Matters officially noticed by the court; or in anticipation of the defense.

See **EVIDENCE, II.**

D. Matters of evidence; those implied by the allegations; and surplusage.

1. Where the petition is insufficient to allow proof of the agency of defendant, upon whom citation was served, and defendant appealed from a judgment by default, confirmed against him, and assigned as error, apparent on the face of the record, the want of authority of his agent, the case will be remanded with leave to plaintiff, to amend and have a new citation issued on defendant. 16 A. 180, *Aldigé & Co. v. Knox & Pugh*. See **APPEAL, IX. (a).**

2. If a contract be proven, plaintiff cannot recover on a *quantum meruit*. 19 A. 13, *Willis v. Melville*; 12 L. 459. See **PLEADING, V. (d), 1.** **JUDGMENT, V. (a), 1), Nos. 10, 11.** **EVIDENCE, VII. No. 27.**

3. It is not necessary to allege that the evidence is in writing. 19 A. 438, *Brown v. Caves*.

E. Description of property and the title thereto; and items of account.

1. It is not necessary that the description of property demanded in a petitory or rescissory action should be given with such certainty, that the sheriff or any other person could find the same without aid. 15 A. 159, *Lea v. Terry*.

2. The title to property cannot be passed upon, if the pleadings do not ask for such judgment, the more so, if the owner is not before the court. 27 A. 365, *Succession Ricard*. See **I. (c), 4), No. 2.** **JUDGMENT, I. No. 11.** **SALE, VI. (c), No. 14.**

3. Where the transactions between plaintiff and defendant were few, and not such as required the keeping of regular books, an account furnishing the items, without giving specific dates, is sufficient to put defendant on his guard. 27 A. 634, *Davis v. Madden*.

4. Plaintiff who enjoins a seizure of his property, is not bound to give the nature of his title. See **INJUNCTION, IV. No. 3.**

5. The allegation that plaintiff's title is derived from his father, who was the owner and possessor at the time of his death, is sufficient. See **PETITORY AND POSSESSORY ACTIONS, I. No. 10.**

F. Error or fraud; and actions, rescission, or injunction.

1. Evidence of fraud, in an action on a policy of insurance, can only be admitted, when specially pleaded. 17 A. 185, *Flynn v. Merchants' Mutual Insurance Company*.

2. By failing to answer to a rule, to show cause why the interrogatories on facts and articles should not be taken for confessed, and judgment rendered accordingly, the objections to the mode of proceeding are waived, and cannot be urged after judgment. 18 A. 189, *Swift & Co. v. Armstrong*.

3. An averment in the petition, to the effect that a plea of prescription had been filed, after the case was argued and submitted to the court, of which notice had been given, is a sufficient cause of action to have a judgment annulled. 23 A. 305, *Mrs. Gayarré v. Millaudon et al.* See **VI. (c), 4), No. 16.**

4. Plaintiff who enjoins a seizure of his property, is not bound to give the nature of his title. 26 A. 707, *Lewis v. Winston, Morrison & Co.*

4) Annexing documents and swearing to petition.

1. When an obligation is made part of the petition, this is ample notice of the cause of action. 18 A. 273, *Johnson v. Gennison*.

2. The note being made part of the petition, the want of an allegation that it was indorsed, is cured. 18 A. 680, *Drumm v. Bradfute*. See **BILLS AND NOTES, XII.**

3. Although the petition is loosely constructed, the documents on which the suit is brought being made part thereof, supply the deficiency; the only consequence of a failure to file them at the time of filing the petition, is that the defendant may refuse to answer until he has oyer of them. 27 A. 225, *Police Jury v. Mahoudeau*; 2 L. 133.

4. The draft, even if annexed and made part of the petition, must be offered in evidence. See EVIDENCE, XIII. (c), No. 3.

5. Of the affidavit for an attachment, see ATTACHMENT, III. For an injunction, see INJUNCTION, IV. For a provisional seizure, see PROVISIONAL SEIZURE. For a sequestration, see SEQUESTRATION, II. (b).

5) Prayer and signature; and character of the action.

1. A mistake in the special prayer, ought not to prejudice a party's right to recover on the averments of his petition, when they are sufficient to sustain the proper action, and are followed by a prayer for general relief. 15 A. 426, *Espinola v. Blasco*.

2. The prayer of the petition determines the character of the action; therefore a prayer for a money judgment, on allegations which should maintain a suit *en declaration de simulation*, is not, however, the latter action. 20 A. 170, *Edward v. Ballard*; 15 A. 293, *Nouvel, syndic v. Bollinger et al.*

3. Interest not prayed for, will not be allowed. 20 A. 217, *McIntyre v. Hall*.

4. If the note, made part of the petition, bears eight per cent. interest, but plaintiff has asked only six per cent. interest, the court cannot be compelled to give more than prayed for. In such a case, if the amount claimed in the petition does not exceed five hundred dollars, the Supreme Court is without jurisdiction. 22 A. 53, *Citizens' Bank v. M. Condran*.

5. If the prayer of a petition contains some requests which the law will not grant, they will be rejected, and the proper demand maintained. 22 A. 471, *Ellison v. M. A. & W. M. Iler*.

6. Where the petition prayed for a judgment against all the defendants *in solido*, for the whole amount of the partnership debt, but the facts alleged by the pleadings and disclosed by the proofs, showed that the partnership was not a commercial but an ordinary one, within the law of Louisiana; *Held*: That a verdict against each defendant for his proportionate share of such debt, and the judgment rendered thereon, were not vitiated by such a departure from the issues. 91 U. S. (Otto's), 134, *Beauregard v. Case*. See JURY, IV.

7. When the prayer is, that plaintiff's title be recognized, and that he be put in possession, the action is a petitory one. See PETITORY AND POSSESSORY ACTIONS, II. (a), No. 3.

(b) Answer.

1) In general.

1. Where the seizure of land was enjoined, upon the ground that the plaintiff in injunction had acquired such land at the sheriff's sale, and the defendant raised the objection of want of registry of such sale in the recorder's office; *Held*: That where the evidence discloses no title in the seized debtor, the defendants having no interest in the matter, cannot urge this objection. 15 A. 547, *Maillon v. Lynch*.

2. The more regular proceeding, is to object to the evidence, instead of moving to strike out a portion of the answer. 20 A. 193, *Lallands v. Ball*, See EVIDENCE, XVIII. (d), 1), No. 4; *infra*, V. (c), 1), No. 4.

3. Where the exception, which is ordered to stand as an answer, denies no allegation of the petition, no proof is required to sustain the allegations of the petition. 20 A. 430, *Lea, ex'r v. Terry*; 64, *Stilley v. Stilley*; 14 A. 137; 4 N. S. 615, *Aiken v. Bedford*; 19 L. 90.

4. ON RE-HEARING: Where the exception of no cause of action is taken, as an answer, with leave of defendant to amend, and a denial is made of plaintiff's allegation, proof thereof should be offered. *Ib.*

5. The object of pleading is to put the other party on his guard. 23 A. 676, *Raburn v. Cage, adm'r.*

6. A defendant, who invokes plaintiff's and his own turpitude, as a defense, should make out his case clearly. 24 A. 238, *Babcock & Kernochan v. Watson*; 20 A. 1, *Weaver v. Anfour*. See No. 10.

7. A defendant has no interest in disputing the ownership of the judgment. The transfer deprives him of no defenses. 25 A. 558, *Pipes v. Norsworthy*.

8. One who has contracted with a minor, cannot set up the incapacity of the latter, when he seeks to enforce the contract. 28 A. 145, *Hand, tutor v. West*.

9. An affidavit by counsel, in the Supreme Court, that the clerk was not directed to file the answer which is in the record, will not prevent the court from treating the said answer as such. 29 A. 161, *Soulié v. Ranson*.

10. Defendant can plead his own turpitude to defeat plaintiff's action. See ESTOPPEL, No. 10.

11. The court may determine whether a peremptory exception be an answer and order it so to stand. See VI. (d), No. 8.

2) Prayer for oyer.

1. The surety on an appeal bond, when sued, cannot pray for oyer; the appeal bond is already filed in court. 25 A. 1, *Cincinnati Insurance Company v. Harrison*.

2. Plaintiff cannot call on defendant to produce the note alleged to have been paid. See SALE, IV. (a), No. 1.

3. Plaintiff cannot appeal from an order to produce his title on a day fixed, in default of which his suit is dismissed, and refusing to dismiss the suit on the motion of defendant afterwards made. 30 A. —, *State ex rel. Harnan v. Houston, judge*.

4) Waiver and admissions by answer.

1. A tender of something else than what is claimed, admits nothing. 17 A. 97, *Davis v. Millaudon*.

2. The allegations contained in the petition, and not denied by the answer, must be taken as true. 18 A. 161, *Barnett v. Cate & Co.*

3. If the injunction against the writ of seizure and sale be taken before another court than the one issuing the writ, and the defendant in injunction invokes its aid to realize the fund tendered, the objection to the jurisdiction is waived. 18 A. 340, *Dufossat v. Berens*; C. P. 129; 10 L. 228; 11 R. 418.

4. Memoranda on the back of the notes, are not admitted by a general denial, and prove nothing as against defendant, unless it be established that they were written by him, or with his knowledge and consent. 21 A. 335, *Boulin v. Rainey*; 12 A. 83, 661. See BILLS AND NOTES, XII.

5. A general denial, followed by a special denial of plaintiff's capacity to sue, and a further answer that the consideration of the note failed, because the goods furnished were rotten, etc., substantially admits the capacity of the corporation to sue. 22 A. 75, *Boston Belting Company v. Simonds*.

6. Defendant, who denies unsuccessfully his signature to the bond, will not be heard urging other defenses. 24 A. 362, *Commercial Bank v. Harrison et als.* See BILLS AND NOTES, XII. (e), 2).

7. Where a third person claims the property seized, and plaintiff in execution answers: "Now comes into court, M. S., made defendant herein, and for answer to the petition herein, requires strict proof of the facts and allegations therein, and prays that plaintiff's demand be rejected," the *proces verbal* of the sheriff will be sufficient proof of title. 29 A. 270, *Strauss v. Soye*. See EXECUTION, V. (d), 7), Nos. 4, 5.

8. If a contract which has been sued upon, be contrary to public policy or good morals, the defense of its illegality cannot be waived by a reconventional demand of the defendant. In such cases, there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself; and whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. A stipulation in the most solemn form, to waive the objection, would be tainted with the vice of the original contract, and void for the same reason. 7 Wall. 542, *Coppell v. Hall*. See OBLIGATIONS, III. (c).

5) Matters that must be specially pleaded; general issue; and evidence under it.

A. *In general.*

1. If defendants deny the partnership, plaintiff must prove the same. 18 A. 226, *Atwater & Co. v. Colton & Simonds*.

2. Whether the surviving partners have succeeded to the interest of the deceased in the firm, is not a question of capacity to sue, but a question of title or right to the debt, covered by the general denial. 16 A. 248, *Skipwith v. Lea*.

3. If the items of the account be not sufficiently explicit, an exception should be made thereto, else evidence will be received to prove the items. 27 A. 634, *Davis v. Madden*.

4. The tutorship being denied, should be proved. See I. (c), 2), No. 3.

5. For relevancy and variance of evidence, see EVIDENCE, VII.

B. *Plaintiff's proof under the general issue; and what he need not prove unless specially denied.*

1. A general denial admits the signature of the party sued on a promissory note, but leaves open every other legal defense. 16 A. 10, *Miller v. Whitfield*. See BILLS AND NOTES, XII. (e), 2).

2. Defendant who pleads the general issue without confessing or denying his signature, is considered as having confessed it, but he has left open, every other defense. 8 N. S. 300; 1 L. 488; 2 L. 420; 5 L. 33; 14 L. 361; 19 L. 86, 88; 8 A. 312; 16 A. 10, *Miller v. Whitfield*.

3. Under the general denial, plaintiff must show the date of the waiver of protest. 20 A. 538, *Wilkins v. Ferguson*.

4. Plaintiff must prove the authority of the agent who signed the promissory note. 23 A. 274, *Barrière v. Fortier*.

5. An admission, in the answer, that plaintiff received the note from the payee, entitles the transferee to judgment against the maker without proof of the indorsement. 24 A. 216, *Moore & Simonds v. Polk*. See BILLS AND NOTES, IV. (f); XII.

6. The widow and heirs, who bring suit to recover from a third party, succession property in his possession, need not show affirmatively that the administration is closed. 19 A. 428, *Ware et al. v. Jones, Sr.* See PETITORY AND POSSESSORY ACTIONS, III. (c).

7. The capacity of plaintiff, who sues in a fiduciary capacity, need not be proved, unless specially denied. 23 A. 137, *Succession Hatcher*. See VI. (a), 3).

8. A denial that the plaintiff ever "obtained any valid judgment against defendant," in another State, which forms the basis of a suit here, is not sufficient to compel plaintiff to offer the statutes of that State in evidence. 24 A. 222, *Graydon v. Justus*.

9. A general denial admits the capacity of plaintiff. 24 A. 404, *Peychaud v. Lane*.

10. The signature of the deed, not being denied, need not be proved. 27 A. 267, *Tesson v. Gusman*. (See 20 A. 193.)

11. In an action on a valued policy of insurance, the plaintiff is not put, on proof of his interest, in the object insured, by a plea of the general issue. 27 A. 410, *Roos & Co. v. Merchants' Mutual Insurance Company*; 12 A. 35; 10 A. 809. See INSURANCE, I. (b).

12. Under the general denial, plaintiff is bound to prove the agency, and the extent of the power given to defendants, sued in a representative capacity. 29 A. 363, *Dawson v. Landreaux*.

13. Where the answer denies generally, that the formalities of law have been fulfilled in adjudicating a contract for the construction of a banquette, the contractor is not required to prove that the formalities were fulfilled. 30 A. 251, *Connell v. Hill*.

c. *Defendant's proof under the general issue; and what he cannot prove unless specially alleged.*

1. Under the general issue, defendant can prove that his lessor gave him

permission to remove from the premises, before the expiration of his lease. 18 A. 124, *Friedlander v. Cushing*.

2. Under the general issue, in a suit for coal, taken by defendant, the latter may show that he had the permission of the owner. 18 A. 304, *O'Dowd v. Boyle*.

3. Under a general denial, to an action for the value of lumber taken from plaintiff, defendant cannot prove that he purchased the property from the ostensible owner. 18 A. 661, *Sherman v. City of New Orleans*; 3 A. 326. See No. 6.

4. Under the general issue, the indorser cannot prove that the post office to which the notice was sent was not the nearest one to his residence. 19 A. 46, *Citizens' Bank v. Pugh*. See BILLS AND NOTES, XII.

5. Under a general denial, the insurance company cannot prove that the building was represented to be of brick, when it was of wood. 19 A. 233, *Pino v. Merchants' Mutual Insurance Company*; 9 A. 590; 10 A. 811; 12 A. 38; 17 A. 135, *Flinn v. Merchants' Mutual Insurance Company*. See INSURANCE, I. (d).

6. Under a general denial, defendant cannot prove his ownership. 20 A. 306, *Draper v. Richards*. See No. 3.

7. Under the general issue, defendant cannot prove that he was induced to sign the waiver by the declaration of plaintiff that he would procure similar waivers from the other parties to the bill, or failing in that, cause the bill to be regularly protested. 21 A. 377, *Marsh v. Waterman*.

8. Under a general denial, the insurer cannot prove that the insured stored lime in his premises and thereby forfeited his policy. 28 A. 917, *Theodore v. New Orleans Mutual Insurance Association*. See BILLS AND NOTES, VII. (d), 2); XII.

9. Under the general issue, the sureties of the recorder cannot show that the deputy recorder who caused the damages, was appointed without their consent. See REGISTRY, II. (e), 1), No. 6.

(c) *Admissibility of evidence under the pleadings.*

1) In general.

1. The plaintiff cannot be permitted to establish by proof, a cause of action not alleged in the petition, without the consent, express or implied, of the defendant. 15 A. 618, *Broxton v. Bloom*. See EVIDENCE, VII.

2. A fact not alleged, cannot be proved. 24 A. 159, *Levyson & Co. v. Ward*.

3. Where defendant denies that he employed plaintiff by the year, but if he *did*, pleads that he had good cause to discharge plaintiff, by reason of incompetency, evidence should be received to prove the incompetency. 16 A. 189, *Webre v. Gaillard*.

4. To avoid the examination of issues improperly raised by the answer, the more regular practice is to object to the introduction of the testimony. 21 A. 271, *Schneider & Zuberbier v. Letchford & Co*. See V. (b), 1), No. 2.

5. Defendant may offer proof of payment, without having specified the different amounts paid, and every circumstance of time and place. 23 A. 238, *Holmes v. Deplaigne*.

6. The evidence is admissible, if the other party could not have been surprised by it. 23 A. 676, *Raburn v. Cage, administrator*.

2) Evidence to repel new matters, pleaded, or proved by the adverse party.

1. Where a decision was had on the first rule, and no new cause arises after the first, a second rule for the same purpose cannot be entertained. 18 A. 399, *Harlan v. White & Trufant*. See, for *res judicata*, VI. (c), 2).

2. By pleading a general denial, defendants put at issue their liability to pay the note, and although not declared upon, plaintiff can offer the contract by which defendants assumed to pay the note. 27 A. 128, *Cottam v. Smith & Co*. See V. (b), 5), B. No. 1.

4) Matters of inducement, or aggravation; subordinate facts substantially within the allegations; and evidence of the extinction, or diminution of the obligation.

1. Evidence is not admissible, on the part of the defendant, to show a payment, on the furniture, to a third party, at the instance of plaintiff, under the plea of *dation en paiement*, nor is evidence admissible to prove that the owner is indebted to third parties for the furniture, where the title is not put at issue by the answer. 22 A. 55, *J. Douglas v. E. Raab*. See SALE, IX.

5) Error, fraud or simulation; and actions of nullity, rescission or injunction.

See OBLIGATIONS, VII. (b), 2), A; B; C; III. (b), 3).

(d) *Relevancy of evidence.*

1) In general.

1. In a suit brought on a special contract, evidence may be received to prove the value of the work or labor performed under the contract; but the plaintiff is not entitled to a judgment for more than the stipulated price, as his claim is based on the contract, and not on a *quantum meruit*. 15 A. 69, *Lacroix v. Tournillon*.

2. Plaintiff, who performed the services and fails to prove a contract for compensation, should be allowed to sue on a *quantum meruit*. 28 A. 595, *Provost v. Carlin*. See PLEADING, V. (a), 3), D. No. 2. JUDGMENT, V. (a), 1), Nos. 10, 11.

3. Although the grounds of an exception be vaguely and indefinitely set forth, yet where they are sufficiently certain to apprise the plaintiff of the nature of the legal bar intended to be pleaded against the demand, evidence is admissible to sustain them. 15 A. 501, *Holmes v. Dabbs*.

2) Fraud and simulation; actions of nullity and evidence of character.

1. Under a single allegation of simulation, no evidence to show that the mortgage was real but fraudulent, to give undue preference to some creditors, can be admitted. 24 A. 35, *Brewer v. Gay et al.* See OBLIGATIONS, VII. (b), 2), c. § 2. EVIDENCE, VII.

(e) *Variance.*

1. Plaintiffs who sue on a contract, cannot recover on a *quantum meruit* and *vice versa*. 14 A. 793, *Gribble v. McKelroy*; 848, *Brown v. Snow*; 7 N. S. 300; 4 L. 117; 9 L. 176; 11 L. 255; 14 L. 339; 9 A. 163, *Beard v. Evans*; 25 A. 281, *Mazureau & Hennen v. Morgan*; 1 A. 176; 11 Wheaton, 258; 19 A. 13; 15 A. 69; 24 A. 349; 28 A. 595; 20 A. 65. See EVIDENCE, VII.

VI. OF EXCEPTIONS.

(a) *Dilatory exceptions.*

1) In general.

1. Where the suit is brought on a *quantum meruit*, sufficient details should be given, to put defendant on his guard, and when he excepts he should not be forced to answer, until the bill of particulars called for, be furnished. 20 A. 65, *Hyland v. Rice*. See V. (e), No. 1.

2. Want of amicable demand, must be pleaded before issue joined. 19 A. 208, *Marrienneaux v. Downes*.

3. Want of amicable demand cannot avail defendant even as to costs, when he does not offer to comply. 20 A. 547, *Nelligan & Von Zinken v. Musback*. See COSTS, III. (a), No. 3.

4. The exception that the petition is only in English, must be pleaded in *limine litis*. 21 A. 651, *Leon v. Bouillet*.

5. Where a portion of the petition, which is not material, is written in the French language, no exception can be maintained thereto. 21 A. 653, *Generes v. Simon*.

6. An exception that all joint debtors have not been made parties, must be made in *limine litis*. 22 A. 291, *Moore v. Gray*. See act of 1871. p. 19.

2) Misnomer; non-joinder, and residence of parties.

1. The want of defendant's full name and residence, must be pleaded in *limine litis*. 21 A. 665, *Taylor v. Littell*. See V. (a), 2).

3) Authority, or capacity of parties; prematurity of the action; and generality of the averments.

1. The exception to the capacity of the executor, curator, etc., should be pleaded in *limine litis*, and it is considered waived by the general and special defenses to the merits. 19 L. 429; C. P. 333; 11 A. 688, 689; 18 A. 206, 207; 3 A. 150; 6 A. 533; 23 A. 137, *Succession Hatcher*; 207, *Silliman v. Miller, Norwood, third opponent*; 224, *Wells, curator v. Wells, executor*.

2. The question of the identity of the party suing, in a representative capacity, must be pleaded specially, in *limine litis*. 22 A. 16, *Beyris v. Spor*.

3. The general denial admits the capacity in which defendant is sued. 19 A. 434, *Hays v. Compton*.

4. A general denial admits the representative capacity of plaintiff. 21 A. 188, *Silvernagle v. Fluker*.

5. If defendant does not except to plaintiff's capacity to sue as under-tutor, in the lower court, he cannot raise the issue in the appellate court. 20 A. 174, *Cordill v. McCullough*.

6. The defendants having joined issue, waived the plea of prematurity, which should have been filed in *limine*, in an action to enforce a contract, the term of which has not yet arrived. 17 A. 232 *Pecquet v. Pecquet*; 4 R. 392; C. C. (2044); 7 M. 284; 1 L. 420. See OBLIGATIONS, VIII. (c).

7. After issue joined, defendant cannot set up the prematurity of the action. 18 A. 187, *Wiltz v. St. Romes*; 1 L. 420.

8. If the event fixed for the payment of the note has not arrived, defendant must except in *limine litis*, otherwise it will be too late. 20 A. 236, *Mortee v. Edwards*.

9. A judgment can only be rendered upon an obligation which has matured, and cannot order a note to be paid at maturity. 24 A. 50, *Christen v. Ruhlman*.

10. The ordinance requiring all certificates of indebtedness to be presented to a committee to be approved by them before issuing a warrant, renders an action brought on them before complying with this formality, premature, but this should be pleaded in *limine litis*. 18 A. 158, *Peniston v. City of Jefferson*.

11. The plea of prematurity should be maintained where there is not sufficient cause for the sequestration. 23 A. 577, *Cattlet v. Heffner et al.* See SEQUESTRATION, II. (a), No. 6.

12. An exception that the action *en declaration de simulation* is premature, because the defendant has taken a devolutive appeal from the judgment obtained against him by plaintiff, for his debt, cannot be maintained. 22 A. 248, *Duncan v. Brandon*.

13. How an exception of prematurity may be overcome. See IX. (c), 2), No. 4.

(b) *Declinatory exceptions*.

1) In general.

1. It is too late, after a judgment by default, to except to the jurisdiction of the court, on the ground of commorancy. 15 A. 184, *TeGarden v. Powell*.

2. An answer waives the exception of jurisdiction *ratione personarum*. 29 A. 194, *Marquez & Co. v. Leblanc*. See 2).

2) Plea to the jurisdiction.

1. The court of the parish wherein is situated the property mortgaged, has jurisdiction to render executory the mortgage, although the defendant does not reside in the parish. 22 A. 428, *Allen v. Tarlton*.

2. Where the defendant alleged that plaintiff was domiciled in another parish, although plaintiff, by his averment and testimony, may be estopped

from setting up another domicile than the one alleged, defendant has the right to prove the domicile. 26 A. 387, *Stephenson v. Broadwell*.

3. The exception to the jurisdiction comes too late after issue joined. 26 A. 587, *Wilson v. Benjamin*; 15 A. 184; 29 A. 194.

4. If an exception to the jurisdiction of the court be pleaded *in limine*, a reconventional demand afterwards filed on condition that the exception to the jurisdiction be overruled, does not waive the plea. 14 H. 368, *Peale v. Phillips*.

5. How an exception to the jurisdiction may be waived. See V. (b), 4), No. 3.

3) Plea of *lis pendens*.

1. During the pendency of an appeal, plaintiff may bring a contrary suit, provided he puts his waiver, for which there is no sacramental form, on record. 7 N. S. 403, *Fosworth, ex. v. Buchalter*; 3 A. 365, *Dubosse v. Hall*; 7 A. 568; 5 L. 440; 14 L. 277.

2. The exception of *lis pendens* must be pleaded *in limine litis*. 15 A. 479, *White v. Gleason*.

3. *Lis pendens* does not occur when the holder of the note institutes a suit which is still pending on an exception as to the first indorser, and a suit brought against the said first by the second indorser, who has paid the said note. 16 A. 205, *Hacker v. Lanaus & Co.*; C. P. 335; 2 A. 839.

4. There is no *lis pendens* in a suit for rent and one for possession. 21 A. 266, *Morgan v. Tamiet*.

5. The exception of *lis pendens* will not be sustained where the suit, instituted before the United States provisional court, could not be transferred to the United States Circuit Court, being between citizens of this State. 21 A. 277, *Noland v. Sterling*.

6. The plea of *lis pendens* will not be maintained against an action under the intrusion act, which is brought by the State itself, where the suit set up is one under the form of a mandamus, on the relation of the claimant to the office. 21 A. 482, *State v. Kreider*.

7. Because the garnishee is sued by defendant for the same cause of action, this does not prevent plaintiff from proceeding under garnishment process. 26 A. 531, *Smith v. Durbridge*.

8. A suit by the lessees to annul their lease, will be held as *lis pendens*, to a subsequent action brought by the lessors to recover their rent. 26 A. 581, *Rochereau v. Lewis*.

9. A third opposition, presenting the same points as a pending rule, coupled with an injunction, should be dismissed on the plea of *lis pendens*. 27 A. 82, *Woolridge v. Monteuse*.

10. The exception that a suit in equity was pending, in which the plaintiff asked for a decree for the same money, was no ground for abatement of his action at law, as the result of the action may be necessary for the perfecting of a decree in that suit. 92 U. S. (Otto's), 116, *Kittredge v. Race et al.*

(c) *Peremptory exceptions*.

1) In general.

1. Defendant excepted to the suit for alimony, on the day of trial, for the reason that a reconciliation had taken place; the exception was correctly tried separately, and before taking up the merits. 18 A. 643, *Holbrook v. Holbrook*.

2. Payment may be pleaded at any time before judgment. 19 A. 207, *Reiners v. St. Ceran*.

3. A peremptory exception can be pleaded after default. 21 A. 501, *Tarleton et al. v. Kennedy et al.*

4. No amount of evidence can have any influence in deciding an exception of no cause of action. 21 A. 642, *Bouligny v. Gary*.

2) *Res judicata*.

1. The plea of *res judicata* must be pleaded; it is not sufficient to object to evidence on that ground. 28 A. 946, *Mitchel v. Levi*.

2. Rule XXII. of the district courts, for the parish of Orleans, provides that upon the trial of a rule *nisi*, for an injunction, the defendant is permitted to file affidavits to contradict the petition. This rule is not applicable to an exception of *res judicata* to the petition filed in answer to the rule; in such a case, the record forming the basis of the plea, is admissible. 28 A. 893, *Verneuil v. Harper, sheriff*.

3. A rule *nisi* is unknown to the laws of Louisiana. 29 A. 796, *Beebe v. Guinault*. See INJUNCTION, I. No. 9.

4. The authorization of the wife having been maintained on the motion to dismiss, the appeal, the question is settled, when considering the merits. 26 A. 542, *Deblancv. Levasseur*.

4. A decision on a rule will bar a second rule for the same purpose. See PLEADING, V. (c), 2), No. 1.

5. See JUDGMENT, XV. EVIDENCE, XXII. (g).

6. The judgment on a third opposition, when *res judicata*. See PLEADING, VIII. (e), No. 9.

3) No cause of action disclosed.

See *infra*, (d), No. 4.

4) Prescription.

1. Prescription may be pleaded to plaintiff's demand, at any time, although the answer may disclose a state of facts different from the allegations of the petition. 21 A. 492, *Burch v. Willis*; 12 A. 358; 13 A. 609.

2. Prescription must be specially pleaded. 21 A. 395, *Mansfield's Assignee v. Doherty*.

3. If prescription be not pleaded, the court cannot supply the plea, C. C. 3463, 3464; 23 A. 473, *Daniel & Edwards v. Harrison*.

4. This exception must be specially pleaded, else the Supreme Court cannot examine the points, if raised in the brief. 23 A. 55, *Yorke & Co. v. Scott & Co.*; 191, *Capmartin v. Police Jury Natchitoches*. See BRIEF.

5. The exception of prescription will be maintained, when pleaded for the first time in the Supreme Court, when the same is apparent on the face of the record, and defendant in exception does not ask that the case be remanded to prove an interruption. 21 A. 120, *Long v. Succession Scott*; 134, *Louisiana State Bank v. Cammack*.

6. Where prescription is pleaded for the first time before the Supreme Court, and the indorsements on the note show partial credits, which are not otherwise proven, the case will be remanded to allow plaintiff to show the interruption. 21 A. 191, *Roddy v. Robertson*; 238, *Roth v. Hebert*.

7. When the plea is filed in the Supreme Court, as the request of the plaintiff, the case will be remanded for the purpose of having it judicially ascertained, whether there has been an interruption or renunciation of prescription. 23 A. 210, *New Orleans Canal Banking Company v. Martin*.

8. The case will be remanded to give an opportunity to plaintiff, who asks for the same, to offer evidence to show an interruption, where prescription was pleaded in the Supreme Court. 25 A. 213, *Taylor v. Woodward*.

9. Appellee has a right to ask that the case be remanded to show an interruption of the prescription pleaded in the Supreme Court. 27 A. 304, *Hoffman v. Howell & Riley*.

10. The defendant is not estopped from pleading prescription in the Supreme Court, because, in the judgment confirming the default, there is a clause staying execution for one year. This clause could not have been inserted by the defendant who did not appear. 23 A. 210, *New Orleans Canal Banking Company v. Martin*.

11. Plaintiff must show, affirmatively, the interruption of prescription. 26 A. 245, *Alter v. McDougal*.

12. The burden of proof is on the party who pleads prescription. See EVIDENCE, VIII. No. 1.

13. Prescription may be pleaded on appeal from executory process. See EXECUTORY PROCESS, II. (a), Nos. 8, 9.

14. Prescription cannot be pleaded on such appeals. See *Ib.*, Nos. 10, 11, 12.
15. The plea cannot be enlarged. See PRESCRIPTION, III. (a), No. 2.
16. Prescription cannot be pleaded in the Supreme Court, after submission of the case. 30 A. 152, *O'Hara v. City of New Orleans*. See V. (a), 3), P. No. 3.
17. Prescription pleaded in general terms, cannot be considered. 30 A. 246, *Gaines v. Succession Del Campo*.

(d) *Exceptions in general.*

1. Where a party consents to go to trial on the merits, without insisting on the previous action of the court on his exceptions, he is presumed to have waived the same. 15 A. 188, *Powell v. Graves*.
2. An exception to plaintiff's interest to maintain the suit, inserted in the answer, is waived by going to trial without requiring a decision thereon. 18 A. 468, *Curé v. Porté*; 14 L. 288; 4 L. 482; 12 R. 194.
3. The exception is waived by going to trial on the merits without requiring a decision thereon. 23 A. 254, *Lewis, Nauron & Co. v. Rex & Tracy*; 18 A. 207; 1 N. S. 130; 4 L. 482; 14 L. 288.
4. Defendant does not waive the exception of no cause of action, by going to trial on the merits. 21 A. 151, *Fletcher v. Dunbar*.
5. The exceptions are abandoned, when the case is submitted on the merits, even if defendant is absent. The judge is not required, previous to submission, to dispose of the exceptions. 26 A. 312, *Francis v. Lavine*.
6. Defendant, who answers without excepting to the proceeding by rule, waives such exception. 18 A. 65, *Qurtier & Co. v. Succession Hille*.
7. The exception having been overruled, the same grounds of objection cannot be urged in a motion to suspend further proceedings. 19 A. 166, *Miller v. Dupuy*.
8. The court may determine whether a peremptory exception, so-called, be really an answer to the merits, and order it so to stand. 20 A. 428, *Lea. executor v. Terry*; 11 M. 640; 5 A. 41; 15 A. 160, 200; 6 R. 421.
9. Evidence is not admissible to prove facts pleaded in an exception filed after an answer. 21 A. 731, *Case, receiver v. Watson & Dunham*.
10. Admissions made in an exception, which is afterward taken as an answer, entitles plaintiff to a judgment, on motion. 22 A. 185, *Frank v. Hardee*; 4 R. 144; 5 R. 447; 4 A. 407; 11 A. 746; 20 A. 137.
11. An exception, that plaintiff cannot recover, because disloyal to the United States, is not worthy of consideration. 22 A. 211, *W. W. King v. Mrs. M. Cressap and Her Husband*.
12. An exception, averring that all the matters set up in the petition existed, and were known to plaintiffs before judgment, and are insufficient to maintain an injunction, treated as an exception in the lower court, is nevertheless an answer, and on appeal, the judgment dissolving the injunction, where there is no note of evidence, will be affirmed. 25 A. 339, *Cheval v. Destez*.
13. Where the exception was referred to the merits, and the case decided thereon by the lower court, the Supreme Court may maintain the exception if well taken. 26 A. 321, *Brady v. Parish of Ascension*.
14. Where the exception seems to have been treated as an answer, and evidence is introduced on the merits, the court, in reversing the judgment dismissing the suit, will decide the merits. 26 A. 620, *Bowen v. Callaway*.
15. An exception being referred to the merits, the case is at issue; and upon the trial, plaintiff has a right to prove his case, in the absence of defendant, who refused to participate. 29 A. 398, *Mayeur v. Bloomfield & Co.*
16. The sureties, who demand a division, should specially plead this exception. See OBLIGATIONS, VIII. (e), No. 4.

VIII. OF INCIDENTAL DEMANDS.

(a) *Compensation.*

1. Defendant has a right to set up his accounts, as compensation, so as to reduce his indebtedness to plaintiff, transferee of defendant's creditor, in an

action involving a settlement of mutual accounts. 16 A. 348, *Gordon v. Millaudon*. See *infra*, (b), No. 3.

2. A corporation cannot prevent the transfer of stock sold at sheriff's sale, by pleading compensation based on the judgment debtor's indebtedness to the corporation. 22 A. 99, *Bryon v. Kendall Carter*.

3. This plea admits the debt sued upon. 23 A. 142, *Normand v. Fielding Edwards*.

4. See COMPENSATION.

(b) *Reconvention*.

1) In general.

1. Where the defendant in a suit set up a reconventional demand, the plaintiff is not permitted to discontinue his suit, when defendant opposes it. If the plaintiff has discontinued the suit, without opposition on the part of defendant, the latter has the right to prosecute against him his claim in reconvention, notwithstanding the discontinuance. 15 A. 70, *Barrow v. Robicheaux*. See DISCONTINUANCE.

2. When plaintiff resides out of the parish, defendant may institute a demand in reconvention for any cause whether incidental or not to the main action. 16 A. 250, *Spinney v. Hyde & McKie*; 27 A. 642, *Spears v. Spears*.

3. Plaintiff being the purchaser of a balance of account due by defendant, cannot be held liable on a reconvention for any amount due by his vendor. 16 A. 348, *Gordon v. Millaudon*. See *ante*, VIII. (a), 1).

4. Evidence received without objection, by way of reconvention, will be considered, as if the formal plea had been made. 17 A. 37, *Kean v. Brandon*; 4 A. 193; 5 A. 184; 9 A. 255. See EVIDENCE, V. (c).

5. When a reconventional demand grows out of the plaintiff's cause of action, a verdict in favor of one party is necessarily a verdict against the other. 19 A. 98, *Delee v. Hatcher*; 4 L. 40; 6 A. 222. See No. 15.

6. Damages claimed by reconvention need not be liquidated. 20 A. 193, *Lallande v. Ball*.

7. Receipts bearing date prior to the settlement of the parties by note, cannot be pleaded as a demand in compensation and reconvention to the note. 21 A. 459, *Levi & Co. v. Carter*.

8. An answer in writing is not necessary to raise an issue on a reconventional demand. 23 A. 385, *Hobson v. Woolfolk*.

9. Plaintiff is bound, without service, to take notice of a reconventional demand, and is presumed to be in court. 26 A. 541, *Huppenbauer v. Durlin*; 23 A. 385, *Hobson v. Woolfolk*.

10. Defendant has no right to pray for a jury when the principal action cannot be submitted to them. 26 A. 669, *Pool v. Alexander*.

11. A defendant cannot plead in reconvention against the United States. 7 H. 833, *United States v. King*; but see COMPENSATION, III. Nos. 7.

12. When plaintiff's suit is dismissed, as in case of non-suit for want of appearance on his part, defendant cannot afterwards insist on the trial of his reconventional demand. 28 A. 815, *Warfield v. Hamlet, sheriff*.

13. For costs, see COSTS. III. (a), No. 1; IV. No. 1.

14. For discontinuance, in case a reconvention is filed, see DISCONTINUANCE, No. 1.

15. Where the judgment is simply for defendant, the reconvention is virtually dismissed. See No. 5. JUDGMENT, III. No. 8.

16. If the breach of the contract be passive, a default is a prerequisite to a claim for damages by direct action or by reconventional demand. See OBLIGATIONS, VII. (a). 2), A. No. 3.

2) Right to plead in reconvention.

1. A demand for a certain sum of money, as commission on an account collected by plaintiff for defendant, gives the latter the right to reconvene for the sum of money in plaintiff's hands, on which he charges his commission. 15 A. 409, *Hyson v. Wheeler*.

2. A draft acquired by defendant, after the transfer of the debt of plaintiff, and notice thereof to defendant, cannot be pleaded in reconvention against the transferee. 22 A. 173, *Falls, Howell & Co. v. Thorne & Powell*. See SALE, VIII. (a), No. 1.

3. The lessee sued for rent, cannot reconvene for damages done to his furniture by want of repairs to the house. 22 A. 292, *Pesant v. Heartt*; 23 A. 59, *Diggs v. Maury*. See LEASE, I. (c), 1), No. 15.

4. No reconvention can be made for damages caused by the sequestration, when the parties reside in the same parish. 24 A. 208, *Muzum v. Gore*.

5. In a suit for the value of stolen property, defendant cannot reconvene for damages arising from a criminal prosecution which preceded the civil action. 26 A. 38, *Murphy & Co. v. McCarty & Co.*

6. A reconventional demand, based on a wrongful act committed at another time than that alleged in the petition, is not admissible. 28 A. 238, *Harrison v. Jurgielewicz*; 574, *Moses v. Munn & Co.*

7. Plaintiff being the purchaser of a balance of account, cannot be held liable for a debt due by his transferee to the defendant. See SALE, VIII. (a), No. 2.

(c) Warranty.

1) In general.

7. Where a party is cited in warranty, and he neglects to call in his warrantor; in a separate action, he can only recover from his warrantor, the costs of the former suit, up to the date of the citation. 16 A. 45, *Back v. Miller*.

2. One, sued on his note, cannot, on the plea that a third person was to save him harmless, call the latter in warranty. There is no privity between plaintiff and such third person. 18 A. 555, *Butler v. Stewart*; 8 L. 37.

3. The warrantor becomes the real defendant in the case; he has a right to make any defense to defeat plaintiff's claim. 18 A. 693, *Woolfolk v. Ship Graham's Polly, etc.* See No. 8; 2), Nos. 2, 3.

4. The warrantor should not be condemned to pay more than the price received by him, no damages being proven. 19 A. 12, *Sullivan v. Goldman*.

5. A party called in warranty, where none really exists, cannot intervene in the suit under his answer to the call. To intervene, he must do so by petition which must be served on the adverse parties. 20 A. 567, *Barker v. Bank of Louisiana*.

6. Defendant cannot answer, and pray for a citation on a third party, with the intention of calling him in warranty, such pleading cannot be permitted. 21 A. 35, *Marchand v. Bell*.

7. The warranty by the vendor, only extends to eviction, and not to an assault and battery, in ejecting plaintiff. 21 A. 404, *Jones v. Worley*.

8. The surety on an appeal bond, when sued, has no right to call in warranty, one who agreed in a separate act, to warrant him against all liability. No privity exists between plaintiff and the warrantor. 28 A. 297, *Chs. de Greck v. Murphy & Gaines*. See No. 3; 2), Nos. 2, 3.

9. No personal judgment, in the absence of a citation, or its equivalent, can be rendered so as to be obligatory against an absentee. The only good purpose which can be attained by calling an absent person in warranty, through a *curator ad hoc*, is the giving of notice, as far as practicable, to the warrantor, of the pendency of the action. But it does not justify the rendition of a final judgment. 15 A. 451, *Pagett v. Curtis*.

10. Right of the ship owners to recover from their employees, certain damages. See MANDATE, V. (a), Nos. 2, 3.

11. Heirs, who have not accepted the succession, are not bound in warranty. See PETITORY AND POSSESSORY ACTIONS, I. No. 1.

2) Right to call in warranty.

1. The acceptor of a conditional bill, who calls in the drawer as warrantor, and the latter appears in said capacity, and files a reconventional demand, after denying his liability on the bill, is entitled to prove his case, and should not be thrown out of court for not appearing as intervenor. 16 A. 51, *Gilman v. Pilsbury*.

2. There must be a privity of contract between plaintiff and the party called in warranty. 8 L. 37; C. P. 378 and 379; 8 R. 27; 8 A. 136; 123, *Frost v. Harrison*; 18 A. 555, *Butler v. Stewart*. See (c), 1), Nos. 3, 8.

3. Where the defendant pleads that the consideration was money loaned to a third party, he is not entitled to have that third party called in warranty. 19 A. 67, *Hackett v. Schiele*. See No. 2.

4. Defendant, sued for trespass, cannot call in warranty the person who gave him permission to cut the trees. 8 N. S. 549; 2 A. 219; 25 A. 230, *Coco v. Hardie*.

5. The holder of a promissory note, when suing the drawer who pleads want of consideration, cannot call in warranty, by a supplemental petition, the indorser, his transferrer. 23 A. 554, *Burbridge & Co. v. Andrus*; C. P. 379.

(d) Intervention.

1) In general.

1. A judgment cannot be rendered on a petition of intervention, which has been filed without leave of the court, and has not been served or put at issue. 15 A. 206, *Bradley v. Trousdale*.

1. An intervenor must always be ready to exhibit his evidence; he cannot be permitted to retard the principal suit. 15 A. 108, *Gaines v. Page*.

3. An intervention filed the day preceding the day fixed for the trial, will be too late. In 16 L. 264 and 3 A. 331, where time was given to the intervenor to cite the original parties, the cause was not on trial. 19 A. 118, *Smith v. Strickland*.

4. Although an intervention cannot retard the principal suit, time must be allowed to cite the party against whom it is directed, and the same delays given to answer as in ordinary suits. 20 A. 258, *Perkins v. Perkins*; 16 L. 268; 3 A. 331; C. P. 391.

5. An intervention may be filed before or after issue joined. 22 A. 79, *Taylor and Husband v. Boedicker & Badenhausen*.

6. An intervention filed on the day of trial, should be served on the opposite parties, and for this purpose, the cause should be continued to put the intervention at issue. 25 A. 564, *Sandel v. Douglas, sheriff*.

7. The intervention may stand, although the motion to bond, by the intervenors, be dismissed. 17 A. 79, *Letchford v. Jacobs*.

8. An intervenor must be in actual or constructive possession of the property, as owner, at the time it was attached, in order to be able to bond it. 17 A. 81, *Letchford v. Jacobs et als*; 14 A. 52. See ATTACHMENT, IX. (b), Nos. 4, 6, 7, 8. SURETYSHIP, I. (a), No. 2.

9. An intervenor, who avers that the sheriff has seized, by virtue of a *feri facias*, etc., admits the judgment and execution. 19 A. 256, *Asher v. Fredenstein*.

10. An intervenor cannot substitute himself in the place of defendant. 19 A. 462, *Clapp & Co v. Phelps & Co.*; 14 A. 427.

11. An intervenor has no right to bond property sequestered. 19 A. 463, *Clapp & Co. v. Phelps & Co.*; but see acts of 1876, No. 51. See ATTACHMENT, IX. (b). SEQUESTRATION, II. (d), 1), Nos. 2, 3. SURETYSHIP, I. (a), No. 2.

12. An intervenor must set out his demand as clearly and explicitly as a plaintiff. 19 A. 462, *Clapp & Co. v. Phelps & Co.*

13. An intervenor cannot contest the right of plaintiff to bring the suit or stand in judgment. 20 A. 174, *Cordill v. McCullough*.

14. In the absence of fraud and injury, the intervenor, whether he claims the property or a mortgage thereon, will not be permitted to urge defenses which are personal to the defendant, such as irregularities in the attachment. 21 A. 118, *Fleming v. Shields*; 8 M. 55; 8 R. 123; 13 A. 222.

15. An intervenor cannot except to plaintiff's form of action. 21 A. 643, *Heirs Bedell v. Hayes*.

16. Intervenor must establish a sufficient interest, before he can plead prescription as against plaintiff's demand. 21 A. 669, *Walker v. Simon, Jr.*

17. Where two of four heirs have intervened, and have been recognized as entitled to a portion of the price of adjudication, which has been absorbed, a subsequent intervention, made by the two remaining heirs, must be dismissed. 22 A. 226, *Moore v. Moore*; 20 A. 159.

18. The intervention falls, whenever the judgment does not pass thereon at the same time as on the main question. 22 A. 385, *Aleix v. Derbigny*.

19. The intervention falls with the dismissal of the principal suit, for want of appearance on the part of plaintiff. 24 A. 258, *Walmsley, Carver & Co. v. Whittlefield et als.*

20. Intervenor cannot urge the insufficiency of the affidavit for a sequestration, or other irregularities in the suit. 27 A. 239, *Carroll & Co. v. Bridewell*; 21 A. 118.

21. Where property was deposited by the intervenors in a bank, subject to the judgment to be rendered, and the suit was dismissed, and the defendants went into bankruptcy; *Held*: That the funds should be returned to intervenors, and not to the assignee of the bankrupt. 28 A. 1, *E. J. Gay & Co. v. Eaton & Barstow; Behm et als., intervenors*. See SEQUESTRATION, II. (d), 1), No. 3.

22. Intervenor who seek to recover no judgment, cannot complain of the judgment between plaintiff and defendant. 28 A. 241, *Weil v. Weil*.

23. A creditor of the deceased cannot intervene in a suit in partition between the heirs to claim his debt. See PARTITION, III. (a), No. 10.

24. How release bonds given by intervenors are considered. See ATTACHMENT, IX. (b), Nos. 6, 7, 8. PLEADING, VIII. (e), Nos. 19, 20, 21, 22.

25. As to privileges on the property attached, claimed by intervenors after bonding, see ATTACHMENT, IX. (a), No. 9.

26. When for less than five hundred dollars, the district court is without jurisdiction as regards the intervention, see COURTS, II. (g), 1), No. 13.

27. No default can be confirmed as to defendant, when the intervention has been filed and the delay of citation not expired. See JUDGMENT, IX. No. 7.

28. In a proceeding against the board of liquidators, holders of a series of bonds distinct from the ones forming the basis of the proceeding, should not intervene; this creates confusion. 30 A. 449, *Hamlin v. Board of Liquidators*.

2) Right to intervene, and when an intervention may be ordered.

1. The bond given by an intervenor claiming property attached, is a substitute for the property with regard to plaintiff in attachment, but not to third persons disclaiming the property attached, after its release. 16 A. 25, *White v. Hawkins*. See No. 3; VIII. (e), Nos. 19, 20, 21.

2. The State has the right to intervene in a proceeding by mandamus to compel the auditor to warrant on the treasurer, to join the auditor in his defense. 23 A. 403, *State ex rel. Salomon & Simpson v. Graham, auditor*; 22 A. 366, *State ex rel. Burbank v. Dubuclet, State treasurer*. See MANDAMUS, II. No. 16.

3. After release on bond, no intervention can be allowed to claim the property seized. The intervenor should pursue the cotton in the hands of the litigant in whose possession it is. 23 A. 751, *Burbank v. Taylor, Wright, intervenor*. See No. 1.

4. The purchaser at a tax sale, previous to the constitution of 1868, having enjoined the sheriff from proceeding on a mortgage with the clause *de non alienando* resting on his property previous to his purchase, without making the mortgagee a party, the latter has the right to intervene and set up the nullity of the tax sale and assert his rights of mortgage. 25 A. 504, *Dupré v. Thompson, sheriff*.

5. WYLY, J., *dissenting*: The tax sale must be presumed correct, and the intervenor should proceed by a direct action to have its nullity declared. *Ib.* See TAXES, III. (d), 3), Nos. 13, 14.

6. It is the duty of an administrator to interpose any defense which the law places in his hands; he may intervene in a suit by the mortgage creditor against the widow and minors, as soon as he is qualified, and plead prescription. 25 A. 512, *Banker v. Durand, Jr.*

7. Although the part or interest of an individual owner be seized and sold, the furnisher of supplies has no right to intervene and claim his privilege, because it is only the interest of the owner that passes; the privilege remains on the ship. 22 A. 164, *Sibley, Guion & Co. v. Fernie Bros. & Co.* See MORTGAGE, VIII. (b).

8. The plaintiff, being ostensibly the owner under his purchase at sheriff's sale, of the property rented to defendants, is entitled to its revenues. If the intervenor is the real owner, and as such, entitled to both the property and its revenues, he must seek his remedy in a different action. He cannot intervene in a suit where plaintiff claims rent. 26 A. 141, *Hunter v. Dunham, Richardson, intervenor.* See EXECUTION, V. (d), 12).

9. An intervention by a bondholder of the same series, is permissible in a proceeding to have that class of bonds declared valid, under the funding act. 1874, p. 39, and act of 1875, p. 110. 30 A. 34, *Lord Cecil et als. v. Board of Liquidation.* See MANDAMUS, II. No. 16.

10. The parish may intervene in a proceeding by mandamus against its treasurer to compel the registry of the sheriff's bill of costs in criminal cases, and may appeal from the judgment therein rendered. 30 A. 516, *State ex rel. Barrow v. Fisher, treasurer.*

11. The mortgagee may intervene in a suit between the heirs and their tutrix, to have all proceedings, whereby the property was adjudicated to her, annulled, and may pray that their mortgage be declared valid, and the mortgaged property sold thereunder. 26 A. 596, *Webb v. Keller.*

(e) *Opposition of third persons.*

1. When legally exercised, the court cannot prevent the filing of a third opposition. 15 A. 663, *Bowman v. McElroy.*

2. In a third opposition to a seizure of property, based upon the alleged ownership of such property, the issue to be tried between the third opponent and the party provoking the seizure, is the fact of ownership. 15 A. 136, *Harper v. Commercial and Railroad Bank of Vicksburg.*

3. The third opponent stands in the attitude of plaintiff, and is bound to administer proof of his pretensions, in order to sustain his opposition. He cannot enquire into the validity of the proceedings between the plaintiff and defendant in the original suit. 15 A. 136, *Harper v. Commercial and Railroad Bank of Vicksburg.*

4. If the agent, who gave the mortgage, was without authority, the principal alone can urge this defense; not a third opponent. 24 A. 598, *Theurer v. Knorr*; 6 N. S. 676; 21 A. 118, 52, 500.

5. The mortgagee became purchaser, at the sheriff's sale, of the property mortgaged, and on the refusal of the sheriff to pass a deed of sale, because third oppositions had been filed, and it was necessary for the purchaser to pay the price, took a rule to compel the sheriff to pass the deed; the Supreme Court remanded the rule to be tried with the oppositions. 22 A. 573, *Buron v. Cage, sheriff.*

6. To answer to the third opposition of the wife claiming priority on the proceeds, the creditor cannot attack the judgment obtained by her against her husband; he must do so in a direct action. The rule *quæ temporalia*, etc., does not apply to such a case. 23 A. 547, *Frère v. Mentz.*

7. WYLY, J., *dissenting*: The husband's creditors should have the right to attack the wife's judgment whenever it is set up against them. *Ib.* See ACTIONS, No. 3.

8. A judgment awarding a privilege on a steamboat, by virtue of an attachment, although entirely binding between the parties to it, may, nevertheless, be questioned by another creditor who was not a party to the judgment, by way of a third opposition. 15 A. 433, *Converse v. Steamer Lucy Robinson.*

9. In an opposition by a third party, to regulate the effect of a seizure in what relates to himself, he is bound to assert all his pretensions at the same time, and the judgment of the court in such proceeding, determining the rights of the creditors growing out of the seizure, cannot afterwards be dis-

turbed on a new claim set up by such third opponent. 15 A. 663, *Bowman v. McElroy*. See VI. (c), 2).

10. A third opposition, without an injunction, in order to have the effect of annulling the sale, must be filed prior to the sale of the property seized. 16 A. 111, *Coleman v. Brown*.

11. One cannot demand the nullity of the sale, and at the same time seek to be paid out of its proceeds. 16 A. 288, *Ouliber v. His Creditors*; 24 A. 289, *Blessey et als. v. Kearney*; 598,* 22 A. 136; 21 A. 263, 500; 3 A. 455; 2 A. 684; 23 A. 246; 27 A. 560, *Walker & Vaught v. Kimbrough, administrator*.

12. A third opponent cannot claim the proceeds of the sale, and aver the simulation of the mortgage under which the property is sold. 29 A. 274, *Bou-bède v. Aymes*; 3 A. 454; 22 A. 135; 23 A. 245. See Nos. 29, 30.

13. DEBLANC, J., *dissenting*: If the act be a simulation, the proceeds should be paid to a real creditor. *Ib.*

14. Defendant need not be made a party to a third opposition claiming a privilege over the proceeds. 18 A. 511, *Wagner v. Neuman*.

15. The owner may claim the proceeds of his property seized and sold for the debt of another, by way of third opposition. 19 A. 163, *Bach v. Verbois*.

16. A debtor cannot recover the proceeds of the sale of his property, on the ground that the judgment was based on a slave consideration, after the proceeds have been applied to the satisfaction of the writ. 23 A. 524, *Wailes v. Citizens' Bank*.

17. A proper occasion is presented, when mortgages are sought to be enforced, to settle preferences and distribute proceeds. 21 A. 151, *Fletcher v. Dunbar*.

18. A third opposition claiming a preference on the proceeds of sale, need not be sworn to. 23 A. 657, *Rains v. Chaffe & Brother*.

19. The property being bonded, the bond was left to respond to plaintiff's rights, and opponent can have no privilege on the bond or its proceeds; his opposition perished by the bonding. 25 A. 353, *Case & Dowling v. Rouark*.

20. ON RE-HEARING: The property was bonded after the filing of the opposition. The bond remained in lieu of the property to respond for whatever judgment might be rendered in the case. *Ib.* See VIII. (d), 2), Nos. 1, 3. ATTACHMENT, IX. (a), No. 9.

21. One claiming a superior privilege to the seizing creditor, must assert the privilege before the seized property is released on bond. 27 A. 239, *Carroll & Co. v. Bridewell*. See Nos. 19, 21. MORGAN, J., *dissenting*: The bond represents the property.

22. A third opposition, whereby the proceeds of sale are claimed, should be made before the court which issued execution. 26 A. 598, *Berard v. Young*; See Nos. 19, 20.

23. A third opposition is not the proper proceeding to prevent the sheriff from selling, unless the property bring a certain price. 26 A. 260, *Hickman v. Thompson*.

24. The third opposition having been maintained, in part, the costs follow. 26 A. 382, *McCarthy v. Baze*. See COURTS, II. (e), No. 14.

25. A defendant cannot allow his property to be sold under a judicial process and claim the proceeds on the ground that he did not owe the debt. 26 A. 729, *Weedon v. A. Landreaux*.

26. In the wife's succession, the community property was sold, to pay debts, by the administrator; the purchaser at probate sale subsequently sold the same property to the husband, and the purchase price not being paid, he foreclosed his mortgage; one of the community, mortgaged creditor, claimed by way of third opposition the proceeds of the sale by preference over the vendor; *Held*: That the proceeding was proper, and that he was entitled to the proceeds because the probate sale in the wife's succession did not transfer the mortgages to the proceeds. 26 A. 690, *Harper v. Linman*.

27. A third opposition cannot be made after the sale has been consummated and the funds distributed. 27 A. 160, *Payne, Dameron & Co. v. Eaton & Barstow*. C. P. 396.

28. The delay in serving a third opposition, filed before the sale, does not defeat third opponent's rights. 27 A. 316, *Schmidt & Ziegler v. Williston*.

29. Third opponents claiming the proceeds, cannot urge the nullity of the judgment, under which the seizure was executed. 21 A. 262, *Peychaux v. Citizens' Bank*. See Nos. 11, 12.

30. A purchaser of property, under an order of seizure, who claims the fruits of the sale, is precluded from questioning the validity of the decree ordering the sale. 21 A. 495, *Howe v. Whited & Gibbs*. See Nos. 11, 12.

31. By claiming the proceeds of the execution, its legality is thereby admitted. 28 A. 711, *Chanut v. Levasseur & Co.*

32. It is sufficient, in a third opposition, to state the nature of the claim, and the privilege sought to be enforced. 29 A. 143, *Good v. Nelson et als.*

33. Third opponent, who alleges that plaintiff's claim is fictitious, and made to defraud him, shows a cause of action. 28 A. 596, *Buckner v. Gordy, sheriff*.

34. Third opposition, when for less than five hundred dollars, see COURTS, II. (g), 1), No. 13.

35. The widow may, by third opposition, claim her homestead in preference to the seizing mortgage creditor. See HOMESTEAD, I. No. 22.

IX. OF AMENDMENTS.

(a) *In general.*

1. Where a supplemental and amended answer has been filed by order of court, the judge who permitted its filing cannot, *ex proprio motu*, rule it out, as not filed in time. 15 A. 694, *Heiss v. Corcoran*.

2. The lower courts may allow any amendment on the pleadings, conducive to justice. 29 A. N. R., *Voinché v. Voinché*; 1 A. 256.

3. The supplemental petition must be put at issue. See JUDGMENT, IX. No. 9.

4. The administrator may, on trial of the oppositions to his account, amend as to an error of fact to his prejudice. See SUCCESSION, VIII. (f), 4), Nos. 5, 9.

5. When the opposition to an account may be amended, see *Ib.*, Nos. 8, 9.

(b) *At what time allowable.*

1. Pleadings cannot be amended after the case has been called for trial. 22 A. 351, *Case, receiver v. Watson*; 534, *Spyker v. Hart*.

2. The peremptory exception of no cause of action may be pleaded at any time, and, if well founded, plaintiff may be permitted to amend, although the jury was impaneled when the exception was filed. 27 A. 715, *McCubbin v. Hastings*.

3. The failure of plaintiff to state his residence, may be amended instantan, and without service of an amended petition. See V. (a), 2), No. 3.

(c) *Admissibility as affecting the issue, demand, or previous allegations.*

1) *In general.*

1. Amendments should always be allowed to subserve justice, and if the other party is taken by surprise, he should ask for a continuance. 27 A. 316, *Bussey & Co. v. Rothschild*.

2. An intervenor may amend his pleadings, if he do not retard the trial. 29 A. 698, *Gillis v. Carter*.

2) *Amendments affecting the demand.*

1. A suit being brought on the same note in two States, the judgment first rendered, may be declared upon by supplemental petition, so as to maintain the attachment. 18 A. 634, *Jones v. Murphy & Lewis*.

2. A promise to pay, subsequent to the maturity of the obligation, may be set up by an amended petition. 21 A. 130, *Ledoux v. Buhler*.

3. An amendment should be allowed, provided it does not alter the substance of the demand. 22 A. 351, *Case, receiver v. Watson*; C. P. 419, 420; 20 A. 53; 4 N. S. 516; 8 N. S. 407; 2 A. 453.

4. The action being instituted prematurely, the exception was properly sustained *with leave to amend*, it appearing that the obligation was now long past due. 4 A. 184; 17 L. 212; 23 A. 612, *Warfield v. Oliver*.

5. An amended petition claiming the enforcement of the price, with vendor's privilege, is not a change in the character of the suit in rescission for non-payment of the price. 28 A. 845, *Pickett v. Haynes*. See SALE, VI. (c).

6. A supplemental petition should not always be allowed, in an injunction suit. See INJUNCTION, VII. No. 15.

7. An amended petition pleading prescription may be filed after the injunction. *Ib.*, No. 17.

8. The defendant should except, instead of answering an amended petition filed to explain an admission. See V. (a) 3), A. No. 1.

3) Amendments affecting the defense.

1. An amended answer may be filed on the day the cause is tried, and many months after the filing of the original answer; allegations introducing a new issue may be stricken out by the judge in the exercise of a proper discretion. 21 A. 111, *Williams v. Gay*.

2. In a suit on a promissory note, a general denial cannot be amended by afterwards pleading want of consideration. 28 A. 109, *Avegno v. Fosdick*; 2 L. 207; 11 L. 74; C. P. 419.

3. The succeeding administrator is not bound by the pleadings of his predecessor where there is error of fact. The court may allow an amendment contradicting the previous admission. 30 A. 687, *Lusk v. Succession Benton*.

(d) Admissibility to change parties or allege subsequent matters.

1. A supplemental petition by the individual partners, averring that the firm was dissolved before the institution of the suit, and praying that they be allowed to become parties, should be allowed. 20 A. 251, *Estlin v. Ryder*.

2. An amended petition substituting a new party plaintiff on allegations of ownership, in direct conflict with the original petition, after filing of a reconventional demand, will not be allowed. 21 A. 303, *Duncan v. Helm*.

3. The suit being brought in the name of a partnership, it was competent for one of the members to acquire the sole right of action and to aver the fact in a supplemental petition. 29 A. 160, *Payne v. Furlow*.

PLEDGE.

I. OF PAWN.

(a) Requisites of the contract.

- 1) In general.
- 2) Act evidencing the contract; its requisites and registry.

3) Delivery and transfer of claims.

(b) Rights and obligations of the parties.

II. OF ANTICHRESIS.

I. OF PAWN.

(a) Requisites of the contract.

1) In general.

1. The pledgee of promissory notes can sue thereon. Acts 1866, p. 266; 8 N. S. 370, *King v. Gayoso*; 21 A. 5, *Succession Dolhonds*; 7 A. 225. See (b), No. 3.

2. An unexecuted promise to deliver a certain collateral, as security, gives no privilege or pledge to the creditor. 26 A. 35, *Succession D'Meza*.

3. A chattel mortgage is unknown to our law and cannot be enforced here. 26 A. 185, *Delop & Co. v. Windsor & Randolph*.

4. Where goods are pledged, the court will give them the highest value which the testimony reasonably sustains, the pledgee having the option to return them upon payment of his debt or of keeping them at the value placed thereon by the court. 20 A. 570, *Johnson v. Robbins*.

5. When a national bank agreed to deposit with a certain commercial firm, in pledge, a portion of its assets, to secure a loan to be made to itself, and the loan was received by the bank, it was held that there was no legal obstacle if the depositing of the assets according to the contract, arising from the fact that the president of the bank was a member of the firm with which the deposit was to be made. 2 Woods, 77, *Casey v. La Société du Crédit Mobilier*.

6. One with power to sell, may pledge. See MANDATE, V. (b), 3), No. 4.

7. The factor cannot for his own debts pledge the planter's cotton. *Id.*, No. 5.

2) Act evidencing the contract; its requisites and registry.

See C. C. 3165, relative to planters and crop, 1874, p. 114.

3) Delivery and transfer of claims.

1. In order to create a pledge, it is necessary, not only that delivery should accompany the private deed, but also that the instrument should exhibit the nature and extent of the reciprocal rights and obligations of the contracting parties. 15 A. 165, *Martin v. His Creditors*.

2. The certificates of stock must be delivered to the pledgee. 19 A. 368, *Lallande v. Ingram*.

3. To pledge a claim, the evidence of the obligation must be transferred, and delivered to the pledgee. 19 A. 364, *Lallande v. Ingram*; 17 L. 428.

4. The legislature of Louisiana has left it in doubt, whether indorsement as well as delivery is essential to the pledge of a negotiable instrument. 2 Woods, 77, *Casey, receiver v. La Société du Crédit Mobilier*.

5. Stock may be pledged without transfer on the company's books. 30 A. 714, *Blouin v. Liquidators Hart & Hebert*.

6. Planters and crops, 1874, p. 114; warehouse and press receipts, 1876, p. 113.

(b) Rights and obligations of the parties.

1. Under special instructions, the pledgee may sell, at private sale, pledged stocks. 27 A. 472, *Louisiana Savings Bank v. Cyrus Bussey*. See acts of 1872.

2. Also, even if the pledge had been made before amendment of article 3165, Civil Code if the consent of the pledger had been obtained after the amendment of said article. 29 A. 258, *Carr v. Louisiana National Bank*.

3. The pledgee may sue on the pledged note, and if the proceeds of sale be more than sufficient to satisfy his claim, the surplus must be paid over to the pledger. 28 A. 419, *Ducasse v. McKenna*; 21 A. 3, *Succession Dolhonde*. See PLEDGING, I. (c), 7), No. 6; 9), No. 7; ante, I. No. 1.

4. Where an accommodation note for a greater sum than due was pledged to a bank, and at maturity of the debt, the drawers of the pledged note and the pledger offered to pay to the bank the amount due, the bank has no right to refuse such payment, and if it retains the note and protests the same, damages will be recovered by the drawers. 27 A. 110, *Teutonia National Bank v. Loeb & Co*.

5. A pledgee, who is a creditor for less than the amount of the note pledged, cannot maintain an action for the surplus of his indebtedness, where the maker has a good defense against the real owner for the balance of said note. 18 A. 27, *Lacroix v. Derbigny*.

6. Where, to secure a mortgage note, a similar note having longer time to run, is given in pledge, the holder has a right to seize, under both notes, the mortgaged property and sell the same, and if the proceeds are more than sufficient to satisfy his claim, the surplus must be paid over to the party entitled to the second note. 28 A. 419, *Ducasse v. Keyser and McKenna*.

7. The pledgee of a note, who acts with the knowledge and approval of the owner, but is stayed in his proceedings against the drawer, by superior authority, and when the drawer never had property sufficient to pay the note, is not responsible to the owner for the difference between his debt and the amount of the pledged notes. 28 A. 946, *Mitchell v. Levy*.

8. Notes belonging to others than the pledger, and wrongfully pledged, should contribute ratably to the payment of the debt for which they were pledged. 29 A. N. R., *Citizens' Bank v. Ducros*. See BILLS AND NOTES, IV. (e), 1).

9. Neither the bank, nor its receiver, could recover possession of negotiable securities, pledged by the bank for advances to it, on the ground that the pledge was ineffectual, for want of indorsement of the securities, while at the same time holding on to the assets, to secure repayment of which the pledge was given. 2 Woods, 77, *Casey v. La Société du Crédit Mobilier*.

10. The pledger of mortgage notes has no right, after the pledge, to grant a priority of mortgage, over the pledged notes. 29 A. 549, *Mechanics' Building Association v. Ferguson*; C. C. (2645); 3 R. 389; 21 A. 529.

11. The pledgee, with special authority, may sell the pledge. See MANDATE, V. (b), 3), Nq. 3.

12. The pledgees, who again pledge the notes for a larger amount than their interest in it, are liable to the pledger for the difference between the amount of the note and the one due to them. See OBLIGATION, VII. (a), 2). B. No. 10.

13. Where a bill of lading is gratuitously given as collateral security for a pre-existing obligation, the vendor may stop the goods *in transitu*. See SALE, III. (b), 3), No. 6.

14. The assignee of a bankrupt has no right to claim property pledged by the bankrupt, without paying the debt. The pledgee is not bound to prove his claim against the bankrupt. 95 U. S. (Otto's), 764, *Yeatman v. Savings Institution*.

15. The pledgee of a promissory note, who sued in his individual name, as owner, is not thereby bound to credit the whole amount of the note on his debt, but only such amount as he realized. 30 A. 714, *Blouin v. Liquidators Hart & Hebert*.

16. The creditor may, by agreement, dispose of the pledge. Acts 1872. p. 36.

II. OF ANTICHRESIS.

1. A counter letter stipulating that the property sold, could not be disposed of by the purchaser without the consent of the vendor, and so soon as the debt, in security whereof the sale was made, should be paid, the property should revert to the former owner, showed that such a contract was an antichresis, and no agreement having been made to the contrary, the fruits of the property belonged to the vendor, and should be applied to the payment of the debt. 23 A. 658, *Calderwood v. Calderwood*.

2. Succession rights cannot be pledged, because they cannot be delivered. 24 A. 85, *Warner v. Burke*.

3. A contract, by which a party sells real estate to another, accompanied with a transfer of possession, but with the stipulation that if the vendor pays the vendee a certain sum of money, within a given time, the premises are to be reconveyed to him, or in default of such payment, that the premises shall be sold, and the stipulated sum paid to the original vendee, out of the proceeds of the sale, the remainder going to the original owner, must be classed as an antichresis under the laws of Louisiana, and not as a *vente à réméré*. 11 P. 351, *Livingston v. Story*. See SALE, VI. (a).

4. In the contract of antichresis, the creditor does not become proprietor of the pledged immovables, by failure of payment at the stated time, any cause to the contrary is null; nor can the parties by a subsequent agreement, stipulate that the pledge shall vest in the creditor, by the mere failure of the debtor to pay. 11 P. 351, *Livingston v. Story*.

5. The agent who incurs expenses in raising a crop, has a pledge thereon. See PRIVILEGE, III. (i), No. 4.

POINTE COUPEE.

To issue bonds, 1870, p. 23; 1875, p. 85; Poydras fund, 1876, p. 112.

POLICE OFFICERS.

1. Are not agents of railroads. See OFFENSES AND QUASI OFFENSES, II. (e), 2), No. 3.
2. See METROPOLITAN POLICE.

POLICE JURY.

1. B. contracted with the police jury of the parish of Avoyelles, for the establishment of a public road from a certain point in the parish to his landing on the Red River, for the purpose of carrying on the receiving and forwarding business; *Held*: That the private interest of B. was a sufficient consideration for the agreement on his part, and the incidental public advantage to the parish, authorized the action of the police jury in the establishment of the road as a public highway. 15 A. 559, *Barbin v. Police Jury*. See ROADS AND LEVEES.

2. The police jury of St. Tammany are prohibited by the charter of the town of Mandeville, from imposing taxes on said corporation. 19 A. 99, *Marigny v. Carradine*.

3. A warrant drawn and signed by the president and clerk of the police jury, is not binding on the parish unless authorized by an ordinance. 19 A. 448, *Capmartin v. Police Jury*. See Nos. 6, 12.

4. The police jury of Caddo had a right to establish a ferry across the river, outside of the corporate limits of Shreveport. 21 A. 586, *O'Neil v. Police Jury of Caddo*.

5. A contract made under the authority of the police jury, to construct a private road in the parish, across a tract of land belonging to an absentee, stipulating that the land should pay the costs of construction, cannot be enforced against the parish, for the difference between the price the land brought and the cost of making the road. 22 A. 87, *Young v. Parish of Iberville*.

6. Police juries have no right to issue bonds, or other instruments creating obligations, without special authority from the general assembly. 23 A. 232, *Breaux v. Parish of Iberville*; 250, *Marionneaux et als. v. Parish of Iberville*. See BONDS; *infra*, No. 12.

7. Article 124 of the constitution, requires taxation in the State to be equal and *ad valorem*. A tax, levying one dollar on every four hundred pounds of cotton, is not equal upon the property taxed, and therefore null. 22 A. 440, *Sims v. Parish of Jackson*. See TAXES, II. (b), 2), A. B.

8. An ordinance creating a debt, should provide the means for paying the principal and interest, otherwise it is null and void. Acts, 1853, 234; 23 A. 191, *O. Copmartin v. Police Jury, parish of Natchitoches*. See CORPORATIONS, II. (b), Nos. 9, 10.

9. The holder of lawful obligations of the parish, is entitled to the remedy provided by act No. 69 of 1869, or sections 2628 to 2630 of the Revised Statutes, 1870, which are not contrary to the constitution. 23 A. 329, *Benjamin v. Parish of East Baton Rouge*.

10. The police jury have a right to contract with experienced attorneys, in addition to the regularly paid attorney, to aid in defending heavy suits, without, at the same time, providing the means of paying them. 24 A. 145, *Talbot v. Parish of Iberville*. But see No. 28.

11. Police juries have the right to make a contract with the parish attorney for extra compensation, in particular cases. 24 A. 146, *Rills v. Parish of Iberville*.

12. Warrants or obligations issued by the police jury, through their president, without the authority of any special act of the legislature, nor providing, by ordinance passed at the time it authorized their issuance, for their payment, are null and void. 24 A. 457, *Edwards v. Bossier*; 1853, p. 234; 23 A. 190, 232, 251; 26 A. 59, *Sterling v. Parish of West Feliciana*. See Nos. 3, 6.

13. Police jurors hold their office and discharge their duties until their successors are duly qualified. R. S., § 2608; 25 A. 139, *Gorham v. Montgomery*. See OFFICE AND OFFICER.

14. A clerk of court may be a police juror. The prohibition of the consti-

tution only applies to the constitutional officers. A constitutional officer may also hold a municipal office. *Ib.* 15 A. 598, *Voorhies v. Fournet*; 5 A. 155, *Dorsey v. Vaughn*; 6 A. 516, *State v. Blanchard*.

15. A police juror is not a legislator. 25 A. 140, *Gorham v. Montgomery*.

16. Police juries have the right to regulate the police of shops where liquors are retailed, and to impose such tax as they may see proper on grog shops. R. S. 2745, § 6; 25 A. 587, *Jones v. Grady*. See TAXES, II. (b), 2), A.

17. Their power is exclusive to make such laws and regulations for the sale or prohibiting of intoxicating liquors. R. S. 2778, 2780. *Ib.*

17. Section 2778, of the Revised Statutes, does not mean that before a license is issued by the police jury, to keep open a grog shop, a vote of the citizens of the ward should be taken. *Ib.*

19. Even if the warrants were issued by the police jury to defray the expenses of the parish, being renewed from time to time by the issue of new warrants, when no funds were in the treasury, they became a debt, to pay which no taxes have been levied, and, as such, null. 26 A. 59, *Sterling v. Parish West Feliciana*.

20. Police juries have no power to confiscate and sell cattle running at large, and to discriminate between a resident and non-resident tax-payer. Such ordinance is null and void. 16 A. 204, *Halloway v. Police Jury*.

21. Police juries have power to levy a license tax. 26 A. 141, *Parish of East Feliciana v. Gurth*; 151, *Howell v. McVea*.

22. Police juries cannot, without cause, deprive an individual of his right to pursue his occupation of keeper of a wood yard. 26 A. 281, *Morgan & Co. v. Police Jury Rapides*.

23. If the work adjudicated by the inspector of roads and levees, was not authorized by the police jury, no recovery can be had against them. 26 A. 151, *Branch v. Police Jury*.

24. If the police jury had no authority to issue the warrants, they could not bind the parish by confessing judgment; an ordinance to that effect will not bar an appeal. 28 A. 343, *Benham v. Parish of Carroll*. See APPEAL, I. (c).

25. Where the warrants appear to have been issued, not in payment of claims due by the parish, but really for the purpose of raising money, and were made negotiable, no law authorizing the issuance thereof, and the police jury has not provided a tax for their payment at the time of their issuance; no recovery can be had thereon as against the parish. 28 A. 77, *Mathé v. Parish of Plaquemines*; 26 A. 59, *Sterling v. West Feliciana*.

26. Where the judgment has been provided for, in the estimate of taxes to be levied, the remedy of plaintiff is found in section 2450, R. S., whereby the judge, on motion of plaintiff's attorney, may order the tax collector to proceed forthwith, to collect the taxes, and the same shall be appropriated to the payment of the judgment. If the police jury has not provided an estimate for the payment of the judgment, under section 2628, R. S., or the estimate cannot be collected, the judge may order the board of assessors to levy a special tax to meet the payment of the judgment. 28 A. 538, *Christian Kline v. Parish of Ascension*.

27. The police jury have no right to bind the parish by borrowing money, and issuing negotiable notes. 28 A. 263, *Citizens' Bank v. Parish of Concordia*.

28. The employment of attorneys by the police jury, is the creation of a debt, and unless the police jury provide the means of paying the same, no judgment can be recovered for the services rendered. 28 A. 455, *Lacey & Butler v. Parish of St. Bernard*. See Nos. 10, 11.

29. Under the authorization to contract for the building of a house not to exceed one thousand dollars, the police jury could not bind the parish for one costing seven thousand dollars. 28 A. 263, *Hasie & McCloy v. Police Jury Madison*.

30. In a suit against a police jury, for services rendered, the warrants being offered to corroborate and substantiate the claim, and judgment should be rendered in favor of plaintiff. 28 A. 192, *Dr. Meng v. Police Jury St. Charles parish*.

31. WYLY, J., *dissenting*: The warrants were the foundation of the suit, and no recovery can be had, no matter what the consideration be. *Ib.*

32. For want of evidence that the debts were regularly created by the police jury, and means provided for their payment, no judgment can be recovered against the parish on the warrants so issued. 28 A. 343, *Benham v. Parish Carroll*; 24 A. 457; 26 A. 59.

33. To obtain judgment against the parish, it is not sufficient to offer in evidence the warrants drawn by the police jury; their authority must be shown, and if they have none, the warrants are null. 27 A. 320, *Flagg v. Parish St. Charles*; 26 A. 59, *Sterling v. Parish West Feliciana*.

34. The police jury has authority to acknowledge a claim, or debt, even if negotiable warrants had previously issued therefor. 28 A. 861, *Davis v. Parish Caldwell*.

35. Police jury warrants, in negotiable form, are null; 26 A. 59, affirmed. 28 A. 588, *Bertrand v. Vermilion*; 618, *Lodds, executor v. Same*; 77, *Mathé v. Police Jury Plaquemines*.

36. Where an act of the legislature authorizes a parish to issue its bonds for a specific purpose, in such form as the police jury may prescribe, all bonds issued without a previous ordinance are invalid. 29 A. 590, *Lisso v. Red River*.

37. The police jury of a parish have no authority (unless specially authorized by law) to issue negotiable securities of such character as to be unimpeachable in the hands of *bona fide* holders, for the purpose of raising money or funding a previous indebtedness. *Per curiam*: That a municipal corporation, which is expressly authorized to make expenditure for certain purposes, may, unless prohibited by law, make contracts for the accomplishment of the authorized purpose, and thereby incur indebtedness and issue proper vouchers therefor, is not disputed. This is a necessary incident to the express power granted. But such contracts, as long as they remain executory, are always liable to the equitable considerations that may exist or arise between parties and to any modification, abatement or rescission, in whole or in part, that may be just and proper in consequence of illegalities, or disregard or betrayal of the public interest. Such contracts are very different from those which are in controversy in this case; the bonds and coupons on which a recovery is now sought are commercial instruments, payable at a future day, and transferrable from hand to hand. 15 Wall. 566, *Police Jury v. Britton*.

38. The certificate of acceptance of the work by the police jury is not sufficient. See EVIDENCE, XVIII. (a), No. 1.

39. A police jury is not an officer in the intendment of the constitution. See OFFICE AND OFFICER, No. 1.

40. The act directing the parishes to pay the clerks and recorders for recording the mortgages of minors, is constitutional. See RECORDER, No. 2.

41. Under the acts of 1874, p. 124, creating a board of commissioners to examine and ascertain the valid outstanding indebtedness of the parish of Terrebonne, and authorizing the police jury to fund the same, it was requisite that the police jury should pass an ordinance to authorize the issuance of the bonds, and to select three of their number to sign the same. The bonds issued without that formality are null. 30 A. 288, *State ex rel. Rabasse v. Police Jury of Terrebonne*.

42. Police juries have no power to issue paper of any kind, unless specially authorized by the legislature; even, in that case, they must provide the means for paying the debt in the ordinance creating it. 30 A. 461, *Smith v. Parish of Madison*.

43. The police jury, having elected the district attorney *pro tem.*, was without power to cancel the election. 30 A. 659.

44. Not to levy poll tax, nor special road tax, 1870, p. 47; reorganized, 1871, p. 216; 1873, p. 54; expenses and taxes limited, 1877, E. S., p. 47; police jurors appointed by the governor until next election, 1877, E. S., p. 87; authorized to levy taxes for expenses in criminal proceedings, 1878, p. 144.

POLICE REGULATIONS.

1. See IMMIGRATION. MONOPOLY. POLICE JURY, Nos. 16, 17, 18, 20.
2. As regard liquors, 1878, p. 135.

POSSESSION.

I. IN GENERAL.

II. OF THE RIGHT OF POSSESSORS IN GOOD OR BAD FAITH TO FRUITS, IMPROVEMENTS, ETC.

- (a) *In general.* (c) *Possessor's right of detention; and the apportionment between him and his warrantor.*
 (b) *Who are possessors in good faith; and owner's right of election.*

I. IN GENERAL.

1. Where defendant relies entirely upon a supposed authorization from the city, for the occupation of plaintiff's property, to break up flatboats, the absence of such authorization entitles plaintiff to have the injunction against such use, perpetuated. 16 A. 359, *Ursuline Nuns v. Fresch*.

2. Where a party gains possession of the effects in dispute, by the unlawful use of force, such possession will not avail him. 20 A. 37, *O'Donnel v. Burbridge*.

3. A purchaser may be evicted, although he continues in possession of the property, if that possession has been under a different title. C. C. 2476; 26 A. 588, *Wilson v. Benjamin*. See SALE, III. (c), 1), No. 1.

4. A title resting upon a judgment absolutely null, cannot be the source of any legal right, nor of possession in good faith. 24 A. 253, *Walworth v. Stevenson*.

5. The attachment being released, the possessor, who previously occupied peacefully the land, during more than twelve months, is entitled to the possession. 26 A. 685, *Chaffe, Shea & Loye v. Abercrombie*.

II. OF THE RIGHT OF POSSESSORS IN GOOD OR BAD FAITH TO FRUITS, IMPROVEMENTS, ETC.

(a) *In general.*

1. Where a contractor accepted the sale of the building and lot, in payment of his debt from the committee of a corporation, and the sale is declared null, he should recover the amount due to him, and the value of the improvements put on the lot whilst he owned it. 19 A. 303, *Church v. Duru*.

2. The possessor in good faith owes rent only from the institution of the suit, and is entitled to the value of the improvement, with legal interest, from the time he made them. 27 A. 398, *Dufilho v. Mayer*.

3. Where the owners parted with their interest previous to the sale, but continued the partition proceedings in their name, they will be held liable for the value of improvements put on the land by a possessor in bad faith. 26 A. 589, *Wilson v. Benjamin*.

4. A possessor in bad faith owes rents. 26 A. 733, *French v. Bach*; 24 A. 253, *Walworth v. Stevenson*.

5. Defendant may claim the value of the materials and price of workmanship of the buildings erected by him, without regard to the increase or decrease of the value of the land. 26 A. 588, *Wilson v. Benjamin*.

6. In the assessment of damages which a trespasser is called to pay, the benefit derived from the improvements made by him, must be considered. 26 A. 589, *Wilson v. Benjamin*.

7. Where the holder of a United States patent, issued by error, puts up buildings on the land so patented, he is entitled to the value of his improvements, when the real owner makes a claim for the land. 28 A. 720, *Cullen M. Castle v. J. J. B. Chaney, et als*.

8. The possessor in good faith is entitled, in case of eviction, to be reimbursed the amount expended by him for improvements. 15 A. 698, *Roberts v. Brown*.

9. A possessor in bad faith is entitled to be reimbursed the costs of repairs necessary for the preservation of the property, and for taxes. 24 A. 253, *Walworth v. Stevenson*.

10. The fruits which must be restored by a possessor in bad faith, consist of what the premises are reasonably worth, annually, with interest to the time of the trial. 15 Wall. 624, *New Orleans v. Gaines*.

11. He owes interest on the profits of the property, without any special putting in default; in contemplation of law, he is continually in default. *Id.*

12. Where a party is in possession of lands, claiming under an adverse but defective title, without any fraud, either of himself or his grantors, he cannot be held to be the trustee of the party holding the true title, nor if he has sold the lands, made to account for the proceeds of the sale to the true owner. 1 Woods, 56, *Gaines v. Lizardi et als.*

13. The decree of the Supreme Court, in these cases, found that the defendants were not possessors in good faith of the lands sued for; they were therefore liable for rents, and profits, and were not entitled to compensation for their improvements. 1 Woods, 56, *Gaines v. Lizardi et als.*

14. The defendants, being possessors in bad faith, owe all the rents which plaintiff might have realized if she had been in possession. *Gaines v. Mousseaux et als.* BILLINGS, J.

15. A possessor in bad faith is entitled to compensation for improvements put upon the land, which have been accepted by the owner, together with interest on the amount expended therefor, and is chargeable with the rents and profits, with interest. 2 Woods, 254, *Jackson v. Ludeling*.

16. A possessor in good faith owes rent from the time he is put in default. See SALE, V. (a), No. 1.

17. For rights and obligations of purchasers, in good or bad faith, see SALE, V. (a); (b); (c).

(b) *Who are possessors in good faith; and owner's right of election.*

1. One who settles on land with the intention of acquiring a pre-emption right, but who does not take the necessary steps, is a possessor in bad faith. 26 A. 588, *Wilson v. Benjamin*.

2. To be in good faith, the possessor must have the positive belief that he is the true owner of the property he holds; if he doubts the validity of his title, his possession cannot be the basis of the prescription of ten years. 24 H. 553, *Gaines v. Hennen*.

3. When the judgment is absolutely null, the purchase is not made in good faith. See I. No. 4.

4. For the same subject, see SALE, V. (a).

(c) *Possessor's right of detention, and the apportionment between him and his warrantor.*

1. The possessor in good faith, who places improvements on land against which a hypothecary action is brought, is entitled to have their value ascertained, and first paid to him out of the proceeds of sale. 28 A. 830, *Bridges v. Simonton*. See MORTGAGE, VI. (c), 1).

2. Improvements on confiscated property. See CONFISCATION, No. 3.

POUND.

1. Police juries have no right to confiscate cattle running at large. See POLICE JURY, No. 20.

2. See SALE, V. (a), No. 7.

POWDER.

1. The city of New Orleans has not the EXCLUSIVE right to keep powder magazines within the borders of the State of Louisiana. 23 A. 740, *City v. Hoyle*.

PRACTICE.

See PLEADING.

PREMATURITY.

See PLEADING, VI. (a), 3).

PRESCRIPTION, I.

PRESCRIPTION.

I. IN GENERAL.

II. OF USUCAPTION AND PRESCRIPTION ACQUIRENDI CAUSA.

- (a) *Prescriptible things.* 2) Fifteen and thirty years.
- (b) *Prescription of immovables.* (c) *Prescription of movables.*
 - 1) Five; and ten to twenty years.
 - A. *In general.*
 - B. *Just title and good faith.*
 - C. *Possession.*

III. OF THE PRESCRIPTION LIBERANDI CAUSA AND ITS COMMENCEMENT.

- (a) *In general.* (e) *Three years.*
- (b) *Less than one year.* (f) *Four years.*
- (c) *One year.* (g) *Five and ten years; and ten to twenty years.*
 - 1) *In general.*
 - 2) *Redhibition and quanti minoris.*
 - 3) *Offenses and quasi offenses.*
 - 4) *Claims of workmen, laborers and servants; material-men; and officers and crew of vessels.*
 - 5) *Nullity of judgment.*
 - 6) *Revocatory action and action en declaration de simulation.*
- (d) *Two years.* (h) *Thirty years.*

IV. OF THE INTERRUPTION OF PRESCRIPTION.

- (a) *In general.* (d) *Acknowledgment of the creditor's rights.*
- (b) *Natural interruption.*
- (c) *Judicial demand.*
 - 1) *In general.*
 - 2) *Hypothecary action.*
 - 3) *Actions by one of several obligees, or against one of several obligors.*
 - 4) *Abandonment which nullifies the interruption.*
- 1) *In general.*
- 2) *Acknowledgment by parties acting in *autre droit*; to whom to be made; when in writing; and change of prescription.*
- 3) *Acknowledgment by one of several debtors.*

V. OF THE SUSPENSION OF PRESCRIPTION.

- (a) *In general; absentees and the rule, "contra non valentem agere, non curit prescriptio."* (c) *Minors; and claims of married women against persons other than their husbands.*
- (b) *Obligations subject to a term or condition.* (d) *Claims between married persons; estates, vacant and under administration.*

VI. OF THE RENUNCIATION OF PRESCRIPTION; AND BY WHOM IT MAY BE PLEADED.

VII. OF THE RULE QUÆ TEMPORALIA SUNT AD AGENDUM, SUNT PERPETUA AD EXCIPIENDUM.

VIII. OF THE LAWS GOVERNING PRESCRIPTION; THEIR CONFLICT; AND THE MODE OF COMPUTING PRESCRIPTION.

I. IN GENERAL.

1. Prescription cannot be pleaded, merely in the brief. 20 A. 201, *Chase v. Davis*.
2. If the prescription is not specially pleaded, the court cannot supply it. 23 A. 300, *Kohler v. Walden et als.*
3. If the prescription is apparent, and no demand is made by the adverse party, to have the case remanded to be tried on the plea raised before the Supreme Court, prescription will be maintained. 21 A. 203, *Nelson & Co. v. Scott*.
4. There is no prescription to an action of boundary. C. C. 825; 21 A. 673,

Arceneaux v. Benoit; 23 A. 529, *Latiolais v. Mouton*; 16 A. 313. See BOUNDARY.

5. A judgment, which does not form the basis of an action, even if prescribed, cannot affect plaintiff's claim. 24 A. 160, *Bynum v. Gordon*.

6. Prescription may be pleaded at every stage of the proceedings, before final judgment. 23 A. 157, *Johnson v. Philips*.

7. Action of the Supreme Court, when the plea is filed in that court, see APPEAL, IX. (g), 2), No. 6.

8. For evidence to affect prescription, see EVIDENCE, XIV. (d).

9. For plea of prescription, see PLEADING, VI. (c), 4).

10. A rent charge is perpetual. See RENT.

II. OF USUCAPTION AND PRESCRIPTION ACQUIRENDI CAUSA.

(a) *Prescriptible things.*

1. One who holds as agent, cannot prescribe. 20 A. 381, *St. Romes v. Levee Steam Cotton Press Co.*; 30 A. 808, *Neil v. Hibard*.

2. See SERVITUDES, II. (b), 1), A.

(b) *Prescription of immovables.*

1) Five; and ten to twenty years.

A. *In general.*

1. The heir, recognized as such, and put in possession, prescribes by the lapse of ten years. 26 A. 419, *Succession of Sarniquet*.

B. *Just title and good faith*

1. Where the principal had no authority to delegate the power to sell to an agent, and all the forms of law have been observed in the execution of the procurement and of the sale, the purchaser will acquire a valid title by the prescription of ten years. 27 A. 596, *Hall & Turner v. Timothy Mooring*.

C. *Possession.*

1. See POSSESSION.

2) Fifteen and thirty years.

1. Undisturbed occupation and possession as owner of real estate for the period of thirty years, gives a good title, even if the owner went into possession by virtue of a contract prohibited by law, and utterly null. 24 A. 240, *McLean, executor v. Keegan, et al.*

2. An act of sale cannot be treated as null, and as interrupting prescription. See PLEADING, II. (b), 1), No. 3.

(c) *Prescription of movables.*

1. Where plaintiff fails to show that the watch was stolen from him, defendant, who pleads the prescription of three years, and who acquired it for a valuable consideration in market overt, will be adjudged to be the owner thereof. 20 A. 336, *Hayes v. Hayman*. See EVIDENCE, VIII. No. 9.

III. OF THE PRESCRIPTION LIBERANDI CAUSA AND ITS COMMENCEMENT.

(a) *In general.*

1. Statutes of prescription and limitation cannot be extended from one action to another, nor to analogous cases beyond the strict letter of the law. 15 A. 143, *Garland v. Scott*.

2. The court cannot enlarge the plea of prescription. Although the note may, on its face, be prescribed by five years, if the plea of four years be set up, it will not be maintained. 20 A. 510, *Aillot v. Aubert*.

3. The foreign debtor is entitled to avail himself of our laws of prescription, just as though he had always been subject to the jurisdiction of our courts. 15 A. 399, *Norton v. Sterling*.

4. In order to plead a foreign statute of limitation, under act of 15th of March, 1855, in bar of a judgment rendered in another State, it must be shown that the prescription was complete, and that there was no adequate means of enforcing the judgment in the State where it was rendered. 15 A. 150, *Morton v. Valentine*.

5. If the claim sued upon could have been pleaded in compensation to a judgment previously obtained by defendant against plaintiff, this does not interrupt prescription, which may be pleaded by defendant, whose judgment has been previously satisfied. 18 A. 593, *Broussard v. Broussard*; 13 A. 250.

6. In actions of partitions, involving a settlement of claims or accounts, no prescription is applicable except that which is a bar to the partition itself. 16 A. 170, *Chapman v. Woodward*; 14 A. 740.

7. Where the note is prescribed on its face, and no interruption is shown by plaintiff, the plea will be maintained. 21 A. 501, *McStea v. Boyd and Blanks*; 20 A. 523, *Watts, ad'r v. Bradley*.

8. The surety on the appeal bond is discharged by the prescription of the judgment. 23 A. 587, *Byrne, Vance & Co. v. Garrett, ex.*

9. A judgment, ordering certain installments to be paid when due, does not affect the obligation, which is not merged with it, even if the judgment should be prescribed. *Ib.*; 24 A. 160, *Bynum v. Gordon*.

10. A plea of prescription of the claim sued on, cannot be admitted in an action to annul a sale made by virtue of the judgment obtained thereon. 24 A. 274, *Wells v. Citizens' Bank*.

11. An action on an arrest bond, for the damages suffered by the illegal arrest, is not one *ex contractu*. 25 A. 307, *Rogay v. Juillard et al.*

12. A right of action thereon begins only from the day final judgment was rendered by the Supreme Court. *Ib.*

13. Upon the same principle that a discharge, under the bankrupt law, does not release an heir from collating, (9 A. 96), prescription of the debt cannot be pleaded against collation. 28 A. 743, *Succession F. Bongère*.

14. Third possessors can plead prescription of the debt. 28 A. 663, *McDaniel v. Lallanne*; (2 A. 367, *King v. Hickey*, is not approved.)

15. When plaintiff is restricted in his proof to cash advances, for want of allegations in the petition, covering other items, and on the objection of defendant the petition is not amended, although in point of fact the whole account is introduced in evidence, the plea of prescription will be restricted to the cash advances, and plaintiff's right to sue for the other items, reserved. 30 A. 531, *Sevin & Gourdain v. Caillouet*.

(b) Less than one year.

1. The action for a separation of patrimony is prescribed by three months. 24 A. 127, *Levi v. Cockern*. See SUCCESSION, V. (a), No. 6; (c), 1), No. 2.

2. The recovery of a fine for the violation of a criminal statute, is prescribed in six months from the time the fine is incurred. 29 A. 704, *State v. King*.

(c) One year.

1) In general.

1. Usurious interest cannot be recovered after the lapse of one year from the date of its payment. 26 A. 450, *Succession Ostrander*; 15 A. 395, *Weaver v. Malliot*.

2. Usurious interest may be recovered after one year, if no plea of prescription be interposed. 18 A. 712 and 717, *Walker v. Villavaso*.

3. The prescription of one year does not apply to the claim of a house-keeper, who has no other boarder, and takes care of a widow, childless, and advanced in years; she is not properly an inn-keeper, nor the keeper of a private boarding-house, nor does the prescription of three years apply thereto. 22 A. 316, *Succession Nitch*.

4. The plea of prescription cannot prevail, when the suit has been brought within one year from the demand for the restitution of property on deposit. 22 A. 214, *King v. Cressap*.

5. The prescription of one year will bar the responsibility of a sheriff who received Confederate money, without authority, from plaintiff. C. C. 3536, (3501). 23 A. 163, *Harvey v. Walden*. See SHERIFF, II. (b), 2), c.; *infra*, (d), No. 1.

6. An action to recover the value of goods delivered to a railroad company for transportation, is not prescribed either by one or five years. 23 A. 353, *Flash, Hartwell & Co. v. New Orleans, Jackson and Great Northern Railroad Company*. See SHIPPING, X. (c), 5); 6).

7. Damages *ex contractu* are not prescribed by one year. False representations in a contract of sale give rise to an action *ex contractu*. 20 A. 193, *Lallande v. Ball*.

8. The action for an error committed by a telegraph company in the transmission of a dispatch, does not arise *ex delicto*, but *ex contractu*, and is not prescribed by one year. 25 A. 384, *Olympe v. Southwestern Telegraph Company*.

9. The action for damages for a wrongful arrest, in a civil suit, is not prescribed by one year, 25 A. 307, *Rogay v. Juillard*.

10. The action against the recorder and his bondsmen for failure to perform an official act, is one *ex contractu*, and as such not prescribed by one year. 26 A. 677, *Brigham v. Bussey, et al.* But see 3), No. 1; RECORDER, No. 1.

11. Where a ship broker agrees, for a stipulated sum, to furnish vessels to transport certain merchandise from one port to another, his suit for the compensation agreed upon is not barred by the prescription of one year. The contract is not one "for the payment of the freight of ships and other vessels," within the 3534th (3499) article of the Civil Code. 4 Wall. 650, *Railroad Company v. Lindsay*. See MANDATE, VI.

12. For repetition of what has been paid on a note, see BILLS AND NOTES, IV. (a), No. 2.

13. For prescription of damages for wrongful seizure, see OFFENSES AND QUASI OFFENSES, II. (f), 1).

14. The difference as to the time for actions under articles 1987 and 1994, Civil Code, see OBLIGATIONS, VII. (b), 2), B., § 4, No. 5; *infra*, 6).

15. The action against a notary who fails to give notice of protest, is prescribed by one year. See 3), No. 1.

2) Redhibition and quanti minoris.

1. The principle as to prescription governing ordinary contracts of sales, are applicable to public sales in general. 15 A. 171, *Stewart v. Boyd*.

2. The action of supplement to the price, where the overplus exceeds a twentieth part of the extent of the premises sold, is subject to the prescription of one year. 15 A. 171, *Stewart v. Boyd*.

3. Defendant must prove that when suit was commenced, more than a year had elapsed since plaintiff discovered that the redhibitory vice existed at the date of or before the sale. 18 A. 118, *Gatlin v. Kendig*.

4. The action of redhibition may be commenced at any time, provided a year has not elapsed since the discovery of the vice of which the seller had knowledge, and which he failed to declare to the purchaser. C. C. (2524). Here is a proper application of the rule, "*contra non valentem agere, non currit prescriptio*." 20 A. 407, *Murphy v. Gutierrez*. (See cases there cited.) But see V. (a), No. 5.

5. An action for redhibition of a slave is not affected by the decisions rejecting actions for the price. *Ib.*

3) Offenses and quasi offenses.

1. An action against a notary, to render him responsible for negligence, in omitting to give notice to a drawer or indorser of a draft protested by him for non-payment, is based on the article (2295), of the Civil Code, and falls under the prescription of one year, established by article (3501). 15 A. 418, *Taylor v. Graham*. But see 1), Nos. 7, 8, 9, 10.

2. Prescription commences to run from the time the damages are sustained,

and not from the day the act complained of was committed. 16 A. 354, *Mestier v. New Orleans, Opelousas & Great Western Railroad Co.*

3. Damages accruing from a tort, are prescribed by one year from the day the tort is committed. 16 A. 338, *White v. McGuire*; C. C. (3501).

4. The prescription of one year, applicable to quasi offenses, commences to run from the day on which the injury was caused, the day a *quo* is not included. C. C. 3467, (3430); 3 A. 528; 22 A. 616, *N. Chestnut, natural tutor of R. Chestnut v. John Hughes*.

5. Actions for damages founded on a tort, are prescribed by one year. 21 A. 492, *Burch v. Willis*.

6. An action for damages occasioned by a quasi offense, is prescribed by one year. 20 A. 214, *Jennings v. Gosselin*.

7. Damages arising *ex delicto*, are prescribed by one year. 16 A. 140, *Harris v. New Orleans, Opelousas & Great Western Railroad Co.*

8. An action in damages for a tort, in taking and appropriating the personal goods of another, is prescribed by one year, from the commission of the offense. 20 A. 151, *Williams v. Greiner*.

9. An action to recover the value of property held for the benefit of the vendor, under simulated title, is an action in damages, and as such, prescribed by one year, commencing from the day the damages were sustained, and the action could be brought. 20 A. 171, *Edwards v. Ballard*.

10. A claim for the value of property, wrongfully taken, is prescribed by one year. 20 A. 323, *Millsbaugh v. New Orleans*.

11. Prescription of one year applies to a claim for property wrongfully taken possession of by defendant. This resolves itself into a claim for damages. 26 A. 511, *Wood v. Harispe*.

12. The prescription does not apply where defendant took the cotton belonging to plaintiff, and his act was ratified. 23 A. 142, *Normand v. Edwards*. See MANDATE, V. (d).

13. For prescription of damages for a wrongful seizure, see OFFENSES AND QUASI OFFENSES, II. (f), 1).

14. Mode of computing prescription. See *infra*, VIII.

15. See also OFFENSES AND QUASI OFFENSES.

4) Claims of workmen, laborers and servants; material-men; and officers and crew of vessels

1. The prescription of one year, mentioned in article (3499, C. C.), does not apply to materials furnished and labor performed. 22 A. 316, *Succession of Susan Nitch*. See BUILDERS AND BUILDINGS.

2. The action to recover for the services of a nurse, is prescribed by one year. 23 A. 62, *Vaughn v. Terrell*.

3. Under Revised Statutes, 2822, an action for work performed for the city of New Orleans, is prescribed by one year. The prescription commences to run when the work is to commence. 27 A. 309, *Wolf v. City of New Orleans*.

5) Nullity of judgment.

1. Where, during the pendency of a revocatory action, the wife, who has a tacit mortgage anterior to that of the creditor, causes the property in litigation to be seized and sold, by virtue of her moneyed judgment accompanying her separation of property, and more than a year has elapsed between the rendition of the judgment in the revocatory action and the claim for the nullity of the wife's judgment, the plea of prescription to the suit in nullity must be maintained. 20 A. 247, *Weil v. Sheriff St. Helena*.

2. The nullity of a judgment against one not qualified to appear in a suit, may be demanded at any time, unless the defendant suffer the judgment to be executed against his property without opposition. C. P. 612; 23 A. 336, *De Moss v. Cobb, Manlove & Co.*

3. Where more than a year elapsed from the day the judgment is obtained by the seizing creditor, and the judgment of separation obtained by the wife, no fraud can be set up against the wife. 28 A. 481, *Elia Boulon v. Waggonman et als*. See MARRIAGE, XIV.

4. An action to annul a judgment for fraud is prescribed by one year from

the discovery of the fraud. 28 A. 625, *Jacobs v. Frère*; 24 A. 260, *Peyroux v. DeBlanc*.

5. The action which the creditors of the husband have to annul the judgment of his wife against him, should be instituted within the year from its rendition. 24 A. 522, *Powell v. O'Neil*.

6. For nullity of judgment, see JUDGMENT, XI.

6) Revocatory action; and action *en declaration de simulation*.

1. The creditors must sue to annul the fraudulent, but real, contracts made by their debtor within a year after their completion. 24 A. 124, *Lafitte v. Daigle*.

2. The action of creditors to annul a contract made in fraud of their rights, commences to run from the date the contract is recorded, and not from the date the fraud was discovered. 24 A. 246, *Brewer et al. v. Kelly, administrator*.

3. The action to annul for fraud, the contracts of the debtor, where there is no simulation, is prescribed by one year from the date of the contract, or the day when the judgment liquidates plaintiff's claim. 29 A. 285, *Renshaw, Cammack & Co. v. E. C. Herbert*.

4. ON RE-HEARING: A suit to have the defendant condemned to pay the value of property held by him for plaintiff, under simulated title, is prescribed by one year. 20 A. 170, *Edwards v. Ballard*.

5. For the revocatory action, and that *en declaration de simulation*, see OBLIGATIONS, VII. (b), 2), A.; B. § 4, No. 5.

6. For contract giving an unfair preference to certain creditors, and the action to set it aside, see OBLIGATIONS, VII. (b), 2), B. § 4.

(d) *Two years*.

1. The act fixing the prescription in favor of the sheriff, by a fair construction, should apply to deputies. 19 A. 457, *Simpson v. Lewis*. See (c), 1), No. 5.

2. The lien and privilege of the State and parish on the property, for taxes, expires by two years. 22 A. 246, *Buckner v. Tax Collector*; 16 A. 132; 15 A. 381; see acts 1855, p. 512, § 43; revising act 1850, p. 138, § 35; acts 1869, p. 155; R. S., p. 564; acts 1870, p. 39, E. S. See PRIVILEGE, V. NEW ORLEANS, II. (e), 1).

3. The prescription in favor of sheriffs and their securities, against their acts of misfeasance, non-feasance, etc., which includes the failure to account for moneys held by the sheriff in his official capacity, is two years from the day of the omission or commission of the acts complained of. R. S. section 3546; 23 A. 300, *Kohler v. Walden*.

4. In the case of a sheriff failing to pay money collected under process of court, the prescription commences to run from the date of demand by the judgment creditor and non-payment by the sheriff. 23 A. 300, *Kohler v. Walden*.

5. The action against a sheriff and his sureties, for non-payment of moneys received in the official capacity of the sheriff, is prescribed by two years from the day he makes default. 25 A. 360, *Hugh v. Hernandez et als*.

6. WYLY, J. *dissenting*: The obligation of the sheriff to pay did not arise from a *quasi* contract. 23 A. 474, *Spaulding & Rogers v. Walden*. *Ib*.

7. The prescription of two years (R. S. 2816), applies to acts of sheriffs, not to such, acting as tax collectors. 26 A. 126, *State v. Ranson*.

8. The assignee of the bankrupt can institute no action after the lapse of two years from his appointment. 29 A. 280, *Latting, v. Fassman, Bryant & Co*.

9. The prescription of two years does not apply to a suit already brought by the bankrupt, and to which the assignee makes himself a party. *Ib*.

10. The fact that an assignee in bankruptcy did not discover his right to certain property of the bankrupt, until after the expiration of two years from the time an action accrued to him therefor, does not remove the bar prescribed by the second section of the bankrupt act. 1 Woods, 163, *Norton, assignee v. De Lavillebeuvre*.

11. A suit brought by the assignees in bankruptcy, of a bank to recover money paid as counsel fees by persons acting without authority as commissioners for the liquidation of the bank under the State law, is barred, unless brought within two years from the time the cause of action thereof accrued in favor of the assignees. 2 Woods, 115, *Mittenberger et als. v. Phillips*.

12. The privilege for paving expires by the lapse of two years. See NEW ORLEANS, II. (e), 4), No. 9.

13. Two years possession, under a judicial sale for taxes, will validate the purchaser's title, 1873, p. 180.

(e) *Three years.*

1. Where plaintiff, who was carrying on a plantation for his own benefit, was declared to be the agent, and all rights to claim compensation for services performed, for the hire of his carts and mules, were reserved to plaintiff; *Held*: That an action for such reserved compensation, was one arising out of a *contract of mandate*, and not a suit based upon *letting and hiring*, and as such was not prescribed by three years. 16 A. 397, *Hereford v. Leverich*; 15 A. 145, *Imboden v. Richardson*; 535.

2. The factor, agent or correspondent to whom a letter of credit is directed, and who advances the money specified, stands in the relation of the drawee of a bill of exchange to the signer of the letter, and the advance extinguishes the letter of credit, and the right of action lies upon an account for moneys advanced, prescriptible by three years. 16 A. 225, *Reggio v. Hebert*.

3. The accounts of an agent are not prescribed by three years. 21 A. 406, *Dolhonde v. Laurans*; 17 A. 246.

4. The account will not be prescribed by three years, if it be for certain specific work performed at different periods. 19 A. 255, *Brown & Co. v. McFarland*; 13 A. 160; 14 A. 653.

5. An action to recover an open account, is prescribed by three years. 21 A. 150, *Williams v. Greiner*.

6. Where plaintiff sets out his demand, as on an open account, the prescription of three years will apply. 21 A. 657, *French v. Riggs*.

7. Even if the balance stated on the open account had been acknowledged in writing, it would be prescribed by three years. 20 A. 116, *James v. Fellowes*.

8. ON REHEARING: A balance having been stated on the open account and acknowledged verbally by the debtor, constitutes a personal obligation prescribed only by ten years. *Ib.* See (g), 1), No. 23.

9. An account which is *signed and rendered by the debtor*, is not an open account, and is not prescribed by three years. 15 A. 49, *Graham v. Sykes*.

10. The account being acknowledged, is not prescribed by three years, C. C. (3508). 19 A. 326, *Conery v. Hayes*. See (g), 1), No. 23; 3), Nos. 8, 9.

11. The account closed and acknowledged, is not prescribed by three, but by ten years. 23 A. 785, *Betzer v. Cronan et als.*

12. When the account is rendered to the defendant, who never objected to its incorrectness until after the institution of the suit, it is *un compte arrêté*, to which the prescription of three years does not apply. 26 A. 208, *Blanc v. Scruggs*; 20 A. 119.

13. An open account, when once acknowledged, is only prescribed by ten years. 27 A. 133, *Prudhomme v. Plauché*.

14. The action to recover the proceeds of merchandise sold by the consignee, is one arising from a quasi contract, and as such, is not prescribed by three nor five years. 26 A. 474, *Whetstone, ad'r v. Rawlins*. See CONSIGNEES.

15. An action for rent is prescribed by three years. 22 A. 581; C. C. 3503; 22 A. 325; 24 A. 73, *New Orleans v. O'Connor*.

16. Claims for services as an overseer, are not governed by the prescription of three years. 15 A. 528, *Copse v. Eddins*; 24 A. 271, *Wells v. Hawley*.

17. Where property belonging to plaintiff, is alleged to have been sold by defendant, and figures, with other items in the account claimed from defendant; the whole is prescribed by three years. 27 A. 639, *Goodman v. Rayburn*,

(f) *Four years.*

1. Where the minor has made a settlement with his tutor, after majority, and has accepted the tutor's notes in liquidation of the amount, prescription of four years is not applicable to the notes so given. 19 A. 174, *Perrett v. Roussel*.

2. The minor's action against his tutor, to render an account, is prescribed by four years; the mortgage securing the minor's claim, falls with the action. 20 A. 510, *Aillot v. Aubert*.

3. Lesion is barred by the prescription of four years. 29 A. 245, *Blake v. Nelson*.

(g) *Five and ten years; and ten to twenty years.*

1) *In general.*

1. Improper or lack of service of the notice of seizure is an informality, which is cured by the lapse of five years from the day of sale. 24 A. 24 *Succession Allan v. Couret*.

2. A silence of five years in the settlement of partnership accounts, will bar any claim for balances. 17 A. 28, *Succession of E. Parker*.

3. A twelve months bond given for the purchase of property at the sheriff's sale, is prescribed by five years. 22 A. 410, *Chastant v. Strong*.

4. All informalities in probate proceedings for the sale of land are prescribed by five years. 21 A. 584, *Pasiana v. Powell*.

5. Warrants drawn by the police juries on the parish are prescribed by five years from the date they become due. 21 A. 645, *Perry, ad'r v. Parish of Vermillion*.

6. A written obligation, signed by the auditor of parish accounts, styled a certificate of indebtedness, is prescribed by the lapse of five years. 22 A. 76, *Jacob C. Van Winkle v. Police Jury of the Parish of Pointe Coupée*.

7. A written agreement to pay a certain sum of money, styled a bond, in favor of the Bank of Louisiana, is prescribed by five years. 21 A. 121, *Bank of Louisiana v. Williams*; 659, *Succession Voorhies*.

8. The presumption *omnia rite acta*, cannot be applied to a title not introduced in evidence; and, under such circumstances, the prescription of five years cannot be invoked to cure irregularities in the title. 15 A. 543, *Reynolds v. Stille*.

9. Before the passage of the act of the legislature, approved April 30, 1853, there was no term of prescription applicable to domestic judgments. 15 A. 649, *Succession of Rice*.

10. Prescription to enforce a foreign judgment commences to run from the date of the judgment. 16 A. 353, *Succession Beckman*.

11. Prescription to enforce a domestic judgment, when the judgment debtor is dead, and his estate is under administration, commences to run from the day of his death. 16 A. 353, *Succession Beckman*; 15 A. 650.

12. A devolutive appeal does not suspend the prescription of a judgment. Prescription commences from its rendition. 21 A. 295, *Arrowsmith v. Durell*.

13. A judgment ordering the assets of an insolvent corporation to be collected, is not prescribed by ten years. It is not a moneyed judgment. 22 A. 209, *Liquidator, etc. v. Whittaker*; 288, *Liquidator, etc. v. Lee*.

14. The act of 1853 makes the prescription of ten years applicable to judgments for money. 22 A. 209, 288, *Liquidator, etc. v. Whittaker*; *Same v. Lee*.

15. A judgment is prescribed by ten years from the *signing* of the judgment. 1853, p. 250; 21 A. 295; C. P. 545, 546, 547; 23 A. 177; 579, 587.

16. Its prescription is not interrupted by an injunction. 23 A. 579, *Yale v. Randle*.

17. A judgment, if not revived, is prescribed by ten years from its rendition, even if execution was issued thereon, and the defendant tendered his draft, (which was not paid), in settlement thereof. C. C. (3547); 25 A. 490, *Succession Hardy and Wife*; 23 A. 587, *Byrne, Vance & Co. v. Garret, ex.*; 173, *Drogre v. Moreau*; 21 A. 295, *Arrowsmith v. Durell*; 23 A. 176, *Walker v. Hays*.

18. A judgment obtained by a tutor against a former tutor, is prescribed by ten years, unless revived, it matters not that it be in favor of minors. 24 A. 211, *Wade v. Caspari*.

19. HOWELL, J. *dissenting*: The judgment being only one homologating an account rendered by a former tutor, cannot be prescribed by ten years. *Id.*

20. A judgment of separation, and for a sum of money, is null after ten years. See MARRIAGE, XIII. (b), 2), No. 11.

21. The prescription of ten years does not apply to a judgment adjudicating the minor's property to the surviving parent. 25 A. 612; *Winter v. Tournoir*.

22. The action to rescind a sale for non-payment of the price, is prescribed by ten years. Article (2540), C. C., gives the court the right to grant some indulgence to the debtor, provided it does not exceed six months. 16 A. 130, *Hunter v. Williams*; 1 A. 442; 11 A. 654.

23. An account closed and recognized by defendant's written approval, is prescribed by ten years. 21 A. 681, *Blanchin & Giraud v. Pickett et als.*; 14 A. 654; 20 A. 116. See (e), Nos. 7, 8, *et seq.*; (g), 3), Nos. 8, 9.

24. The plea of prescription of five years, is not applicable to a claim founded upon the written obligation to pay, contained in a deed of sale. 22 A. 259, *Merle v. Merle*.

25. The right accorded to the surety, to have a personal recourse against the principal for whom he has paid, is prescribed by the lapse of ten years from the time such payment is made. 22 A. 598, *Cleveland v. Comstock*.

26. The action of a co-obligor who has paid the whole debt, for reimbursement of the portion above his share, from the other co-obligor, is only prescribed by ten years. 24 A. 200, *Browder v. Hook*.

27. The claim for money collected is prescriptible by ten years. 24 A. 566, *Harrison v. Succession Adger*.

28. The prescription of ten years is the only one applicable to the liability of the wife, who has accepted the community tacitly against the debts of her husband. 29 A. 722, *Ludeling v. Felton*.

29. The debt against a succession, whether evidenced by a note or otherwise, when duly acknowledged by the administrator, is only prescribed, thereafter, by ten years. 29 A. 493. *Succession Romero*.

30. The five years prescription does not cure the nullity of a sale under execution, made for less than the anterior special mortgages. See EXECUTION, V. (d), 3), No. 1.

31. The defendant having confessed, in a court without jurisdiction, owing the account, the claim is only prescribed by ten years thereafter. See JUDGMENT, X. No. 4.

32. If the judgment recognizing the minor's mortgage against his tutor, be not revived within ten years, it will be prescribed. See MORTGAGE, IV. (b), 1), No. 8.

33. The sale of property ordered by a probate court, when the owner is not dead, is not rendered valid by the prescription of ten or twenty years. See SUCCESSION, VIII. (e), 1), No. 10.

34. The prescription of five years does not cure the defect of assessment in a tax sale. See TAXES, III. (d), 2), No. 1.

35. The taxes due to the city of New Orleans are prescribed by ten years. 30 A. — *Succession J. W. Zacharie*.

2) Real actions.

1. The prescription of ten years is applicable to a debt acknowledged in the act of mortgage, and not represented by notes. 25 A. 486, *Seyburn v. Deyries et als.*

2. The owner, having acquired by the prescription of ten years, no hypothecary action can be brought against the property so acquired. 20 A. 403, *Gentes v. Blasco*; 11 L. 256; 3 A. 334; 16 A. 343.

3. ON REHEARING: The hypothecary action is not prescribed by the lapse of ten years; it may be exercised as long as the mortgage is in existence. *Id.*; 14 A. 301, *Kemp v. Heirs Cornelius*; 14 A. 106. See MORTGAGE, VI. (c), 1); *infra*, IV. (c), 2).

4. Defendant was expelled by the United States military authorities, from the city of New Orleans, and carried within the Confederate lines. During his enforced absence, his property in New Orleans was seized and sold by the sheriff, notice of the seizure and sale being served upon a curator *ad hoc* appointed by the court; *Held*: That the sale was void. 2 Woods, 37, *Kimball v. Taylor*.

5. Such sale is not protected by the prescription of five years. *Ib.*

6. The prescription of five years cures the defect of a sale of minors' property, for less than the appraised value, when not made to pay debts. 29 A. 536, *Fraser v. Zylicz*. See 4).

7. The prescription of five years, to be computed from the day of sale and delivery of possession to the purchaser, cures the failure of the sheriff to take actual possession of the property seized. 94 U. S. (Otto's), 6, *Pike v. Evans*.

3) Actions on bills and notes; and contracts of mandate and deposit.

1. The action arising out of a *quasi contract*, like the action of mandate, partnership and *negotiorum gestor*, is prescribed by ten years. 15 A. 143, *Garland v. Scott*.

2. The action of the principal against the agent, is prescribed by ten years. C. C. (3508); 12 A. 632; 15 A. 145; 16 A. 397; 17 A. 250; 22 A. 151, *Wagoner v. Philips*.

3. The prescription of one year does not apply to an action against a *negotiorum gestor*, to enforce a *quasi contract*. 19 A. 491, *Devot & Co. v. Marx*.

4. The right of a principal to sue his agent for an account, is only prescribed by ten years. 27 A. 132, *Prudhomme v. Plauche*.

5. The claim of an agent against his principal for services, is only prescribed by ten years, if the creditor be present, and twenty years, if he be absent. 17 A. 246, *Millaudon v. Lesseps*.

6. Advances made by a *negotiorum gestor*, are only prescribed by ten years. 28 A. 181, *Gaudé v. Gaudé*.

7. See MANDATE, V. (b).

8. An account rendered, unless objected to within a reasonable time, is an account stated, and only prescribed in ten years. What a reasonable time is, depends upon the relations of the parties, and the usual course of their business. 28 A. 605, *Darby & Tremonlet v. Widow Lastrapes*; 4 A. 196; 18 A. 517; 3 R. 362; 20 A. 116. See (e), No. 7 *et seq.*; (g), 1).

9. A factor's account, closed and rendered at the end of the commercial year, and not objected to by the principal, becomes definitive, and the balance carries interest. 29 A. 679, *Sentell & Co. v. Kennedy*. See No. 8.

10. Where the property of a succession has, by order of court, been sold, and the money paid in the hands of the administrator, although such administrator, on account of the fiduciary and *quasi* official relation which exists on his part towards the court and succession, cannot prescribe against the demand of the heirs, yet the heirs of such administrator, after his death, are entitled to the plea of prescription. Prescription, therefore, commences to run in favor of the heirs of the administrator, from the death of the latter. 15 A. 469, *Bennett v. Alexander*.

11. The prescription in this case runs against minors, reserving to them their recourse against their tutors or curators. 15 A. 528, *Copse v. Eddins*.

12. Possession by the company of the dividends declared by it, will not maintain prescription, being that of a mandatory, a precarious one, unless it shows some initial point at which its possession was one *animo domini*. 20 A. 381, *St. Romes v. Levee Steam Cotton Press Co.*

13. Actions against the drawer, and acceptors of a draft, must be brought within a reasonable time, otherwise they will be discharged. 18 A. 121, *Bridgeford & Co. v. Simonds et als.* See No. 19.

14. A due bill is a mere acknowledgment of a debt, and the promise to pay money being only implied, it does not fall within the definition of a promissory note, and cannot be prescribed as such by five years. 15 A. 143, *Garland v. Scott*.

15. A negotiable due bill is a promissory note, (*Parsons on Bills and Notes*,

vol. 1, pp. 25, 26), and is therefore prescribed by five years. 22 A. 28, *Wardell v. Sterne*.

16. An instrument containing an unconditional promise to pay a certain sum of money at a certain day, whether negotiable or not, is a promissory note, and as such, is prescribed by five years. 21 A. 121, *Bank of Louisiana v. Williams*.

17. An obligation to pay money to one of two persons named, on a day fixed, although it contains stipulations authorizing execution to issue, in case it is not promptly paid at maturity, falls under the denomination of promissory notes, and is prescribed by five years. 22 A. 180, *Fort & Delee v. Reiley*.

18. Whatever may be the nature of the obligation evidenced by the note, it is subject to the same prescription as the instrument itself. 19 A. 176, *Perret v. Roussel*; 11 A. 1.

19. A draft is prescribed by five years. 21 A. 611, *Robicheaud v. Thorne*.

20. Where plaintiff could have brought suit several months previous to the expiration of the five years, but failed to do so, the note will be prescribed. 20 A. 219, *Durbin v. Spiller*; 20 A. 131.

21. Where the inability to sue during the five years after maturity is not established, the note will be prescribed. 20 A. 345, *Durand v. Hienn*.

22. Where fifteen months elapsed after the maturity of the note, before any impediment to the institution of a suit arose and continued, the note will be prescribed by five years. 20 A. 398, *Barriere Bros. v. Aiken*.

23. Prescription on a note runs against the State. 23 A. 570, *Graham v. Tignor*.

24. The right of action on a letter of credit, is prescribed by ten years. 16 A. 225, *Regio v. Hebert*.

4) Actions of nullity, rescission, and for the reduction of excessive donations.

1. All irregularities and formalities of a probate sale are cured by five years, 21 A. 505, *Woods v. Lee*. See 1), No. 30; 2), No. 5.

2. The prescription of five years is intended merely to cure informalities in the execution of a decree or other sufficient mandate to sell, and cannot be held to supply the manifest fundamental defects of the title. 22 A. 492, *Brooks v. Wortman*; 14 A. 597; 21 A. 585. See 1), No. 30; 2), No. 5.

3. The prescription of five years referred to in articles 1994, 3542 R. C. C., and 613, C. P., applies to judgments in contested cases obtained through fraud, and does not apply to a case of purchasers in possession who attack the probate of a will when sought to be evicted. 25 A. 98, *Fuentes v. Gaines*.

4. The prescription for the reduction of an excessive donation, does not run against minors. 30 A. 726, *Eskridge v. Farrar*.

5. See NULLITY. JUDGMENT, XI.

(h) *Thirty years.*

1. Although by the Civil Code, of Louisiana, the tradition or delivery of immovables is always considered as accompanying the public act, which transfers the property; yet, the mere possession of a deed of this character would not be sufficient to establish corporeal possession of real property, which is the basis of the prescription of thirty years. 15 A. 323, *Anderson v. Bock*.

IV. OF THE INTERRUPTION OF PRESCRIPTION.

(a) *In general.*

1. The general rules in relation to interruption or suspension of prescription do not apply to the delays of appeal, unless there had been no judge in the lower court to grant an appeal. 17 A. 238, *Hall v. Beggs*; but see APPEAL, I. (f), 1), No. 2.

2. Defendant's tender of payment debars him from the use of the plea of prescription, as the tender is an admission of the debt. 2 Greenleaf on Evidence, § 600; 2 Starkie on Evidence, § 788; 18 A. 602, *Whitworth v. Ferguson*.

3. Without evidence showing when and by whom the indorsement crediting a payment on the note was made, the credit does not interrupt prescription. 19 A. 170, *Munsen v. Robertson*.

4. The burden of proof is on the holder of the note to show an interruption of prescription. 20 A. 565, *Schlenker v. Taliaferro*; 21 A. 293, *Offutt v. Chapman*. See EVIDENCE, VIII.

5. Plaintiff cannot prove an interruption by simply writing upon the instrument a receipt for payment on account. 21 A. 293, *Offutt v. Chapman*.

6. Forced payment of a note in Confederate notes, to the Confederate receiver, during the war, did not interrupt prescription. 22 A. 530, *New York Belting Company v. Jones*.

7. Plaintiff must show affirmatively the interruption of prescription. 26 A. 245, *Alter v. McDougal*.

8. Prescription once interrupted by a suit, ceases to run until the termination of the suit, no matter how long it may last. 29 A. 298, *Turner, Wilson & Co. v. McMains et als.* See (c), 1), No. 23.

(b) *Natural interruption.*

1. The sole heir to whom a debt is due by the deceased, has no right to sue the estate, his debt being extinguished by confusion. It is only when the will is probated, appointing others his co-universal legatees, that his debt becomes exigible, and that prescription commences to run. 11 R. 402; 2 L. 451; 13 A. 161; 25 A. 372, *Succession Dubreuil*.

(c) *Judicial demand.*

1) *In general.*

1. Where a judgment is rendered in the State of Mississippi, and barred by the statute of limitation, but is subsequently revived by a judgment on a writ of *scire facias*, the prescription of ten years in this State, is interrupted by such judgment. 15 A. 150, *Morton v. Valentine*.

2. A suit brought against the acceptors of a bill of exchange, does not interrupt prescription as to the drawer and indorser. 15 A. 168, *Corning v. Wood*.

3. Citation on the drawers will interrupt prescription as to the surety. See OBLIGATIONS, VIII. (e), No. 15.

4. Prescription is interrupted by a stay of proceedings. 16 A. 306, *McRae v. His Creditors*.

5. Service of the notice of seizure on the widow, who is not administratrix, does not interrupt prescription as to the succession. 18 A. 44, *Succession Virgin*.

6. Proceedings in executory process interrupts prescription. 20 A. 192, *Walker & Co. v. Lee*.

7. Service of the notice of seizure, issued in executory proceedings, on the defendant, interrupts prescription. 22 A. 152; 20 A. 192, 24; 23 A. 215, 427; 21 A. 155, 32.

8. Notice of demand and seizure in executory process, are of no avail when served after prescription has accrued. 21 A. 155, *Mann & Co. v. Norton*.

9. Service of the notice of seizure, in executory proceedings, on the attorney appointed to represent the absentee, interrupts prescription. 23 A. 687, *Williams v. Douglass, sheriff*.

10. Citation, accompanied by a petition in English only, served on one whose native language is French, will interrupt prescription. 21 A. 651, *Leon v. Bouillet*.

11. A waiver of citation by an attorney at law, long prior to the filing of the petition, will be considered as having effect only on the day of filing. 24 A. 523, *Powell v. O'Neill*.

12. The absentee, through his curator, not being cited, and no appearance being made on his part, the judgment cannot be, as to the defendant, a personal one, but a proceeding *in rem* to foreclose a mortgage, which did not interrupt prescription. C. C. 3482, 3484, 3516, 3517; 2 A. 927; 6 R. 142; 23 A. 215, *Roubieu v. Champlin*.

13. A citation, though omitting the capacity of the defendant, as adminis-

trator, is sufficient, if the defendant answers in his said capacity, even if prescription had accrued before the answer was filed. 24 A. 382, *Elmore v. Ventress*.

14. One who qualifies, as natural tutrix of her minor children, becomes necessarily administratrix of the estate of her husband, and a suit as such by her, will interrupt prescription. 25 A. 119, *Locke v. Barrow*.

15. The service of a rule on the sureties of the sheriff to hold them liable, does not interrupt prescription. 6 R. 142; 2 A. 297; 25 A. 360, *Hugh v. Hernandez et al.*

16. Service of a petition and citation, issued by a *de facto* clerk, who is in possession of the office, will interrupt prescription, although the governor granting him the commission, had no such authority at the time. 26 A. 274, *New Orleans Canal Banking Co. v. Tanner, ad'r.*

17. A suit instituted in a court without jurisdiction, interrupts prescription. 27 A. 70, *Sorrel v. Laurent*.

18. Prescription is interrupted whenever the suit is filed in time, although material allegations are afterwards supplied by an amended petition. 27 A. 715, *McCubbin v. Hastings*.

19. Service of a rule on the administratrix, to file an account, will interrupt prescription on the claim of the creditor. 27 A. 688, *Succession Walter Winn*

20. The placing of a claim on the tableau, interrupts prescription. 27 A. 600, *Duckworth v. Vaughn*.

21. One cannot sue, when not the owner, for the benefit of others, so as to interrupt prescription on the claim for damages. 28 A. 412, *Lieberman & Co. v. New Orleans, Florida and Havana Steamship Company*. See PLEADING, I. (c), 9), Nos. 6, 7, 8, 9.

22. A demand by the ward against his tutor, for acts of tutorship, which is dismissed because not stated as a demand for an account, will interrupt prescription. 29 A. 722, *Lay v. Succession O'Neil*.

23. No prescription can accrue for the damages sued for, during the pendency of the suit, although this lapse of time was seven years, or more. 28 A. N. R., *Woods v. City of New Orleans*. See (a), No. 8.

24. Prescription against a judgment can only be interrupted by a suit to revive. 28 A. 615, *Smith v. Palfrey*. See No. 28.

25. Article 3519 (3485), of the Civil Code, declares that a legal interruption of prescription shall be considered as having never happened, if the plaintiff, after having made his demand, abandons or discontinues it, but this article contemplates a voluntary, active, and intentional abandonment of the suit, and not such an abandonment as might be implied from the absence or default of the plaintiff at the time of the trial. 24 H. 553, *Gaines v. Hennen*. See 4), No. 1.

26. Article (3503) of the Civil Code declares, that "the action for arrearages of rent charge, annuities, and alimony, or the hire of movables or immovables," shall be barred by the prescription of three years; but this prescription does not apply to rights which result from the determination of another action. For example, when a suit has been brought for the recovery of real estate, and the defendant is decreed to have held the property in bad faith, the right to sue for the fruits and the revenues of the immovables, and consequently, the prescription applying to such a suit, may be considered to have been suspended during the pendency of the main action. 15 Wall, 624, *New Orleans v. Gaines*.

27. For suspension of delays for appeal, see APPEAL, I. (f).

28. The institution of a suit for the amount due by the judgment debtor, in another court, is not an action to revive. See JUDGMENT, XVI. No. 2. See No. 24.

29. Citation to revive a judgment, served on the discharged bankrupt, does not interrupt prescription. See JUDGMENT, XVI. Nos. 12, 13.

30. A citation to revive a judgment, which does not contain the number of days the defendant is called upon to answer, will interrupt prescription. 30 A. 818, *Martinez v. Succession Vives*.

2) Hypothecary action.

1. In a suit of the Consolidated Association of the Planters to enforce a mortgage, no call in warranty can be made; no peremption can be urged; no prescription pleaded. 27 A. 534, *Consolidated Association v. Mason et als.*; acts 1828, p. 32; charter of 1827; act 1842, amending article 3333 C. C.

2. The action may be exercised during the existence of the mortgage. See III. (g), 2), No. 3.

3) Actions by one of several obligees, or against one of several obligors.

1. Co-trespassers being bound *in solido*, service of citation on one of them interrupts prescription as to all. C. C. (2092), (3517); 21 A. 541, *Frazier v. Hardee*.

2. Judicial pursuit as to the principal, interrupts prescription as to the surety. 27 A. 78, *Cohen & Wilson v. Golding*; 9 A. 174; 12 A. 667; 2 A. 916, 970; 5 A. 551; 14 A. 144; C. C. 2097, 3553.

3. MORGAN, J., *dissenting*: Prescription is not interrupted as to the surety. 4. A suit brought against the acceptors of a bill of exchange, does not interrupt prescription as to the drawer and indorser. 15 A. 168, *Corning v. Wood*. See OBLIGATIONS, VIII. (e), No. 15.

5. When a suit is brought against two debtors, bound *in solido*, and service of citation is made on one only, prescription in favor of the other is suspended, during the pendency of the action against the one who is served, and is not merely interrupted by the service. 2 Woods, 156, *Ellery Wendt & Co. v. Brown & Co.*

4) Abandonment which nullifies the interruption.

1. A judgment of non-suit, rendered on motion of defendant's counsel, when the counsel for plaintiff declines to go into the case, is not such an abandonment of the action as is contemplated by article (3485), C. C., and prescription is considered as interrupted during the pendency of the action. 16 A. 95, *Price v. Emerson*; 10 A. 327. See 1), No. 25.

(d) *Acknowledgment of the creditor's rights.*

1) In general.

1. A note addressed to a physician, stating that his account had been examined and the charges found to be exorbitant, coupled with a refusal to pay, is not a sufficient acknowledgment to interrupt the prescription of such an account. 15 A. 135, *Stewart v. Watts*.

2. The defendant having pleaded part payment, acknowledges thereby that the balance of the debt is still due, and his plea of prescription must be overruled. 18 A. 652, *Elmore v. Robinson*.

3. Payment of one of a series of notes does not interrupt prescription as to the others. 20 A. 486, *Brown v. Johnson*.

4. The answer of defendant, on presentation of the note, "that he would attend to it," does not interrupt prescription. 22 A. 328, *Marquez & Co. v. Bloom, Kohn & Co.*

5. An offer to pay in Confederate notes does not interrupt prescription of the note. 22 A. 478, *McCranie v. Murrell*.

6. Nor does an offer to compromise and avoid a law suit. *Ib.*

7. The proposition of defendant to pay the principal of the note was a recognition which interrupted prescription. A promise to pay the debt is not necessary. 23 A. 252, *Walker v. Cruikshank*.

8. A promise to pay, made after prescription has accrued, creates a new debt binding on the deceased, but does not renew the mortgage, so far at least as third persons are concerned. C. C. 3285; 23 A. 456, *Succession Kugler*.

9. An acknowledgment in the following words is not sufficient to prove an interruption of prescription: "For the sum of money that I will be able to pay you only (annually ?) it wouldn't pay you to come after it." 23 A. 621, *Ross v. Adams*.

10. It is the acknowledgment which interrupts prescription. 23 A. 783, *Betzer v. Colman et als.*

11. A note given for interest on a mortgage claim already prescribed, cannot be construed as a renunciation of prescription. 25 A. 486, *Seyburn v. Deyris*; 23 A. 621; R. S. 2821.

12. A letter to the following effect, addressed by the debtor to his creditor, interrupts prescription: "I cannot this year pay my debt. I hope to make a better crop next year. Therefore please grant me one year, by paying you interest, at the maturity of this note." 25 A. 512, *Banker v. Durand, Jr.*

13. Also the following: "Yours of —, in which you request payment of my notes, came to hand, etc. I will soon be with you, and will exert myself to answer your demand." *Ib.*

14. "It is impossible for me to pay my note before * * * I will be able to pay my note on the first of * * * and not before," written by the drawer to the attorneys of the holder, interrupts prescription. 27 A. 70, *Sorrell v. Laurent.*

15. Where the interruption of prescription on the note is shown by proof of partial payment, and of the date when it was made, the plea of prescription should be overruled. 20 A. 427, *Gordon, syndic v. Schmidt*; 12 A. 661, 82.

16. Payments made in Confederate money, interrupt prescription. 28 A. 584, *Dupré v. Lumpkin.*

2) Acknowledgment by parties acting in *autre droit*; to whom to be made; when in writing; and change of prescription.

1. The proof must be direct and unambiguous, to establish an interruption by the acknowledgment of the debt by the administrator, curator, etc. 18 A. 219, *Succession Philbrick.*

2. The acknowledgment of a warrant by the parish treasurer, will not interrupt prescription, and does not bind the parish. 22 A. 71, *Hynes v. Madison Parish.*

3. When the executor writes on the notes, the words: "*presented and allowed, and will be paid in the settlement of the estate,*" in compliance with article 985, C. P.; *Held*: That this interrupts prescription. 22 A. 85, *Sevier v. Succession Gordon.*

4. No recognition of the creditor's rights can be inferred from a payment made by a third person on a note, without the authority express or implied, of the debtor. 4 A. 509; 22 A. 445, *Smith v. Coon.*

5. An acknowledgment signed by the administratrix, in her individual name, is admissible to prove an interruption against the estate she represents. 23 A. 184, *Warren & Crawford v. Childress.*

6. The list of creditors filed by an administratrix, for the purpose of convoking them into a meeting, is not an acknowledgment of their claims, and does not interrupt prescription. 28 A. 615, *Smith v. Palfrey.*

7. Prescription is interrupted by payments of the interest, made by each subsequent purchaser, for the benefit of the former. 24 A. 292, *Levy v. Police Jury Pointe Coupée.*

8. Prescription is not interrupted by an account filed, and upon which plaintiff's claim has been put down, presented without authority of the representative of the succession. 26 A. 206, *Succession Pipes.*

9. It is not sacramental that the administrator should write his approbation upon the evidence of the claim, or on a paper, which he shall annex to it. A letter recognizing such claim is sufficient, and prescription is interrupted thereby. 16 A. 261, *Succession Yarborough.* See INTEREST, No. 10.

3) Acknowledgment by one of several debtors.

1. One can interrupt prescription as to all the other parties, who are bound *in solido*, even after the dissolution of the partnership. 15 A. 671, *Carroll v. Gayarré.*

2. The acknowledgment of a surety not bound *in solido*, does not interrupt prescription as to the principal. 21 A. 660, *Succession Voorhies.*

3. A payment on a note, made by the purchaser, who retained in his hands the amount due to the original vendor, and who has assumed to pay the note, will interrupt prescription, as to both himself and the original debtor. 21 A. 523, *Cockfield v. Farley*; 12 R. 399.

4. An acknowledgment of the obligation entered upon the note by the drawers, who were also indorsers, does not interrupt prescription as to the other indorsers. 22 A. 130, *Citizens' Bank v. Murdock*.

5. Payment by a surety, does not interrupt prescription as to the principal. 21 A. 659, *Succession Voorhies*.

6. The acknowledgment of one of the solidary obligors, interrupts prescription as to the others. 30 A. 494, *Boullt v. Sarpy*.

V. OF THE SUSPENSION OF PRESCRIPTION.

(a) *In general, absentees and the rule contra non valentem agere, non currit præscriptio.*

1. The doctrine of the interruption of prescription, is not admitted at common law to the extent it is allowed by the civil law; the maxim there, is, that when the statute of limitation has once commenced to run, it never stops on account of any subsequent inability. But by the law of Mississippi, an exception is made to this general rule in favor of the first absence of the debtor from the State, at the time of the accruing or after the accruing of the action, which is alone to be deducted. 15 A. 281, *Mandeville v. Huston*.

2. Where there is no allegation or proof that the foreign debtor had changed his domicile, and that the same was unknown to the creditor, or that the creditor could not, on account of some other obstacle, have instituted an action at the domicile of the debtor, the maxim, *contra non valentem agere non currit præscriptio*, will not apply. 15 A. 399, *Norton v. Sterling*.

3. A change of residence openly and publicly made from one State to another, does not create a case for the application of the maxim, *contra non valentem agere, non currit præscriptio*. 16 A. 347, *Canal Bank v. Beard*.

4. The redhibitory action having been commenced immediately by plaintiff, when he ascertained that the defendant had property and was represented by an agent, although more than a year had elapsed since the discovery of redhibitory defects, will be maintained by the equitable rule "*contra non valentem agere non currit præscriptio*." 17 A. 270, *Murphy v. Gutierrez*.

5. The maxim, *contra non valentem agere non currit præscriptio*, cannot be recognized. 20 A. 280, *Payne & Harrison v. Douglas*; 131, *Rabel v. Pourciaux*; 363, *Payne & Harrison v. Douglas*. But see III. (c), 2), No. 4.

6. The maxim, *contra non valentem*, does not suspend the prescription on a note. 20 A. 413, *Marcy v. Steele*; 131; 427, *Lemon, tutrix v. West*.

7. The maxim, *contra non valentem agere non currit præscriptio*, is not recognized by our code. 21 A. 76, *Smith v. Stewart*; 106, *Mechanics' and Traders' Bank v. Saunders*.

8. The maxim, *contra non valentem agere non currit præscriptio*, forms no part of our written law, and the plea of prescription will be maintained where ten years had elapsed from the rendition of the judgment to the day of citation on defendant for a revival, although the place where the court held its sitting was in the power of the Confederate States, and the defendant resided in the Federal lines, during the last year of accruing prescription. 21 A. 126, *Bartley, Johnson & Co. v. Succession Bosworth*.

9. A certificate of stock, pledged by the owner to the corporation, to secure the payment of a note, operates as a standing interruption of prescription. 21 A. 128, *Citizens' Bank v. Johnson*.

10. Where the creditor held the property of the debtor, by consent, as security for the debt, there is a tacit acknowledgment of the existence of the debt as long as the pledge is held. 22 A. 107, *Police Jury v. Duralde*.

11. In case a third party is subrogated to a debtor who has pledged his stock to a bank to secure his note, the third party assumes all the obligations of the debtor, and as to him prescription is continually interrupted by the pledge of the stock. 22 A. 117; 21 A. 128; 23 A. 294, *Citizens' Bank v. St. Amans*.

12. Prescription is suspended while the creditor holds collaterals pledged by the debtor. 23 A. 199, *Blanc v. Hertzog*; 22 A. 107; 22 A. 117, *Citizens' Bank v. Knapp*.

13. Prescription is not interrupted, although the defendant was in the Confederate army during the whole war. 19 A. 187, *Hutchinson v. Richardson*.

14. That the war of the rebellion did not suspend prescription, is no longer an open question. 22 A. 111, *Jacquet v. Webb, Levert & Co.*

15. Prescription is not interrupted because plaintiff resided in the Confederate, and defendant in the Federal lines, during the war. 23 A. 553, *Perret v. Lee*.

16. The war suspended prescription, whenever the debtor and creditor resided, the one within, and the other without, the Federal lines. 24 A. 31, *Auchincloss v. Frois & Co.*; 30 A. 673, *Sewell v. Mc Vay*.

17. The act of congress, of June 11, 1864, suspended prescription, as between persons residing in the Federal and Confederate lines. 28 A. 841, *Aby, etc. v. Brigham*; 18 Wall. 151; 11 Wall. 244, 493, 508; 12 Wall. 700.

18. Where more than five years elapsed after the maturity of the note, before service of citation, the plea of prescription must be sustained. 23 A. 748, *Stewart & Co. v. Bloom, Kohn & Co.*

19. Not where a part of the time ran, after the act suspending prescription in certain cases, had been passed by congress. 11 Wall. 493, *Stewart v. Bloom, Kohn & Co.*

20. The act of congress suspending prescription during the war, does not apply where the residence of the parties is in this State and within the Federal lines. 24 A. 184, *Miltenerberger v. Witherow*.

21. The act of congress, of June 11, 1864 (13th Statutes at Large, 123), declaring, "that the time during which the war continued should be deducted from the estimate," can have no retroactive effect, and the deduction to be made must commence from the date it went into operation. 24 A. 566, *Harrison v. Succession Adger*.

22. The deduction must be made for time elapsed before, as well as after the passage of the act. 11 Wall. 493, *Stewart v. Kahn*.

23. The act is binding on the State courts; a decision rendered contrary thereto, will be reversed. *Ib.* See No. 26.

24. The plaintiff could have availed himself of the last days necessary to complete prescription, but failed to do so; the suspension previously occurring will be of no avail. 20 A. 131, *Rabel v. Pourciau*; 423, *Norwood v. Mills*; 21 A. 109, *Jackson v. Yoist, administrator*.

25. As the statutes of limitation were suspended in Louisiana during the war, a note payable January 28th, 1860, was not prescribed when the plaintiff, the executors of the payee, made a legal demand on the defendant by instituting action, January 5th, 1870. The defendant, by paying the note at that time could, therefore, have been subrogated, and could have maintained suit against the maker in their names. 93 U. S. (Otto's), 96, *Bird et als., executors v. Louisiana State Bank*.

26. Prescription did not run in Louisiana during the war, and while the remedy was suspended, the decisions of the Supreme Court of Louisiana, to the contrary, are not satisfactory, and therefore not followed. 11 Wall. 244, *Levy v. Stewart*. See No. 23.

(b) Obligations subject to a term or condition.

1. Where a party's service was employed, on the express promise that he was to inherit a portion of the estate of his employer; *Held*: That prescription was suspended in favor of the employee, until the death of his employer. 15 A. 528, *Copse v. Eddins*.

2. Where the interest on a note, made with the privilege of renewal, for a certain period of time, has not been paid during five years, prescription will accrue. 22 A. 252, *Bernard v. Ledet*.

3. A note became due, but could not be collected until a certain mortgage should be raised by the payee; the supervision ceased, as soon as it became in

the power of the payee to raise the mortgage, and collect the note. 23 A. 211, *Taylor, adm'r v. Robertson*.

4. See OBLIGATIONS, VIII. (c).

(c) *Minors, and claims of married women against persons other than their husbands.*

1. Minority suspends prescription. 23 A. 447, *Beeklain v. Henderson*.

2. The prescription of the tutor's account against the minor, does not run as long as the claims of the minor against him exists. 23 A. 683, *Tutorship of Hewitt*.

3. Prescription does not run against a minor, in favor of the tutor, during tutorship. 30 A. 673, *Sewell v. McVay*.

4. See MINORS, VII.

(d) *Claims between married persons; estates, vacant, and under administration.*

1. Prescription does not run against a beneficiary heir, with respect to the debt due him by the estate, from the time of the express acceptance under benefit of inventory. The interval between the opening of the succession and the acceptance, must be computed. 19 A. 152, *Viola v. Burguieres*.

2. Prescription of a claim against an estate, when acknowledged by the administrator, is suspended as long as the administration is not terminated. 30 A. 858, *Renshaw v. Stafford*.

3. See MARRIAGE, XIII. (e), 4), E.

4. Prescription does not run in favor of the husband, and against the wife, during marriage. 30 A. 673, *Sewell v. McVay*.

VI. OF THE RENUNCIATION OF PRESCRIPTION; AND BY WHOM IT MAY BE PLEADED.

1. The drawer, who provides in writing for the payment of a note, after prescription has accrued, renounces thereto. 17 A. 255, *Succession Ferguson*.

2. A waiver of prescription and promise to pay, with full knowledge that prescription has been acquired, will bind the debtor. 20 A. 156, *Gauche v. Gondran*.

3. A simple acknowledgment, and not a positive promise to pay a debt when prescription is acquired, such as a promise to pay one-half, is not a renunciation of the prescription. 25 A. 476, *Frellsen & Stevenson v. Gantt*; 21 A. 275; C. C. 3461.

4. An executor cannot renounce prescription, which has been acquired. 21 A. 373, *Sevier v. Succession Gordon*.

5. The administrator has no authority to renounce prescription, even by the most solemn written act. 21 A. 373; 22 A. 445, *Smith v. Coon*.

6. When prescription has accrued, it requires under act No. 148, of 1858, a written promise of the debtor to pay the debt, in order to revive the obligation. 21 A. 740; 23 A. 173, *Areaux v. Mayeux*.

7. The executor has no authority to renounce an acquired prescription. 21 A. 373, 748; 23 A. 194, *Flanner v. Lecompte*; 24 A. 83, *Dickson v. Succession Compton*; 25 A. 492, *Millard v. Smith, adm'r.*; 26 A. 380, *Villeré v. Villeré*.

8. The tutor cannot revive against his ward, a debt which is prescribed. 29 A. 798, *Clement & Tremoulet v. Sigur*; C. C. 3462.

9. A renunciation of prescription, after it has been acquired, cannot affect subsequent mortgages. See MORTGAGE, VII. No. 9. SALE, VI. (c), No. 7.

10. See SUCCESSION, VIII. (f), 5), A. MINORS, III.

VII. OF THE RULE QUÆ TEMPORALIA SUNT AD AGENDUM, SUNT PERPETUA AD EXCIPIENDUM.

1. The above rule cannot relieve the defendant in an action for the erasure of a mortgage, on the ground that the note is prescribed. The rule is intended as a shield, as when a purchaser sued for the price of property, may set up a

redhibitory defect, deficiency in quantity, and the like, although the right of a direct action arising from such, may be prescribed. 23 A. 68, *Lastrapes v. Rocquet*.

2. Nor does it apply, so as to interrupt prescription against a claim for damages set up in reconvention by the railroad company after a year, against the plaintiff, who claims the value of a horse killed by a locomotive. 16 A. 140, *Harris v. N. O., O. & G. W. R. R. Co.*; 3 A. 141; 12 A. 116.

3. Article (3505) Civil Code, governs the maxim *contra non valentem agere non currit præscriptio*. 22 A. 111, *Jaquet v. Webb, Levert & Co.*

4. Where plaintiff and defendant were indebted simultaneously to each other, no prescription accrues on their debts, which are extinguished by compensation. 17 A. 246, *Millaudon v. Lesseps*.

VIII. OF THE LAWS GOVERNING PRESCRIPTION; THEIR CONFLICT, AND THE MODE OF COMPUTING PRESCRIPTION.

1. Domestic judgments rendered anterior to the passage of the act of the legislature of 1853, cannot be barred under that statute, before the lapse of ten years from its promulgation. 15 A. 649, *Succession of Rice*.

2. When the law is changed, after prescription begins to run, the time elapsed before the change is to be computed according to the old law, and that which follows, according to the new. 6 L. 660; 11 L. 57; 10 A. 583; 21 A. 111, *Fisk v. Bergerot*; 18 A. 602, *Whitworth v. Ferguson*.

3. Under the revenue act No. 55, of 1865, the privilege for taxes continued for two years, from the first Monday of July, of the year for which the taxes were assessed; under the revenue act of 1868, to take effect on the first of January, 1869, the lien was extended to five years; in computing the time required for prescription, the time yet unexpired on the first of January, 1869, must be increased in the same ratio. 26 A. 117, *Dunlop & McCance v. Minor et al.*

4. The prescription of a judgment rendered in a country parish, commences to run, not from the day of its rendition or of its signing, but from the day when it began to have effect, that is, the last day of the term. 29 A. 518, *Broussard v. Dupré*. See APPEAL, I. (b), 1), Nos. 4, 5.

5. Prescription against lawyers' fees commences to run from the date their services cease. 24 A. 230, *Hyams and Jonas v. Rogers, tutor*.

6. Prescription against the action for the dissolution of a sale for non-payment of the price, commences to run from the failure to pay the first installment. 28 A. 598, *Gonsoulin v. Adams & Co.*; 23 A. 355. See SALE, VI. (c), Nos. 8, 11, 12, 13.

7. Prescription of an obligation to pay attorney's fees, in case of suit, on the mortgage note, commences to run from the day payment was exigible. 28 A. 609, *Allan v. McWaters*.

8. How prescription is computed under certain clauses of a policy of insurance, see INSURANCE, No. 7.

9. Prescription commences to run from the day of the wrongful seizure, See OFFENSES AND QUASI OFFENSES, II. (f). No. 1.

10. When the prescription for offenses and quasi offenses commences to run, see PRESCRIPTION, III. (c), 3).

11. Prescription commences from the time of eviction. 17 A. 44, *Friedlander v. Bell*.

12. When prescription of judgments commence. See PRESCRIPTION, III. (g), 1).

13. Prescription commences to run in favor of the heirs of an administrator from his death. See PRESCRIPTION, III. (g), 3), No. 10.

14. Inability to sue. See III. (g), 3), Nos. 20, 21, 22.

15. The right of the usufructuary to demand re-imbursement of sums advanced, to pay debts, does not arise until the expiration of the usufruct. Prescription commences to run only then. 30 A. 374, *Succession Dougart*.

16. Prescription in favor of the sheriff and his sureties for money collected by the former, will commence to run from the day the first demand is made for the money. 30 A. 486, *Soulié v. Norwood, ad'r*.

17. Prescription of a claim which has been acknowledged by an administrator, curator, etc., commences to run when the administration terminates. 30 A. 858, *Renshaw v. Stafford*.

PRINCIPAL.

1. For principal and agent, see MANDATE.
2. See CRIMINAL LAW, V. (d); VI. (f). EVIDENCE, XII. (d). JUDGMENT, XV. (a), 3). LOAN, III. OBLIGATIONS, VIII. (g). PAYMENT, III. SURETYSHIP.

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PRIVILEGE.

I. IN GENERAL.

II. OF GENERAL PRIVILEGES.

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| (a) <i>Law charges.</i> | (c) <i>Homestead privilege.</i> |
| (b) <i>Wife's privileges.</i> | (d) <i>Other general privileges.</i> |

III. OF SPECIAL PRIVILEGES.

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| (a) <i>Lessor's privilege.</i> | (d) <i>Privilege of the factor and consignor.</i> |
| (b) <i>Vendor's privilege.</i> | |
| 1) In general. | 1) Consignor's privilege. |
| 2) Duration, waiver and extinction. | 2) Factor's privilege. |
| A. <i>In general.</i> | A. <i>In general.</i> |
| B. <i>Movables.</i> | B. <i>Plantation supplies.</i> |
| C. <i>Immovables.</i> | |
| 3) Laws by which governed and their conflict. | (e) <i>Overseer's privilege.</i> |
| | (f) <i>Privileges on buildings.</i> |
| (c) <i>Privileges on vessels; and merchandise for freight.</i> | (g) <i>Privileges springing from the contracts of deposit, mandate and pledge.</i> |
| 1) Privilege on merchandise for freight. | (h) <i>Privileges for improvements on lands.</i> |
| 2) Privileges on vessels. | (i) <i>Other special privileges; and right of retention.</i> |
| A. <i>In general.</i> | |
| B. <i>Duration, waiver and extinction.</i> | |
| C. <i>Laws by which governed and their conflict.</i> | |

IV. OF THE CONFLICT AND RANK OF PRIVILEGES.

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| (a) <i>In general.</i> | (b) <i>Charges of insolvent and mortuary proceedings.</i> |
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V. OF THE PRIVILEGE OF THE STATE; AND PRIORITY OF THE UNITED STATES.

VI. OF THE REGISTRY OF PRIVILEGES.

I. IN GENERAL.

1. The right of creditors to privileges on property within our jurisdiction, must be determined by the *lex fori*, and not by the *lex loci contractu*. 15 A. 22, *Owens v. Davis*. See III. (d), 2), B. No. 10.
2. Persons who have advanced money towards the purchase of slaves, acquire no privilege. 16 A. 107, *Gause v. Bullard*.
3. Privileges being *stricti juris*, can be recognized only in cases where they are clearly established by law. 23 A. 3, *Succession Rousseau*; 16 A. 107, *Gause v. Bullard*.
4. Privileges cannot be given by consent. 24 A. 568, *Hoss et al. v. Williams*.
5. Privileges exist independently of the judgment. See JUDGMENT, I. No. 13.

II. OF GENERAL PRIVILEGES.

(a) *Law charges.*

See SUCCESSION, VIII.

(b) *Wife's privilege.*

See MARRIAGE, XI. MORTGAGE, IV. (c), 1); 2); 3).

(c) *Homestead privilege.*

See HOMESTEAD. PRIVILEGE, IV.

(d) *Other general privileges.*

See HOMESTEAD, I. SUCCESSION, VIII. SHIPPING.

III. OF SPECIAL PRIVILEGES.

(a) *Lessor's privilege.*

1. The goods or effects of the sub-lessee, found on premises that are leased, are only subject to the privilege of the lessor to the extent of the sub-lessee's indebtedness to the principal lessee; but when such goods are seized by the lessor for rent due him, and the sub-lessee does not disclose the title under which he occupies the premises, the privilege of the lessor will cover the goods for the whole amount of rent due. 15 A. 229, *Simon v. Goldenberg*.

2. The effects of a sub-lessee who owes no rent to the lessee, cannot be seized by the landlord, and if they be sold during his absence, he may recover their value. 18 A. 718, *Kittridge & Co. v. Ribas*; 15 A. 229, *Simon et al. v. Goldenberg*; 5 R. 352.

3. When the sub-lessee and the lessee combine, so as to defeat the rights of the seizing creditor of the sub-lessee, by confessing a judgment in favor of the lessor, for the whole amount of the lease, the lessee will be compelled to pay to the seizing creditor, whatever surplus was received by the lessor, over the amount due by the sub-lessee for rent. 19 A. 154, *Simon v. Leopold*; 15 A. 229.

4. The lessor has the first privilege on the movables contained on the plantation, excepting the crop, on which the laborers and overseer have a preference. 19 A. 112, *Duplantier v. Wilkins*.

5. The lessor of a plantation has no privilege on sugar and molasses manufactured for third parties, from cane grown on another plantation. 18 A. 653. *Lesseps v. Ritcher*.

6. Raw sugar, belonging to third persons, found in the refinery, to be manufactured, cannot be seized for rent. 28 A. 93, *John Coleman v. Fairbanks & Gullman*; *Cavaroc & Son, intervenors*. See PARTNERSHIP, I. (c).

7. The mere occupation of property does not necessarily imply the relation of lessor and lessee, and thus give rise to the lessor's lien and privilege. 19 A. 101, *Jordan v. Mead*; 11 R. 280; 7 A. 654; 17 A. 22.

8. One who buys mules, stock, etc., from a lessee, takes them subject to the lessor's privilege, and has no right to complain of their seizure for rent. 23 A. 340, *Davis v. Thomas*.

9. The lessor has not only a privilege, but a *right of pledge*, and therefore his lease need not be recorded. 23 A. 454, *Johnson v. Tacneau*.

10. The lessor has a privilege, for the payment of his rent, on all the movables found on the leased premises, whether belonging to lessees or planting partnership. 21 A. 553, *Hynson v. Cordukes*; 19 A. 112; 20 A. 266; 18 L. 193; 3 R. 52; 10 A. 627.

11. Agreements in the lease, whereby the lessee is to repair the premises, is secured by the right of pledge. 23 A. 612, *Warfield v. Oliver*.

12. The lessor's privilege on furniture contained in the house is preferred to the seller's; the former's provisional seizure, being released on bond, did not destroy the privilege. 23 A. 707, *Harrison v. Jenks*.

13. The landlord's right of pledge is lost as soon as the goods are removed from

the house leased, if they belong to third persons. 26 A. 513, *Sillman v. Short, Martin & Hall*; 530, *Hughes and Wife v. Caruthers*; 28 A. 432, *Bailey v. Quick*; 27 A. 87.

14. The effects of a third person removed from the leased premises, cannot be seized by the lessor, even within fifteen days of their removal. 27 A. 87, *Merrick, Race & Foster v. La Hache*.

15. The property of the lessee may be seized, and the lessor cannot prevent a sale by asserting his landlord's privilege and right of pledge; he must proceed by third opposition. 26 A. 482, *Case receiver v. Kloppenburg et al.* See III. (g), No. 3.

LUDELING, C. J. and WYLY, J., *dissenting*: The code means what it says, "the lessor may detain the effects until he is paid." C. C. 3218. *Ib.*

16. The lessor can have no privilege on a debt due to the lessee. 29 A. N. R., *Edwards v. Fairbanks & Gilman*.

17. The judge correctly charged that the lessor may take the effects upon the leased premises, and keep the same until he is paid; that his lien is as valuable as if he were the owner, and not even a sheriff or marshal can take away the property before paying the lessor his rent. 29 A. 213, *Cooper v. Capel*; C. C. 3185; 5 A. 112; 23 A. 605.

18. A covenant by a landlord to pay for improvements erected by a tenant, does not constitute a lien upon the premises, for the value of the improvements. 1 Woods, 221, *The Confiscation Cases*.

19. Where property subject to a landlord's lien, after being provisionally seized, is bonded on the condition that the surety shall be liable for whatever judgments may be rendered against the lessee, the bond containing no condition for the return of the property when called for, and subsequently the lessee removes to another house, where he remained for more than fifteen days, the last lessor will be entitled to the payment of his rent out of the proceeds of the furniture contained in the leased premises, by preference over the first landlord. 29 A. 465, *Conrad v. Patzelt*.

20. See LEASE, I. (d), Nos. 2, 3, 7.

21. If the effects provisionally seized be released by being bonded, and are subsequently sold by the lessee to an innocent third party, the lessor loses his privilege thereon. See PROVISIONAL SEIZURE, No. 6.

22. The lessor cannot seize any piano, organ, or other musical instrument hired for use, 1874, p. 112; see (b), 2), B. No. 7.

23. The lessor's privilege extends to the dry dock moored to the leased river front. 30 A.—, *Cochran v. Ocean Dry Dock Co.*; 5 A. 36; 6 A. 452.

(b) Vendor's privilege.

1) In general.

1. A sale for cash of agricultural produce, does not carry with it a vendor's privilege as to third persons who loan money on said produce, by virtue of a bill of lading obtained by the purchaser. 25 A. 83, *Delgado & Co. v. Wilbur*.

2. Where the seized debtor purchases his property on a twelve months bond, the creditor holding the bond, acquires no vendor's privilege; it is only an additional security. 25 A. 116, *Succession John Heitzler*. See EXECUTION, V. (d), 6), A. SALE, I. (c), No. 1.

3. The vendor who delivers to the vendee, in Germany, movables sold there, and shipped here, cannot recover, by preference, over the creditor who seized the goods, in the hands of the consignee. 25 A. 232, *Loeb & Co. v. Blum*. See SALE, III. (b), 3).

4. The vendor could only exercise his privilege by seizing the goods *in transitu*, before they had been reduced to the possession of the vendor, in case of the latter's insolvency. *Ib.* See SALE, III. (b), 3).

5. The privilege of the vendor extends to the buildings put upon the vacant lots, by the vendee. 25 A. 432, *Succession Bouvet*; 29 A. 355, *New Orleans National Bank v. Raymond*.

6. A note given in renewal of one secured by vendor's privilege, is not a novation of the debt. See NOVATION, II. No. 4.

7. The assumption of the vendor's debt as part of the price, gives to the creditor all the rights which the vendor could have exercised. See OBLIGATIONS, VII. (b), 1), No. 3.

2) Duration, waiver, and extinction.

A. In general.

1. A creditor loses his vendor's privilege when the property is sold confusedly with a mass of other things, and the proceeds become undistinguishable from the others. Privileges must be recorded to affect third person. 29 A. 714, *Succession of C. L. B. Bofenschen*.

B. Movables.

1. The vendor's privilege on movables, can only be enforced while the goods are in possession of the vendee. 20 A. 545, *Elkin v. Harvey*; 557, *Flint & Jones v. Rawlings*.

2. A sale of personal property, without actual delivery, will not defeat the vendor's lien. 20 A. 557, *Flint & Jones v. Rawlings*.

3. The vendor who identifies the goods sold by him, and not paid for, has a vendor's privilege, and may claim them back in kind, under C. C. (3196), within eight days of delivery. 19 A. 491, *Burkett, agent v. Hopson*.

4. If the vendor permits the movables on which he has a privilege to be sold confusedly with other articles, and moreover has failed to record his privilege, it will be lost. 29 A. 714, *Succession Bofenschen*.

5. At common law there is no vendor's privilege on movables. See III, (b), 3), No. 1.

6. The vendor, for cash, of produce, who accepts a security for the price, waives the five days vendor's privilege. 30 A. 147, *Musson v. Elliott*.

7. Pianos and sewing machines liable to seizure, for vendor's privilege. Acts 1877, E. S., p. 102; see (a), No. 21.

C. Immovables.

1. By reason of payment of the water works in city bonds, which must be considered equal to currency, no vendor's privilege exists on the water works. 27 A. 286, *Smith & Co v. City of New Orleans et als*. See WATER WORKS.

2. Boilers attached to the sugar house, with brick and mortar, may be seized separately by the vendor, to satisfy his judgment and privilege. See EXECUTION, V. (a), 4), No. 5.

3. The privilege of a furnisher of materials, cannot be enforced by a separate sale of the building. See PRIVILEGE, III. (h), No. 1. EXECUTION, V. (a), 4), No. 14.

4. Pending a devolutive appeal, plaintiff issued execution, and bought the property of defendant, subsequently it was sold to a third person; the judgment on appeal was reduced; *Held*: That plaintiff owed defendant the difference between the amount of his adjudication and that of his judgment, secured by no vendor's privilege, unless the same be recorded. See REGISTRY, II. (a), 1), No. 7.

3) Laws by which governed, and their conflict.

1. The vendor's privilege on movables is unknown to the common law. Movables have no situs. The parties to the contract being citizens of a common law State, even if the movables were in this State at the time of the contract, no privilege exists. 16 A. 158, *Brent v. Shouse*; C. C. 10; 8 M. 98; 2 A. 984; 2 A. 335.

2. The vendor's privilege on produce sold in the market, should be recorded. 29 A. 176, *Chaffraix & Agar v. Price, Hine & Tupper*. See REGISTRY, II. (a), 1).

(c) Privileges on vessels; and merchandise for freight.

1) Privilege on merchandise for freight.

1. This privilege should be recorded. See REGISTRY, II. (a), 1), No. 13. SHIPPING, X.

3) Privilege on vessels.

A. In general.

1. Where the judgment has been rendered in favor of partnership creditors against all the part owners of a steamer, whether they were creditors by privilege, or not, for their respective claims against the boat, they become privileged creditors of each of the part owners for the amount of costs recovered, and these costs form a privilege debt upon the proceeds of the steamer, superior to that of the individual attaching creditors. 15 A. 22, *Owens v. Davis*.

2. Plaintiff, who is obliged to pay, in addition to the full freight paid to defendant, a freight to other carriers for transporting the goods to their destination, under the first contract, has a privilege under article (3204) C. C., for the additional amount paid. 16 A. 172, *White v. Steamer Kate Dale*.

3. No privilege exists on a boat for money advanced to defray the expenses of a trip, in accordance with a contract between plaintiff and defendant, where the profits were to belong to plaintiff. No sequestration can, therefore, issue on such a claim. 27 A. 448, *Welton v. Burton et als*. See SEQUESTRATION, II. (a).

4. A general creditor of a ship has no lien on the vessel. 1 Wood, 99, *Maxwell v. The Powell*.

5. An admiralty lien does not exist for materials and supplies furnished to a vessel in her home port. See LIEN, No. 1.

6. A person who makes a parol contract for the purchase of a share in a vessel, and receives, jointly, with the other owners, possession of the vessel, cannot acquire a lien upon her for maritime services. 1 Woods, 284, *Dowling v. Reliance*.

7. A ship carpenter, who deposits, for safe keeping, money and other valuables, with the captain of a steamboat, on which he is employed, has no lien upon the boat. 1 Woods, 290, *Smith v. The Royal George*. See DEPOSIT, III. PRIVILEGE, III. (g).

8. The owner of an old and decayed boat, employed libellant, who was a ship carpenter, to assist in building for him the hull of a new boat, and after it was completed, dismantled the old boat, and used some of its materials in fitting up the new one; *Held*: That libellant had no lien on the new boat for his wages. *Ib*.

9. A stevedore has no maritime lien upon a ship for his services in loading and stowing her cargo. 2 Woods, 229, *Paul v The Bark Nex*.

10. Advances to equip a vessel, made in a foreign port, carry a lien on the ship. See INSURANCE, I. (b), Nos. 5, 6.

11. The forced sale of a part owner's share, does not transfer the privilege resting on the ship, to the proceeds. See PLEADING, VIII. (d), 2).

12. See SHIPPING, I; II; IV.

B. Duration, waiver and extinction.

1. A credit given by the repairers of a ship in Louisiana, beyond the time when the ship would, in all probability, leave the State, is an implied waiver of the repairers' lien upon the ship. 7 P. 324, *Peyroux v. Howard*.

2. A note taken by a pilot, and a receipt in full of his account, novates his debt. See NOVATION, II. No. 11.

C. Laws by which governed, and their conflict.

1. Our law grants no privilege for money advanced to the master of a steamboat. 15 A. 22, *Owens v. Davis*.

(d) Privilege of the factor and consignor.

1) Consignor's privilege.

1. One making advances on consignments, cannot be required to forward the goods to third persons subsequently, and thus be deprived of their privilege. 17 A. 12, *Bowler & Co. v. Connolly & Co*.

2. The privilege of the consignees for money advanced and freight paid, and who are in possession through their agents, is superior to that of creditors who attached in the hands of such consignees. 21 A. 366, *Maxen, etc. v. Landrum, etc.* See IV. (a).

3. Act of 1841, amending article 3214, has not been repealed by act 1867, amending 3184 C. C. The two sections are entirely distinct; an amendment of one is not an amendment of the other. 23 A. 367, *Buddecke & Co. v. Spence*.

4. The proceeds of the crop paid to the merchant who made advances to raise the same, will be imputed to said indebtedness, in preference to a pre-existing one. 25 A. 71, *Given, Watts & Co. v. Alexander*. See PAYMENT, III.

5. The consignee's privilege should be recorded to have preference over a seizing creditor. 25 A. 233, *Loeb & Co. v. Blum*. See VI.

6. Other creditors of the planter may seize the property consigned to the commission merchant, although he may be in possession of the bill of lading and have a privilege on the crop. An injunction to arrest the seizure is not the proper remedy in such a case. 26 A. 22, *Chaffraix & Agar v. Edwards*.

2) Factor's privilege.

A. In general.

1. The privilege is two-fold; first, under (3214) C. C., for advances specially made upon specific goods; second, under act 1841, 21, for a general balance of account. 16 A. 138, *Cator v. Merrill*.

2. One who furnishes mules to a plantation, and causes them to be sold separately, so as to exercise his privilege thereon, exhausts it, and cannot claim a general privilege on the proceeds of the plantation. 16 A. 306, *McRae v. His Creditors*.

3. The privilege of the merchant, for supplies furnished is equal to that of the lessor. 21 A. 535, *Masson, administrator v. Murray*; 13 A. 443; 6 A. 669. See FACTOR.

4. Advances made to the defendant, who cultivates, for a certain price, the crop of his employer, are not secured by a privilege on the crop of the employer. 25 A. 482, *Lalanne v. Goodbee*.

5. Factor's pledge, 1874, p. 114.

B Plantation supplies.

1. Where the land, mules, etc., and growing crop, have been sold in block, the value of the crop may be ascertained by proof, and the privilege of the factor allowed on the proceeds. 21 A. 495, *Howe v. Whited & Gibbs*.

2. Debts due for necessary supplies furnished to a plantation, are privileged on the product of the last crop, and the present crop in the ground. 16 A. 305, *McRae v. His Creditors*.

3. One who repairs carts, wagons, etc., on a plantation, cannot be allowed a privilege on the proceeds of the sale of the plantation. 16 A. 305, *McRae v. His Creditors*; 9 A. 254.

4. A factor has a privilege on the crop for necessary supplies furnished to raise it, but not for money advanced to the planter. 21 A. 471, *Woods v. Calloway*; 22 A. 70, *Owners of the Steamer General Quitman v. Packard*; 1867, p. 351.

5. A factor has no privilege on the mules, cattle, and implements attached to the plantation, for advances and supplies furnished. 21 A. 495, *Howe v. Whited & Gibbs*.

6. A commission merchant made advances to carry on a crop, and sequestered the same, claiming his privilege; the advances having been made to one partner, individually, and the produce having been divided in kind, the merchant was not entitled to a privilege on the share of the other partner. 22 A. 269, *Smith v. Williams, Mrs. Dorsey, intervenor*.

7. WYLY, J., *dissenting*: The lien of the furnisher of supplies, attaches to the products, as well after division thereof by the planting partners, as when they were held by them in indivision. *Id.*

8. The defendants employed laborers, giving them, in lieu of wages, one-third of the gross product of the crop. There was plainly no partnership in this. The crop, as it grew, belonged to the defendants, and the privilege of the furnisher of supplies attached to the whole. 22 A. 438, *Bass & O'Brien v. Cowan, Faulk, intervenor*.

9. The privilege extends only to the crop for which advances are made, and money received by the factor for any other produce or effects sold, must be returned to the succession to be distributed in due course of administration. 23 A. 248, *Payne v. Spiller, ad'r*.

10. Furnishers of supplies in the State of Mississippi, who have no privilege there, can claim none here. 26 A. 185, *Delop & Co. v. Windsor & Randolph*. See I. No. 1.

11. Tobacco, pipes, whisky, cards, perfumery, etc., are not supplies necessary to raise a crop, and do not entitle the factor to a privilege. 26 A. 658, *Stafford v. Pearson & Williams*.

12. An agent who incurs expenses and costs, and furnishes mules and carts to a plantation, has a right of pledge, which operates a privilege. See III. (i), No. 4.

(e) Overseer's privilege.

1. The overseer has a privilege superior to that of the factor for supplies. 24 A. 76, *Bouligny v. Esclapon & Lacour*.

2. In case of a forced alienation of a plantation, the overseer is not bound to pursue his privilege on the proceeds of the sale, in the hands of the sheriff. No sale can destroy the privilege which the law creates in favor of the overseer, as long as the crop hangs by the roots, or the proceeds, when gathered, are not beyond the reach of the overseer. 15 A. 665, *Scarborough v. Stinson*.

3. In case of a forced alienation of a plantation, with the crop in the ground, the overseer has not a privilege on such crop, for his whole year's salary, but simply for the proportion of the year elapsed at the date of such sale. 15 A. 665, *Scarborough v. Stinson*.

4. An overseer has no privilege on the crop of the present year, for services rendered the year previous. 16 A. 305, *McRae v. His Creditors*.

5. The overseer's privilege in the crop, is inferior to the mortgage, existing on the land at the time of his contract. 24 A. 281, *Daspit v. Verret*.

(f) Privileges on buildings.

1. The furnisher of materials used in the erection of a building, has no claim against the owner, who complies with his contract, duly recorded, up to the date the work is abandoned, unless previous to payment to the contractor a detailed bill is furnished to him in accordance with R. C. C. 3249, § 3 and 2773; 25 A. 62, *State ex rel. Deblieux v. Recorder of Mortgages*. See No. 8.

2. The builder's privilege should be paid first, when, by the action of the vendor, the former's application for a separate appraisalment was refused, and the sale in block proceeded with, notwithstanding an appeal from the judgment refusing the appraisalment, which was reversed by the Supreme Court and a separate appraisalment ordered. 25 A. 337, *Baltimore v. Parlange*. See (h), No. 3; (i), No. 7.

3. The attorney's fees and damages stipulated in a building contract, bear no privilege. 25 A. 335, *Baltimore v. Parlange*.

4. Mechanics and laborers, and furnishers of materials, are only entitled to the same privilege as the contractor, and when the contractor has failed to record his contract, as required by law, those employed by him have no privilege. 26 A. 221, *Baker & Thompson v. Pagaud*; 4 A. 97; 6 A. 480; 16 A. 127.

5. The privilege of a builder is lost, if he permits the building to be sold in block with the land. 28 A. 289, *Hoy v. Peterman and Sheriff*; C. C. 3228, 3268.

6. The clause, *de non alienando*, does not affect the builder's lien which arises subsequent to the mortgage. 20 A. 452, *Jamison v. Barelli*.

7. A superintendent has a lien and privilege on the building erected. 18 A. 22, *Mulligan v. Mulligan*.

8. Where the contractor violated his agreement, and the owner owes him nothing, the furnisher of materials cannot recover as against the owner. 21 A. 387, *Heuchert v. Barrère*. See No. 1.

9. When the building contract exceeds five hundred dollars, it should be in writing and recorded. See REGISTRY, II. (a), 1), No. 2.

10. The builder's lien will be recognized and enforced against the parish jail, separately from the land which was dedicated to public use. 30 A. 361, *McKnight v. Parish of Grant*. But see EXECUTION, V. (a), 4), No. 14. THINGS, I. (a), 1), No. 4.

11. The mechanic who built a church is entitled to the mechanics' lien, although he may be its pastor. 30 A. 711, *Jones v. Trustees of Zion*.

12. See also BUILDERS AND BUILDINGS. PRIVILEGE, III. (h), No. 1.

(g) *Privileges springing from the contracts of deposit, mandate and pledge.*

1. The articles of the Civil Code, which give a privilege for expenses incurred for the preservation of the thing, apply only to movables. 15 A. 44, *Tom v. Ernest*.

2. The assignment of a warehouse receipt, in the absence of an express stipulation that the property is given in pledge to secure the payment of a principal obligation, the amount of which is so specified, does not confer a privilege to the transferee. 15 A. 165, *Martin v. His Creditors*.

3. Where a party holds goods merely as security for a debt, with a privilege on the same, he has no right to prevent the seizure of the goods by another party also claiming a privilege against the owner. The rights of a party holding goods in this manner is limited to a judicial proceeding to make his privilege available against the goods. 15 A. 473, *Flourney v. Millings*. See III. (a), No. 14.

4. The depositor has no privilege on the property or effects of the depositary who has disposed of the money on deposit. A privilege exists only on the price of sale of the "particular movable" deposited. 25 A. 478, *Lanoue, administratrix v. Dumartrait, administrator*. See III. (c), 2), A. No. 7.

5. See DEPOSIT. MANDATE. PLEDGE.

(h) *Privileges for improvements on lands.*

1. The furnisher of materials, who finds himself opposed by the vendor of the land, cannot, to enforce his privilege, cause the buildings to be seized and sold separately from the land; such sale is a nullity. 26 A. 349, *Wang v. Field*; but see EXECUTION, V. (a), 4, No. 5.

2. A partner who has advanced his partner's proportion towards the erection of certain buildings, has no privilege on the buildings. 26 A. 614, *Pool v. Fontelieu*.

3. An old building, having been demolished and sold to the builder in part payment of the new building, became movable, and having been used in the new building, and sold by other creditors, confusedly with other things, it becomes impossible to show what price it brought; hence, the vendor's privilege on the building is lost. 20 A. 452, *Jamison v. Barelli*. See (i). No. 7.

4. By exchanging the builder's notes for others secured by mortgage, novation takes place, notwithstanding a stipulation to the contrary. See NOVATION, II. No. 5.

5. See BUILDERS AND BUILDINGS.

(i) *Other special privileges; and right of retention.*

1. Keeping and feeding horses must be classed as expenses incurred for their preservation, and as such carries a privilege. 16 A. 208, *Andrews v. Crandell*.

2. A creditor who has proceeded by way of attachment, prior to the proceeding by sequestration, acquires a privilege on the property attached, and preference over the other creditors. 15 A. 258, *Tufts v. Casey*.

3. Workmen engaged to put a raft of logs together, and to deliver it at its proper destination, have no privilege on said raft, and cannot seize it after delivery. 16 A. 173, *Landry v. Blanchard*.

4. The agent who incurs expenses and costs, and furnishes mules and carts to a plantation, has a right of pledge, which operates a privilege on the proceeds of the property in his hands, for the reimbursement of such charges. C. C. (2991), (2992), (3184), No. 4; 16 A. 398, *Hereford v. Leverich*. See PLEDGE, II.

5. The order for executory process, based on an act of mortgage, cannot accord a privilege to plaintiff. 19 A. 34, *Easterling v. Thompson*.

6. The foreman in a job printing office has no privilege on the material, to secure his wages. 20 A. 204, *Lewis v. Patterson*.

7. When the property on which a privilege is claimed, is sold confusedly with a mass of other property, the privilege is lost. 20 A. 486, *Kohn v. McHalton*. See (f), No. 2; (h), No. 3.

8. Excepting the overseer's privilege. See (e), No. 1.

9. The preference acquired by a prior seizure, cannot defeat the existing prior judicial mortgage, where the property seized is all that remains belonging to the seized debtor. 27 A. 279, *Lehman, Newgass & Co. v. Ranson*.

10. For privilege acquired by a seizure, see EXECUTION, V. (a), 6), B.

11. Privilege for paving. See NEW ORLEANS, II. (e), 4), No. 9.

12. A firm, making plantation advances, have a right of retention. See PRIVILEGE, III. (d), 1), No. 1.

IV. OF THE CONFLICT AND RANK OF PRIVILEGES.

(a) *In general.*

1. The sheriff cannot be held, to show the validity of, a judgment which he has been commanded to execute, and to satisfy it with moneys that may come into his hands. It is his duty to pay the proceeds of his sales over to the seizing creditors, shown to be entitled to them by the *certificate of mortgages*, and by the writ of *feri facias in his hands*. And if concurrent seizing creditors intend to contest each other's right of mortgage, or privilege, they must do so contradictorily with each other, whilst the proceeds remain with the sheriff, and cannot afterwards hold him responsible for the payment of such proceeds to the parties shown by the writs and certificate of mortgages, to have been entitled to the same; the creditors' remedy is by third opposition, or action of nullity, to avoid the judgment recognizing the mortgage or privilege, and ordering it to be enforced against the debtors' property. 15 A. 513, *Ethridge v. Milling*.

2. The attaching creditor has no privilege, until judgment. If a surrender be made previously, the distribution must be made in accordance with the nature of the debts. 20 A. 345, *Plassan v. Titus*.

3. The privilege of the furnisher of supplies, and of the lessor, are preferred to the claim of the laborers working under a contract, for one-fourth the net proceeds of the crop. 22 A. 291, *Moore v. Gray*.

4. The seizure of sugar and molasses being effected previous to the recording of any privilege, the debt for which the seizure was made, should be paid in preference. 26 A. 80, *Lapène & Ferré v. Meegel*; 23 A. 270, *White v. Bird*; 25 A. 232, *Loeb v. Blum*.

5. The vendor's and builder's privilege are of equal rank, and where the property is seized, a separate appraisement should be made of the land and the buildings, according to article (3235) Civil Code, to ascertain the *pro rata* due to the maker of such necessary repairs, as have added value to the property. 23 A. 365, *City of Baltimore v. Parlange*.

6. A vendor's privilege, securing a community purchase, will outrank the wife's mortgage, and a sale under the former will extinguish the latter. 25 A. 514, *Lemoine v. Powers*.

7. The charges of the warehouse keeper, at the port of destination, are superior to the privilege for freight. 21 A. 402, *Powers & Co v. Sixty Tons of Marble*.

8. The widow's homestead must be paid in preference to a twelve months

bonds, given by the deceased, who purchased his own property, put up for sale. 25 A. 116, *Succession Heitzler*.

9. The vendor's privilege on real estate, is superior to all other privileges, except those necessary to effect the sale. 21 A. 424, *Marcelin v. His Creditors*; 18 A. 721.

10. A vendor is entitled to be paid in preference to all other claims, except those charges which are necessary to procure the sale of the immovable. 22 A. 266, *Succession Markey*.

11. The widow's homestead should be paid before the landlord's privilege, and the vendor's on movable effects. 26 A. 166, *Succession Wm. Cooley*.

12. The widow's homestead is superior to the builder's lien. 27 A. 560, *Succession Geo. W. Rawls*.

13. The widow's homestead must be paid in preference to all other debts of the succession, except those having the vendor's privilege and the expenses of selling the property. 29 A. N. R., *Succession Dichary*.

14. Where the vendor's privilege was not recorded the same day the act of sale was passed, the widow's homestead and other privileges due by the succession must be paid before the vendor. A senior mortgage cannot be called upon to contribute until this mortgage has been exhausted. 29 A. 415, *Succession Marc*.

15. The preference on the proceeds of his debtor's property, which a creditor has acquired by procuring the cancellation of a fraudulent mortgage, is inferior in rank to the widow's homestead, which would have been preferred to the mortgage even, if valid. 29 A. 669, *Succession Cottingham*.

16. The expenses of last illness and funeral charges, are of a higher rank than the widow's homestead. 29 A. 671, *Succession Cottingham*.

17. The seizing creditor is preferred to the factor, freight bill, duties, etc., when not recorded. See EXECUTION, V. (a), 6), B.

18. The rank of the creditors is fixed at the moment of the surrender. See INSOLVENCY, IV. (a), No. 1.

19. The privilege existing on the immovable when it was purchased, must be paid out of the proceeds of the sale, when the said purchaser, who had again sold it, forecloses his vendor's privilege. See PAYMENT, II. (b), 2), No. 1.

20. Rank of costs against a steamer. See PRIVILEGE, III. (c), 2), A. No. 1.

21. The privilege of the consignee, in possession, is superior to that of attaching creditors. See PRIVILEGE, III. (d), 1), No. 2.

22. The privilege of the factor is equal to that of the lessor. See PRIVILEGE, III. (d), 2), A. No. 3.

23. The overseer's privilege is superior to that of the factor. See PRIVILEGE, III. (e), No. 1.

24. The privilege of the seizing creditor is not superior to that of the anterior judicial mortgage, where the property seized is all that belongs to the seized debtor. See PRIVILEGE. (i), No. 9.

25. The mortgage takes rank, as to third persons, not when the act is deposited with the recorder, but only from the moment it is actually inscribed in the book of mortgages. 30 A. 833, *State, ex rel. Slocomb v. Rogillo*.

26. The overseer's privilege is not superior to a mortgage existing at the date of his contract. See PRIVILEGE, III. (e), No. 5.

(b) *Charges of insolvent and mortuary proceedings.*

1. Where property, offered for sale by the syndic to settle the insolvency, does not bring a sufficient amount to pay the mortgages, the privileges must be paid by the mortgage which is least ancient, or by *pro rata* contribution, when the two or more least ancient mortgages are of equal rank. 20 A. 359, *Ventress v. His Creditors*. See MORTGAGE, VII.

2. The loss, resulting from the deficiency of movables, to pay debts privileged on movables and immovables, must be borne by the creditors whose mortgage is least ancient, and so in succession ascending, according to the order of mortgages. 18 A. 176, *Devergès v. His Creditors*; 142, *Succession O'Laughlin*; 11 A. 482; C. C. 3269, 3270.

3. A vendor's privilege must be paid in preference to every other claim, except those charges which are necessary to procure the sale of the thing. 22 A. 266, *Succession Markey*.

4. For expenses of administration, see SUCCESSION, VIII. (f); and rank of mortgages, MORTGAGE, VII.

5. The settlement of the rank of general privileged creditors, must be postponed to the distribution of the proceeds of the immovables. 21 A. 487, *Succession Gale*.

6. Under art. 3236, C. C., the mortgage least ancient, though on a different piece of property, must contribute to the payment of the privileged debts of the succession. 23 A. 3, *Succession Rousseau*.

7. Commissions of the executor, and law charges, should be paid by preference over the debts of the deceased. 24 A. 162, *Succession Wells*; 18 A. 721, *Succession Lauve*.

8. The proceeds of movables should be distributed between other creditors, and only that of real property, should go to judicial mortgagees. 27 A. 667, *Succession Haggerty*.

9. The opposition to the amount paid for a marble slab and iron railing for the grave, comes with bad grace from the heirs, who are enriched by the succession. 27 A. 588, *Succession Hasley*.

V. OF THE PRIVILEGE OF THE CITY, STATE; AND PRIORITY OF THE UNITED STATES.

1. The United States shall have a first and paramount lien upon all the assets of an insolvent national bank, by the act of congress, June 3, 1864. 22 A. 315, *Schmidt & Ziegler v. First National Bank of Selma*.

2. Each and every piece of property is responsible for the whole amount of taxes assessed to the owner. 26 A. 697, *Geren v. Gruber*. But see 1876, p. 11.

3. No privilege exists on movables for the payment of State and parish taxes. 21 A. 487, *Succession Gale*.

4. Taxes are not privileged debts on all the property of the succession in different parishes. 27 A. 551, item No. 8, *Succession Gayle*. But see acts 1871, p. 104; 1876, p. 11.

5. Taxes, not assessed, are no lien. 19 Wall. 655, *Hiene v. Levee Commissioners*.

6. The privilege of the State, parish, and city of New Orleans, for taxes, is limited to two years. See NEW ORLEANS, II. (e), 1). PRESCRIPTION, III. (d), No. 2.

7. The subrogee of the State and city, loses his privilege by failing to exercise his rights in due time. See PAYMENT, II. (b), 2), No. 3.

8. Necessity of registry. See REGISTRY, II. (a), 1), Nos. 9, *et seq.*

9. Taxes due to New Orleans, to bear a general lien, 1872, No. 73; lien restricted to property assessed, 1876, p. 11.

VI. OF THE REGISTRY OF PRIVILEGES.

1. In construing articles 2772, 3273 and 3272, Civil Code, their purport is to the effect, that unless a builders' lien be recorded on the day that the contract is entered into, it can take effect only from the time it is recorded. 24 A. 612, *Marmillon v. Archinard*.

2. Effect a want of proper registry of a privilege for paving. See MORTGAGE, VII. No. 8.

3. The consignee's privilege should be recorded. See PRIVILEGE, III. (d), 4), No. 5. See REGISTRY, II.; *ante*, III. (b), 2), A. No. 1; IV. (a), No. 14.

PRIVY.

1. See CORPORATIONS, X. (dd); (c). EVIDENCE, XII. (d); (h); (j), 4). JUDGMENT, XV. (a). OBLIGATIONS, VII. (b). PAYMENT, II. (b). RECORDER, I. No. 1. SALE, IV. (a), No. 2; VI. (c), No. 12. SUCCESSION, II. V. SURETYSHIP, III. (b).

2. Privy relative to warranty. PLEADING, VIII. (c).

3. For privy of contract, see INSURANCE, I. (b), No. 4.

PROCES-VERBAL.

1. See EVIDENCE. MINORS, III. (g), 3). SALE, VII. (c). SUCCESSION, VIII. (e), 7), B.
2. The proces-verbal of the sheriff is a deed. See EXECUTION, V. (d), 7), Nos. 4, 5.
3. Privy cleaning, acts 1871, p. 16; 1874, p. 83. See CORPORATIONS, X. (ff); 1877, E. S., p. 123.

PROHIBITION.

1. Article 756, C. P., gives to the court a discretion in relation to the trial of summary cases, with which the appellate court will not interfere. 16 A. 182, *Police Jury v. Manning*. See TRIAL.
2. When a court usurps jurisdiction, the proper remedy is by the writ of prohibition. 16 A. 186, *State ex rel. Logan v. Third District Court of New Orleans*.
3. Where it clearly appears that a judge is exceeding his jurisdiction, a writ of prohibition should issue, so as to prevent an expensive and vexatious litigation. This writ is intended to protect a party from usurped jurisdiction. 20 A. 240, *State ex rel. Michoud v. Judge Fourth District Court*.
4. A writ of prohibition will not be issued to restrain a court of ordinary jurisdiction from entertaining a suit against a universal legatee, on an instrument made payable by the deceased five years after his death. 20 A. 239, *State ex rel. Michoud v. Judge Fourth District Court*.
5. A writ of prohibition will not issue to prevent the judge from executing an order for the sale of succession property, because a suspensive appeal had been taken from executory proceedings against the same property. 20 A. 252, *State ex rel. Sarraz & Co. v. Judge Second District Court*.
6. Where the surety on the appeal bond is not good and solvent, the Supreme Court will not issue a writ of prohibition. 21 A. 178, *State ex rel. Simonds v. Judge Seventh District Court*.
7. On a writ of prohibition, if the surety given on the appeal bond be found good, the Supreme Court will make the writ peremptory. 21 A. 735, *State ex rel. Storrs v. Judge Fourth District Court*.
8. If a district judge assumes jurisdiction in a case from which a suspensive appeal has been taken, the proper mode of bringing such question before the Supreme Court, is by writ of prohibition. 21 A. 114, *State ex rel. Johnson v. Judge Fifth District Court*; C. P. 845; 13 L. 574; 19 L. 174, 179; 21 A. 152, *State ex rel. Stackhouse v. Judge Fifth District Court*.
9. No application for a re-hearing will be entertained from a writ of prohibition. 21 A. 50, *State ex rel. Withers v. Judge Second District Court*.
10. Where heirs of a succession have been put in possession of the estate it cannot be placed under administration, and a writ of prohibition will issue from the appellate court against the probate judge, pending an appeal from an order appointing a dative testamentary executor. 22 A. 61, *State ex rel. Widow Pearson v. Parish Judge of Jefferson*.
11. The writ of prohibition may issue as a conservatory measure to preserve the rights of the parties until the question prayed for in a mandamus be decided. 22 A. 120, *State ex rel. City v. Judge Sixth District Court*.
12. The writs of mandamus and prohibition will not issue to compel the judge *a quo* to grant a suspensive appeal from an order allowing defendant to bond property sequestered. 22 A. 260, *State ex rel. City v. Judge Eighth District Court*.
13. A writ of prohibition will issue against the lower judge to arrest execution, in a case where no evidence has been offered to prove the insufficiency of the surety on the appeal bond. The burden of proof is on the party averring the surety not to be good and solvent. 22 A. 592, *State ex rel. Roman v. Judge Sixth District Court*. But see 1876, p. 49.
14. A writ of prohibition will not issue to restrain the execution, where it is shown that the appeal bond was not given in an amount sufficient to operate

as a surpersedeas. 22 A 115, *State ex rel. Wassell v. Judge Fourth District Court*.

15. Where a party applied for a suspensive appeal, and gave bond in accordance with the order granting the appeal, below the sum required by art. 575 C. P., the plaintiff in executory proceeding may carry the order into execution, and a writ of prohibition will be refused. 22 A. 35, *State ex rel. Bankhead v. Judge Seventh District Court*.

16. A suspensive appeal having been granted; in case the judge of the lower court should proceed to decree the appeal devolutive only, the appellant should proceed by writ of prohibition. 21 A. 114; 23 A. 31, *State ex rel. Beebe v. Judge Second District Court*.

17. The district court may order execution to issue, if the bond be insufficient in amount for a suspensive appeal, but this order may be revised on an application for a writ of prohibition. 27 A. 697, *State ex rel. Pontchartrain Railroad Co. v. Judge Superior District Court*.

18. Where a suspensive appeal was granted from a writ of mandamus, made peremptory, and the bond regularly furnished, the lower court is divested of jurisdiction, and a writ of prohibition will be issued to restrain the lower judge from setting aside the appeal. 22 A. 37, *State ex rel. Mount v. Judge Sixth District Court*.

19. A prohibition will issue, if the judge sets aside an appeal, on the ground that a good surety is insufficient. 23 A. 279, *State v. Judge Seventh District Court*; 23 A. 491, *State v. Judge Fifth District Court*; 24 A. 316, *State ex rel. Dezutter v. Judge Fifth District Court*; 328, *State ex rel. Lynd v. Judge Fifth District Court*.

20. Where the plaintiff took an appeal from the judgment in his favor, and the judgment of the lower court is affirmed, the costs of appeal must be paid by appellant, and a writ of prohibition will issue, to prevent the lower judge from issuing execution for the costs of appeal against defendant. 18 A. 102, *State ex rel. Boye v. Duncan et als.*

21. The Supreme Court having no general superintending control over the lower courts, a writ of prohibition will be refused to prevent the lower judge from entertaining jurisdiction of a suit when an adequate remedy may be obtained after judgment, by appeal. 21 A. 124, *State ex rel. D'Meza v. Judge Fourth District Court*; 3 M. 42; 2 L. 88; 19 L. 478, 183; 8 A. 92; 11 A. 696; 26 A. 750, *State ex rel. City v. Judge Superior District Court*.

22. District courts can issue writs of prohibition, only in cases where they are necessary to aid in the exercise of their appellate jurisdiction. 22 A. 459, *Bush v. Head*; 517, *Hart v. Hoss*; 25 A. 381, *State ex rel. Caballero v. Judge Second District Court*.

23. The court having jurisdiction of the cause, no writ of prohibition should issue. 27 A. 158, *Wilmot v. City*; 4 A. 11; 11 A. 696; 14 A. 505.

24. A writ of prohibition, not being a writ of right, the Supreme Court may grant it on increasing the surety to be furnished for a suspensive appeal, or on such terms and conditions as will secure justice. 27 A. 336, *State ex rel. Coons v. Judge Superior District Court*.

25. The writ of prohibition is not a writ of right, but may issue in the sound discretion of the court. It will not issue to prevent the lower court from deciding an injunction obtained against relator. 29 A. 360, *State ex rel. Comminge v. Judge Superior District Court*.

26. Where an injunction is issued, having for effect to change the position of the appellants during the pendency of his appeal, a writ of prohibition should issue. 28 A., N. R., *State ex rel. F. Frilot v. Judge Superior District Court*.

27. A writ of prohibition will lie to prevent the lower judge from entertaining an injunction, where the matters at issue are before the Supreme Court in another suit between the same parties. 28 A. 143, *State ex rel. Larrieux v. Judge Superior District Court*.

28. MORGAN, J., *dissenting*: The State was the party applying for the injunction, and not the slaughter house company. *Ib.*

29. A writ of prohibition should be decided in accordance with the facts in

existence, at the date of its issuance. 28 A., N. R., *State ex rel. Burton v. Charles Hicks et als.*

30. The parish court is without jurisdiction to issue an injunction in relation to the office of sheriff, where the same is worth more than five hundred dollars. A writ of prohibition is properly issued by the district court to prevent the further exercise of the usurped jurisdiction. *Id.*

31. For the appeal from writs of prohibition, see APPEAL, I. (b), 2), E. Nos. 17, 19; (j), No. 8.

32. See further for appeal bonds, APPEAL, III.

33. A writ of prohibition will issue to restrain the sheriff from giving possession of the property sequestered to plaintiff, when it has been released on bond. See SEQUESTRATION, II. (d), 1), No. 7.

34. When a writ of prohibition will issue from the Supreme Court to the Third District Court for the parish of Orleans, as a court of appeal from justices' courts, see APPEAL, I. (h), No. 7.

35. No writ of prohibition will issue, forbidding the lower court to proceed in a case before it, of which it has no jurisdiction, until an exception to its jurisdiction has been tried and overruled. 29 A. 806, *State ex rel. Larrieux v. Judge Fifth District Court.*

36. Burden of proof as to surety on a bond of appeal, 1876, p. 49.

PROMISE

To pay the debt of a third person, see EVIDENCE, IX. (a).

PROTEST.

See BILLS AND NOTES, VIII.

PROVISIONAL SEIZURE.

1. The ninth section of the act entitled "an act relative to steamboats," approved March 15, 1855, embraces all cases of loss or damage arising from carelessness, neglect, or want of skill in the direction or management of any steamboat, and cannot be restricted to cases of collision. Nor is it, under the act, necessary to swear as to the names of the owners, in order to proceed by provisional seizure. 15 A. 321, *Howes v. Steamer Red Chief.*

2. No damages can be awarded for a provisional seizure, which has been maintained by the judgment of the court from which it issued. 16 A. 1, *Murphy v. Redler.*

3. There being no law at the time, authorizing a bond for the release of property provisionally seized, such a bond is null and void. 23 A. 222, *Benham v. Collins, sheriff, et al.*

4. The act of July 6, 1867, authorized release bonds to be furnished. R. S. 1870, section 1914; 25 A. 124, *Lepretre v. Barthet*; but see acts of 1877, No. 19, authorizing plaintiffs to bond after ten days, if defendants do not.

5. The surety on a forthcoming bond, releasing a provisional seizure, when there was no law authorizing such a contract, cannot be held liable. 25 A. 218, *Urquhart v. Carvin.*

6. If the effects provisionally seized be released by being bonded, and are subsequently sold by the lessee to an innocent third party, the lessor loses his privilege thereon. 22 A. 210, *Haralson v. Boyle.*

7. If the property removed within fifteen days previous to the seizure does not continue to be the property of the lessee, it cannot be seized for rent. 23 A. 715, *St. Charles Hotel Company v. Tarbox*; 27 A. 87, *Merrick v. LaHache.* See PRIVILEGE, III. (a).

8. The lessor loses his privilege by a real sale and delivery of the furniture in the house leased, and cannot seize the same, even within fifteen days after their removal. 16 A. 351, *Desban v. Pickett.*

9. There is no repugnancy between article 288 C. P. and article (2679) C. C. "Third person" would apply to depositaries, bailees, pledgees, and all other persons, except purchasers. 16 A. 351, *Desban v. Pickett.*

10. The defendant having died previous to judgment, but subsequent to the release, a *fi. fa.* could no longer have issued, and a suit may be immediately

entered against the surety on the release bond, who bound himself to pay in default of his principal. 25 A. 124, *Lepretre v. Barthet*.

11. An order of provisional seizure, signed by the parish judge, should be set aside when there is no affidavit by the plaintiff or his attorney, but one by a third person showing that the district judge was absent from the parish. 26 A. 120, *Fernandez v. Miller*. See COURTS, II. (f), No. 28.

12. Article 289, C. P., giving the right to employees to provisionally seize vessels "navigating within the State," and article 289, which, after pointing out the manner of obtaining the writ, adds, that it may issue against "vessels trading out of the State," at the suit of those who have furnished materials for or made repairs on such vessels, must be construed together; thereunder the employees are entitled to a provisional seizure on vessels trading out of the State. 17 A. 277, *Dejona v. Steamboat Osceola*. See COURTS, II. (a), Nos. 15, 16, 17. SEQUESTRATION, II. (a), No. 14.

13. Where goods are in *custodia legis*, the lessor's privilege attaches to the proceeds without any act of seizure on his part. 15 Wall. 600, *Holdane v. Summers*.

14. When a suit is *in rem* against a ship, the original jurisdiction of the controversy is exclusively in the district courts of the United States, but when the suit is *in personam* against the owner or master of the vessel, the mariner may proceed by libel in the district court, or he may, at his election, proceed in any action at law, either in the circuit court, if he and his debtor are citizens of different States, or in a State court, as in other causes of action cognizable in the State and Federal courts exercising jurisdiction in common law cases; and when such jurisdiction attaches to the State courts, they may cause the vessel to be sequestered or provisionally seized, in pursuance of their local laws. 15 Wall. 185, *Leon v. Golcerau*. See COURTS, II. Nos. 15, 16, 17.

15. When a lessor has sued out a provisional seizure, and the sheriff has seized the property, subject to the landlord's privilege, an assignee in bankruptcy cannot take the goods out of the sheriff's hands. In such a case the assignee is only entitled to such residue as may remain in the sheriff's hands after the claim for which the provisional seizure issued has been satisfied. 16 Wall. 551, *Marshal v. Knox*.

16. No appeal lies from an order to bond. See APPEAL, I. (b), 1), No. 20.

17. Annexing documents and swearing to petition. See PLEADING, V. (a), 4).

18. See further, PRIVILEGE, III. (a). LEASE, I. (d), Nos. 2, 3, 7.

19. The lessor has the right to seize property on the leased premises fraudulently given in payment to a creditor who knew of the existence of the lessor's claim, and worth much more than the amount due to said creditor. 30 A. 202, *Worrel v. Vickers*.

20. When the nominal lessee is actually the security of the real lessee, all the facts being known to the lessor, a provisional seizure issued against the nominal lessee will be set aside; but the actual lessee who intervened and against whom judgment for rent is prayed, will be condemned to pay the rent. 30 A. 375, *Aurich v. Wolf & Levy*.

21. Laborers how to sue for wages, acts 1873, p. 663; their provisional seizures to be tried summarily in chambers or during term time, 1874, p. 59; exemption of hired pianos, etc., from landlord's seizure, 1874, p. 112; intervenor's right to bond, 1876, p. 92; plaintiff's right to bond, 1877, p. 22; suit brought by provisional seizure, where the property is situate or at defendant's domicile, 1876, p. 106.

PUBLIC.

1. For public persons, see PLEADING, I. (c), 8).

2. For public things, see THINGS, I.

3. PUBLIC LANDS.

PUBLIC ADMINISTRATOR.

1. See SUCCESSION, VII. (a), 1), Nos. 3, 5, 6, 9; 2), A. No. 3; B. Nos. 3, 5, 7, 8; (b), Nos. 2, 4; (c), No. 1; VIII. (b), No. 2; (d), No. 3; (e), 2), A. No. 9; (f), 1), No. 2; 8), c. § 1, Nos. 2, 5, 7.

2. Act creating the office, acts 1870, No. 87.

3. Abolishing the office of public administrator, except in the parish of Orleans, and reducing his commissions, acts 1877, E. S., p. 111.

PUBLIC EDUCATION.

1. The act of 1855 does not fix the rate of compensation due to teachers of public schools; they must be paid either according to their contract with the directors, or upon a *quantum meruit*. 16 A. 164, *Offut v. Bourgeois*; 13 A. 607.

2. Act No. 6, of the extra session of 1870, creates a board of school directors, with power to appoint, for each ward school, a board of three district school directors; the latter must, in a suit against the board, be cited. 22 A. 537, *Frazier v. Sandlin*.

3. Under the act of 1870, approved March 16, entitled an act to regulate public education in the State of Louisiana, and the city of New Orleans, etc., the functions of the ward boards of school directors, were not superseded by vesting in the city board of directors the numerous powers and duties conferred upon the ward boards, nor to give to the city board concurrent, much less paramount, jurisdiction over the various subjects assigned to the ward boards. 23 A. 153, *Third Ward School District v. City Board of School Directors*.

4. The creditor cannot enforce payment of a warrant drawn in 1865, for teaching in 1862, 1863, and 1864, against the board of school directors established in 1870. Act No. 6, of 1870, E. S. § 31, provides that all such claims shall be referred to the next general assembly. 24 A. 93, *Offut v. Acheverra, President, etc.*

5. The school board cannot make a contract, having for its object the discharge of the sureties on the bond of the parish treasurer. 26 A. 243, *Clements v. Biossat*.

6. Regulated, 1870, E. S., p. 12; 1871, p. 42; 1877, E. S., p. 28; 1877, E. S., p. 193; Franklin College, 1871, p. 168; regulation for New Orleans, 1873, p. 73; funding school debt, 1873, p. 102; improvement, 1873, p. 150; school boards abolished where not necessary, 1874, p. 215; public schools of Orleans organized, 1874, p. 217; amending certain acts, 1877, E. S., p. 115; normal school, 1877, E. S., p. 193.

PUBLIC LANDS.

II. OF THEIR ADMINISTRATION AND ALIENATION UNDER THE COLONIAL GOVERNMENTS AND THE CHANGE OF SOVEREIGNTY OVER THEM.

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| (a) <i>In general.</i> | (c) <i>Change of sovereignty and its incidents.</i> |
| (b) <i>Powers of the colonial officers and evidence of their acts.</i> | |

III. OF THEIR ADMINISTRATION AND ALIENATION UNDER THE FEDERAL GOVERNMENT.

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| (a) <i>In general.</i> | (c) <i>Perfected rights; legislative grants, confirmations of title and patent.</i> |
| (b) <i>Inchoate rights on the public domain before divestiture of the fee.</i> | |
| 1) <i>In general.</i> | 1) <i>In general.</i> |
| 2) <i>Occupants of public land and right of preemption.</i> | 2) <i>Conflict of titles of equal dignity.</i> |
| A. <i>In general.</i> | 3) <i>Effect and validity of the confirmation or patent; to whose benefit they inure; and powers of the land officers in relation thereto.</i> |
| B. <i>Rights and liabilities of mere occupants.</i> | A. <i>In general.</i> |
| C. <i>Sale of improvements, right of preemption or certificate and receipt.</i> | B. <i>Confirmation.</i> |
| D. <i>Quantity of land that may be purchased; its apportionment; and decisions and powers of the land-officers in relation thereto.</i> | § 1 <i>In general.</i> |
| 3) <i>Entry; evidence of purchase and its cancellation.</i> | § 2 <i>Certificate of confirmation; to whose benefit it inures; and powers of the land officers in relation thereto.</i> |
| 4) <i>Registry of the sale of claims to the public lands.</i> | C. <i>Patent.</i> |
| | (d) <i>Survey and location.</i> |

IV. OF THEIR ADMINISTRATION AND ALIENATION UNDER THE STATE GOVERNMENT.

- (a) *In general.*
- (b) *Location and State patent; conflict between State patentees and between the latter and those of the Federal government.*
- (c) *Register and his sureties; his decisions and the appeal therefrom.*

II. OF THEIR ADMINISTRATION AND ALIENATION UNDER THE COLONIAL GOVERNMENTS AND THE CHANGE OF SOVEREIGNTY OVER THEM.

(a) *In general.*

1. All lands in the province of Louisiana, at the time of the cession to the United States, which had not passed by a perfect title from the government then having control of the country, vested in the government of the United States, by the act of session, as public domain. 20 A. 515, *Nixon v. Houillon*.

2. When a grant of land, made by Spanish authorities in Louisiana, has not the aid of any authentic survey to ascertain and fix its limits or to determine its location, and when the instrument, by which the grant purports to have been made, refers to no line of boundaries, it could create no right of private property in any particular parcel of land, which would be maintained in a court of justice. 3 H. 773, *United States v. King*.

3. The sovereignty of the United States, over the territory of Louisiana, dates from the treaty of cession (April 30, 1803). The subsequent ratification of the treaty by the American government, and the formal transfer of the ceded territory to the American commissioners, have relation to the date of the treaty. It follows, therefore, that neither the French nor the Spanish governments could grant any valid titles to lands lying in Louisiana, after the 30th of April, 1803. 9 H. 127, *United States v. Reynes*.

4. The policy of the Spanish authorities, in Louisiana, was to make gratuitous grants, for the purposes of settlement, and not for those of mere speculation, the grantee might establish himself on the land, or might decline; but if he failed to take possession and establish himself, he had no claim to a title; the concession or first decree, in such case, had no operation. 12 H. 433, *United States v. Simon*.

5. If a concession of lands, made by the Spanish authorities in Louisiana, contained a sufficient description to enable the grantee to locate the same without the aid of survey, this incipient grant, coupled with subsequent possession, have always been regarded as such a severance of the tract from the public domain, as would entitle the claimant to a confirmation to the grant. 13 H. 1, *United States v. Hughes*.

6. By the Spanish regulations, in force in Louisiana, while that country was under the dominion of Spain, a grantee of any portion of the public domain was obliged to take possession of the same within a reasonable period, under penalty of a forfeiture of the grant. 13 H. 1, 4, 7, *United States v. Hughes*.

7. The Spanish monarch, according to the laws of the Partidas and Recopilacion, which are alike binding upon the king and the people, had no power to alienate land which had been dedicated to the public use. 10 P. 662, *New Orleans v. United States*.

(b) *Powers of the colonial officers, and evidence of their acts.*

1. An order of survey by Governor Miro, executed, but not returned to, nor approved by the Spanish authorities, is only an inchoate title, which did not divest the ownership from the Spanish government, and the land, therefore, passed by the cession to the United States government. 21 A. 673, *Arceneaux v. Benoit*.

2. The regulations of O'Reilly were intended for the control of subordinate officers, and were not binding upon succeeding Spanish governors of Louisiana; a concession of lands, therefore, made by a Spanish governor, but in pursuance of O'Reilly's regulations, is not, on that account, invalid. 9. P. 117, *Delassus v. United States*.

3. In 1797, the Baron de Bastrop petitioned Governor Carondelet for a concession of lands of about twelve leagues square, upon which he was to establish a large number of colonists, who were to engage in the culture of wheat. The governor ordered a survey to be made of the desired quantity of land, and promulgated a decree, in which he declared that he "destined and appropriated" these twelve leagues, in order that the Baron de Bastrop might settle them under the conditions expressed in his petition; *Held*: That this decree did not vest in de Bastrop any title to the land in question, but merely set it apart to be granted to the colonists whom he might establish thereon. 11 H. 609, *United States v. Philadelphia and New Orleans*.

4. The commandants of posts, in the Spanish colonies, had power to make inchoate titles to lands within their jurisdiction. 15 H. 1, *United States v. Davenport's Heirs*.

5. A presumption of the grant flows from long usage. See NEW ORLEANS, I. (a), No. 1.

(c) *Change of sovereignty and its incidents.*

1. A plat survey, made by a deputy surveyor under the Spanish government, with his certificate that the survey was made by himself, agreeably to the order of the surveyor general of the two Floridas, is not evidence of a complete Spanish grant, but of an inchoate grant within the discretion of congress, after the acquisition of title of the United States, and subject to be entirely rejected. 15 A 673, *Fluker v. Doughty*.

2. Such an incomplete grant, is inferior to the title derived from the government of the United States, by virtue of a legislative act of confirmation. 15 A. 673, *Fluker v. Doughty*.

3. The province of Louisiana, was ceded by France to Spain, by a treaty signed at Fontainebleau, on the 3d of November, 1762, and no valid grant of lands lying within said territory could be made by the French government, between the date of this treaty and that of the treaty of retrocession, signed at St. Ildefonso, on the 1st of October, 1800. 10 H. 609, *United States v. D'Auterive*.

4. From the date of the cession of Louisiana by France to Spain, the right to make grants of the public lands, was vested in the governor of the province, until October 22, 1798, when this power was transferred to the intendant. 12 H. 209, *United States v. Moore*.

5. A treaty of the United States with a foreign power, cannot divest any rights of property vested before its ratification. 19 H. 1, *Prevost v. Grenaux*.

III. OF THEIR ADMINISTRATION AND ALIENATION UNDER THE FEDERAL GOVERNMENT.

(a) *In general.*

1. Where two separate and conflicting surveys of land had been made by the authority of the United States, the first of which had never been approved, but the parties had entered into a notarial agreement, to respect it in preference to the last; *Held*: That the parties are bound by this agreement so long as it remains in force, and has not been set aside by a direct action of rescission. 15 A. 116, *Dugas v. Truxillo*.

2. By the constitution, congress is given the power to dispose of, and make all needful rules and regulations respecting the territory or other property of the United States; having the power of disposal and of protection, congress can alone deal with the title to such property, and no State law, whether of prescription or otherwise, can defeat such title. 4 H. 169, *Jourdan v. Barrett*.

3. Accepting grant of land from the United States, 1869, p. 62.

(b) *Inchoate rights on the public domain before divestiture of the fee.*

1) *In general.*

1. Until the patent issues, an inchoate grant remains within the discretion of the grantor. 15 A. 673, *Fluker v. Doughty*.

2. Where the location of Spanish grants of land, in Louisiana, was vague

and uncertain, no title vested in the grantee, until his claim was confirmed by congress, and the grant surveyed and ascertained, and if, in the meantime, the land had been entered on a patent issued for it to some third person, the title of such third person must prevail over that of the Spanish grantee. 18 H. 473, *Ledoux v. Black*.

3. The 8th article of the treaty, between the United States and Spain, on the 22d day of February, 1819, which stipulated that all grants of land made before the 24th of January, 1818, by his Catholic Majesty or by his lawful authorities, in the territories eastward of the Mississippi, known by the name East and West Florida, shall be ratified and confirmed to the persons in possession of the lands, to the same extent that the same grants would be valid if the territories had remained under the dominion of His Catholic Majesty, does not act directly on the grant, so as to give validity to those which were otherwise valid: it merely pledges the faith of the United States to pass acts which shall ratify and confirm them. 2 P. 253, *Foster v. Neilson*. (*Overruled in United States v. Percheman*, 7 P. 51.)

2) Occupants of the public lands and right of pre-emption.

A. In general.

1. The statutes granting a preference right to actual settlers on public lands, donated to the State, were intended to benefit white persons, who, being heads of families or over twenty-one years of age, had made a settlement with a view to cultivation, and not of speculation. Actual residence is required; and the mere fact of cultivation, without residing on the land, cannot be considered a compliance with the law. 15 A. 237, *Munday v. Muse*.

B. Rights and liabilities of mere occupants.

1. It is not necessary that one should have had a perfect title to lands in Louisiana, in order to entitle him to the protection of the treaty of cession, an inchoate title vested in its possessor, a species of property, and the United States are bound, if necessary to perfect that title, as France or Spain would have done. 9 P. 117, *Delassus v. United States*.

C. Sale of improvements, rights of preemption or certificate and receipt.

1. Where the consideration of an obligation was the sale of improvements on public lands, and it appeared that the vendor, at the time of the sale, was in a situation to avail himself of the benefit of the preemption acts of congress; *Held*: That the consideration was a good and valid one. 15 A. 230, *Dean v. Wade*.

2. It is well settled, that the improvements upon public lands, cannot form the object of a contract, where the party is not in a situation to avail himself of the preemption laws. Being a trespasser, he cannot claim indemnity for his improvements. 16 A. 218, *Spurlin v. Milliken*; C. C. (1772), (1887), (1889); 3 A. 145.

3. For reasons of general policy, the law does not countenance the sale of improvements on the public lands, by a party who is not in a situation to avail himself of the preemption laws; but there is nothing immoral or unjust in such a sale, if no undue advantage be taken of the vendee. A contract of this kind might consequently create a natural obligation, the discharge of which would be conclusive among the parties. 16 A. 218, *Spurlin v. Milliken*.

D. Quantity of land that may be purchased; its apportionment, and decisions and powers of the land officers in relation thereto.

1. By the Spanish policy, the lands of Louisiana which bordered on large streams, were granted (to the depth of forty arpents), to individual proprietors, on the condition that such front proprietors should erect the levees and keep them in repair. The Spanish government reserved to itself another depth of forty arpents back of these front grants; but by the Spanish usages, the front owners had reserved to them a preference in becoming the purchasers of the second depth. This policy was continued in force, after the cession of Louis-

iana to the United States, by various acts of congress, which provided that "every person who owns a tract of land, on any river, creek, bayou or water course, in Louisiana, and not exceeding forty arpents, French measure, shall be entitled to a preference in becoming the purchasers of any vacant tract of land adjacent to, and back of his own tract, not exceeding forty arpents in depth; provided, however, that the right of preemption shall not extend so far in depth as to include land fit for cultivation, bordering on another river, creek, bayou or water course." *Held*: That the words, "lands, bordering," both in the body of the acts of congress, and in the proviso, refers only to lands which border upon navigable streams or common highways; that is to say, such streams as are bordered (under the system of the land department), by fractional sections, and reserved for sale, and not to such waters as are included in square sections, the channels of which, form a portion of the adjacent dry lands, and are sold with them. 8 H. 48, *Surgett v. Lapice*.

2. See *infra*, 3), IV. (c).

3) Entry, evidence of purchase, and its cancellation.

1. Where a grantee of a portion of the public lands, has never taken possession of the same, and has slumbered upon his rights for a long period of time, his claim will be received with suspicion, and the grant will be presumed to have been abandoned. 13 A. 1, *United States v. Hughes*.

4) Registry of the sale of claims to the public lands.

1. By act of congress, of September 4, 1841, the United States made a donation to Louisiana, and other States, of large tracts of land for the purpose of internal improvements. This State sold improvement warrants, which were located by the purchaser or his assignee. The selection was made under the supervision and approval of the land department. In August, 1847, the commissioner of the general land office issued instructions to the registers and receivers, in regard to the selection or location of internal improvement land, under the donation act of 1841. No State selection is admissible, of any land which is or may be reserved from sale, by any law of congress or proclamation of the president, or on any tract which is reserved or withdrawn from market for any purpose. 27 A. 605, *Copley v. Dinkgrave*.

(c) Perfected rights; legislative grants; confirmations of title and patent.

1) In general.

1. Where there is a conflict between the certificate of confirmation by the United States, of an inchoate Spanish grant and the orders of survey, the act of confirmation must prevail, and determine the nature and extent of the rights of the original claimant. 15 H. 673, *Fluker v. Doughty*.

2. United States authorized to purchase land, 1871, p. 49; relinquishment of the State in favor of the United States, 1871, p. 52; homestead secured to actual settlers, 1871, p. 55; land office, 1871, p. 243.

2) Conflict of title of equal dignity.

1. Priority of right gives priority of title, in the case of a conflict between a preemption claim and the location of an internal improvement land warrant, on lands granted to the State by congress. 16 A. 149, *Ellis v. Old*; act of congress, September 4, 1841.

2. The holder and owner of a patent certificate, who disposes of his interest therein, and subsequently ascertaining that the entry had been cancelled on the books of the land office, resells the same land to different vendees; *Held*: That the latter acquired no title to the prejudice of the former vendees, when it is shown that the entry was cancelled through error. 16 A. 301, *Laforest v. Downing*; 3 Howard 46, *Carroll v. Safford*.

3) Effect and validity of the confirmation or patent; to whose benefit they inure; and powers of the land officers in relation thereto.

A. In general.

1. The decision of the land officers of the United States, may be reviewed by

the courts. 20 A. 433, *Ludeling v. Vester*, *ad'r*; 5 Cranch, 191; 20 Howard, 7; 1 Peters, 212; 9 Howard, 328; 14 Howard, 377; 18 Howard, 44; 13 A. 356, *Foley v. Harrison*; 4 R. 79.

2. The decision of the secretary of the interior, adjudicating the title to one of the contesting parties to lands of the United States, cannot form the basis of a plea of *res judicata*. The question whether the United States had any title when the adjudication was made belongs solely to the courts. 25 A. 577, *Copley v. Dinkgrave*; 27 A. 528, *Marks v. Martin*; 20 Howard; 6; 1 Peters, 212; 9 Howard, 328; 14 Howard, 377; 18 Howard, 44; 4 R. 79; 13 A. 356; 20 A. 433.

B. Confirmation.

§ 1 In general.

1. The lands lying between the Mississippi river and the Perdido were ceded to the United States by the treaty of April the 30th, 1803; but grants made in the disputed territory by Spain during the period of her possession, were confirmed by the act of congress, approved June 22, 1860, which extended even to those grants, the validity of which had been denied by the Supreme Court of the United States. 11 Wall. 632, *United States v. Lynde*.

§ 2 Certificate of confirmation; to whose benefit it inures; and powers of the land officers in relation thereto.

1. Whatever name may have been inserted in the certificate confirming a Spanish grant, confirmation inures to the benefit of the real owner. 18 A. 250, *Watterston v. Bennett*; 2 A. 148; 4 A. 268.

2. A confirmation of title by the United States congress, to one who did not derive title from the Spanish grantee, inures to the benefit of the transferee of such grantee. 28 A. 581, *Martin v. Brashear*.

C. Patent.

1. Persons who obtain patents by a suppression of part of the facts of the case, will not be permitted to derive any benefit thereby; such patents will inure to the parties entitled to recover the land thus patented. 16 A. 90, *Cannon v. White*; 4 R. 79; 14 A. 123; 22 How. 202.

2. If the ancestors paid the price to the government, of a land entry, having either previously or subsequently sold the privilege of preemption right, the obtaining of the patent inures to the benefit of the purchaser. 4 A. 266; 21 Howard, 240; 1 A. 426. In default of proof to the contrary, the law will presume that the sales were made afterwards on the same day. 3 R. 363. Acts of congress of 1832, authorize preemptors to transfer their certificates of purchase or final receipts. 4 Statutes at Large, p. 496; 16 A. 201, *Steinpting v. Bent & Sprague*.

(d) Survey and location.

1. The United States surveys and approved township maps, must control the action of surveyors appointed by the court, to establish the boundary line between parties, both of which derive title under a patentee of the general government. 15 A. 171, *Stewart v. Boyd*.

2. Under act of congress, 29th of August, 1842, all entries of lands made in the Greensburg land district, were declared null, and new surveys ordered, so that the same land is described by different boundaries. 18 A. 250, *Watterston v. Bennett*.

3. Under act of congress of January 27, 1851, all lands within the limits of the Maison Rouge grant, was reserved from sale, entry or location, from the date of the act until three months after the public notice, required to be given by the act. Improvement warrants could not therefore be located on said tract previous to said notice. 27 A. 605, *Copley v. Dinkgrave*.

4. By the fifth section of an act of congress, approved March 3rd, 1811, certain riparian proprietors in Louisiana were entitled to purchase from the United States, by preference over other persons, all vacant tracts of land adjacent to, and back of their own tracts. The act further provided, that where

each of two contiguous proprietors could not obtain his full quantity of back land. by reason of bends in the river, the principal deputy surveyor of each district, under the superintendence of the surveyor of the public lands, south of the State of Tennessee, was authorized to divide such back lands between the two contiguous claimants, in such manner, as to him might appear most equitable. Such division, when made by the deputy surveyor, in accordance with the terms of the act, is final and conclusive upon the parties, and cannot be disturbed by any court of justice. 17 H. 23, *Haydel v. Dufresne*.

5. See NEW ORLEANS, II. (g), 3).

IV. OF THEIR ADMINISTRATION AND ALIENATION UNDER THE STATE GOVERNMENT.

(a) *In general.*

1. Lands which have been selected by the State, under the different acts of congress, allowing such selection, and duly confirmed by congress, are severed from the public domain, and a subsequent grant thereof by the United States, in no manner impaired or defeated the title previously acquired by the State. 27 A. 528, *Marks v. Martin*; 11 L. 582; 9 A. 102; 13 P. 498.

2. The issuing a grant cannot be considered as conclusive evidence of the right to make such grant in the power which issued it. 10 P. 662, *New Orleans v. United States*.

3. Land office reorganized, 1870, E. S., p. 89; 1871, p. 243; cancellation of 16th section, 1872, p. 23; 1877, p. 8; Fort St. Philip Ship Canal, 1874, p. 46; donated to Lafourche and Terrebonne, 1878, p. 161; school board of Texas authorized to sell certain lands, 1876, p. 130.

(b) *Location and State patent; conflict between State patentees and between the latter and those of the Federal government.*

1. When the title to land has passed from the United States, and the apparent title is in the defendant, the pretensions of the litigants must be determined by our State laws. 16 A. 89, *Cannon v. White*.

2. One claiming title by virtue of a patent from the State, from one holding under a patent from the United States, in the Bastrop grant, as a *bona fide* settler, under the statutes of the United States September 4, 1841, and March 2, 1851, the patent of the State being even prior to that of the United States, the plaintiff cannot recover. 16 A. 450, *Ludeling v. Vester, administrator*.

3. The party holding the United States patent did not settle upon the land with the intention of securing a preemption. He bought it as private property. He sold the same before making his application for an entry. The claimant who located an internal improvement warrant on the land in litigation and obtained the State patent should recover. 20 A. 433, *Ludeling v. Vester, administrator*.

4. One without a prior equitable right to the land, cannot attack the claim of the preemptor who holds a title from the United States. 21 A. 548, *Mumford v. McKenney*.

5. The United States is without authority to give title to land selected by the State in 1856 as school lands. 28 A. 720, *Cullen M. Castle v. J. J. Chaney, et als.*

(c) *Register and his sureties; his decisions and the appeal therefrom.*

1. The proceedings conducted before the various land officers of the government of the United States, are entitled to great weight in the decision of land titles emanating from the government. 27 A. 601, *Copley v. Dinkgrave*.

2. When the government has parted with its title, the courts will decide the title to lands without regard to the action of the officers of the land office. See PETITORY AND POSSESSORY ACTIONS, I. No. 5.

3. Register's fee, no clerk allowed, 1877, p. 29.

PUBLIC MERCHANT.

1. A married woman who keeps a boarding house, is not a public merchant. 25 A. 38, *Courcelle v. Sauvinet*.

QUANTUM MERUIT.

1. In a suit on a *quantum meruit*, the lowest sum the evidence will justify, and not the lowest sum mentioned by any of the witnesses, is to be allowed. 16 A. 187, *Holley v. Borland*.
2. Where the evidence does not show whether the work was done under a *quantum meruit* or a special contract, plaintiff must be non-suited. 18 A. 29, *Holtzman v. Millaudon*.
3. The first bill made out is admissible in evidence. See EVIDENCE, VII. No. 27.
4. If a contract be proven, plaintiff cannot recover on a *quantum meruit*. See PLEADING, V. (a), 3), D.
5. Plaintiff, who sues on a contract, cannot recover on a *quantum meruit*. See PLEADING, V. (d), 1), Nos. 1, 2.
6. See JUDGMENT, V. (a), 1), Nos. 10, 11.
7. If the formalities have not been observed in the adjudication of the work, the levee contractor may recover from the front proprietor on a *quantum meruit*, by proving the benefit which defendant derived from the work. See LEVEES, No. 8.
8. How teachers of public schools may recover for their services. See PUBLIC EDUCATION, No. 1.
9. A co-proprietor cannot charge commissions for collecting rents. See QUASI CONTRACTS, I. No. 16.
10. A contractor cannot claim from the city the value of extra work done under the direction of a city officer, and not called for by his contract. 30 A. 152, *O'Hara v. City of New Orleans*.

QUARANTINE.

1855; 1870, E. S., p. 54; 1876, p. 110; 1877, No. 80.

QUASI CONTRACTS.

I. IN GENERAL.

II. OF THE RESTITUTION OF WHAT HAS BEEN UNDULY RECEIVED.

I. IN GENERAL.

1. Where one of two residuary legatees incurs an expense in protecting their joint interest, and the evidence shows that the act proved beneficial to both, justice requires that he should be reimbursed by his co-legatees the amount of the expense incurred on his account. 15 A. 625, *New Orleans v. Baltimore*.
2. It is no defense to an action for services, to allege that plaintiff was a Confederate soldier, and, as such, detailed by the Confederate States to perform the services of overseer, and that a proper consideration was paid for said services to the Confederate government. 18 A. 556, *Callahan v. Stafford*.
3. The child who furnished the necessaries for the support of the deceased, and attended to the wants of his sick parent, has a just charge against the estate. 18 A. 594, *Succession Olivier*. See PAYMENT, II. (b), 1), No. 5.
4. Where one renders services beneficial to another, at the latter's request, an implied contract is raised for remuneration. 19 A. 434, *Beall v Bibber*; 13 L. 136.
6. The usufructuary is bound for the tax, and for the paving done in front of the property. 20 A. 504, *City v. Wire*. See USUFRUCT. SERVITUDES, I. No. 6.
7. The purchaser of the land has no right to recover for the use of the tan yard, where hides, in process of being tanned, were sold at the same probate

sale as the land; the purchaser of the hides was merely completing the operation of tanning. 21 A. 176, *Palmer v. Petty*.

8. A succession is liable for lumber and materials furnished, and labor performed for the preservation of the property from decay. 22 A. 316, *Succession S. Nitch*.

9. Services rendered to the deceased are not supposed to be gratuitous, and the claimant cannot be defeated by a plea that she was the concubine of the deceased, "perhaps it increases his obligation to pay for her services in a moral point of view." 23 A. 295, *Succession Pereuilhet*.

10. The plaintiff undertook, as an act of friendship, to have the house of defendant painted; when he presented the latter the memorandum of the cost, a quarrel ensued, and plaintiff brought suit, claiming not only for the cost of the work, but for his services; *Held*: That the quarrel did not create an agreement to pay for the services of plaintiff. 23 A. 75, *Hyland v. Catherine Rice*.

11. One of the owners cannot compel his co-proprietors to erect a building on the lots held in common. 23 A. 502, *Morgan v. Morgan*.

12. A joint co-proprietor, cannot, without the consent of his co-owner, erect buildings on the common property, and compel the latter to pay one-half the costs. 26 A. 255, *Bayley, ex. v. Denny*.

13. One of two joint proprietors may make and enjoy improvements on the common property, and that is important only when it comes to a settlement between the joint proprietors; the one making the improvements, being entitled to be reimbursed, without which the other cannot share the resulting benefit. 29 A. 753, *Jordan & Co. v. Anderson*; 6 N. S. 616; 10 A. 255.

14. An authorization to an agent to indorse a promissory note, is not one which can bind the principal to pay forged ones. See MANDATE, I. (c), No. 2.

15. The employer, who condones the offense of his book keeper, who forged a check on the bank, and retains him in his employ, cannot recover from the bank the amount paid on a second forged check by the same person. See MANDATE, I. (c), No. 2.

16. A co-proprietor, who collects rents and keeps the premises in repair, must show an agreement, to charge commissions. 25 A. 112, *Conrad v. Burbank*.

17. Where the plaintiff, contrary to the wishes of defendant, constructs a banquettes, not embraced in his contract, he can recover nothing for his work. 26 A. 504, *O'Hara v. Krantz*.

18. Private property, not in use by the owner, cannot be taken and used by another without compensation to the owner, although such use may be beneficial to the owner. 26 A. 740, *Canal Carondelet Navigation Company v. First Drainage District*.

19. The president of a railroad company, who superintends the putting up of a building for the company, without stipulation of recompense for his services, can recover none. 27 A. 641, *Levisse v. Shreveport City R. R. Co.*

20. An employee in the auditor's office, who sues to obtain judgment for a commission as auctioneer, for the sale of certain bonds authorized by law, to be made by the treasurer and auditor, shows no cause of action. 28 A. 527, *C. T. Estlin v. State of Louisiana*.

21. Where one of two innocent persons must suffer a loss, through the misconduct of another, the loss ought rather to fall upon him, who put it in the power of the third party to inflict the injury. 27 A. 46, *Mahon v. Dubuclet*; 592, *Gardner v. Maxwell*. See MANDATE, I. (c), Nos. 2, 3.

22. Where property is used for the benefit of the insurance company, and not returned by it to the owner, although it may not be insured, the insurance company will be held liable for its loss. 28 A. 939, *Donally & Son v. Merchants' Mutual Insurance Co.*

II. OF THE RESTITUTION OF WHAT HAS BEEN UNDULY RECEIVED.

1. Plaintiff loaned two steam boilers, which were placed on a plantation, and used in a saw mill; the plantation was afterwards sold, with the boilers attached to the soil. Plaintiff sues the vendor for the boilers or their value; *Held*: That he must recover the latter. 22 A. 387, *Slack v. Gay*.

2. One who, believing himself owner, pays the taxes due on the property, has the right to be refunded by the real owner, the amount so paid, but he is not subrogated to any privilege. 16 A. 132, *Succession Erwin*.

3. An illegal tax paid by error, may be recovered from a municipal corporation. 20 A. 447, *Home Mutual Insurance Co. v. City of New Orleans*; 30 A. 420, *State ex rel. Boutroux v. Judge Third District Court*.

4. There is a natural obligation on the citizens to pay their *quota*, for carrying on the city government, and once paid, no action will lie to recover the amount, on the ground that the law levying the tax was unconstitutional. 25 A. 454, *Factors' & Traders' Insurance Co. v. City*.

5. WYLY, J. and LUDELING, C. J., *dissenting*: There can be no natural obligation to pay an illegal tax. *Ib.*

6. Where the city assessors over valued a piece of property, notwithstanding the application of the tax payer, who paid the amount under protest, he may recover the same from the city. 19 A. 109, *James v. City*.

7. Money recovered by the city after regular judgment and execution for taxes, cannot be recovered, although the property may have been exempt from taxation. 30 A. 259, *First Presbyterian Church v. City of New Orleans*.

8. See PAYMENT, I.

QUO WARRANTO.

1. The writ of *quo warranto* is only issued in relation to the offices of corporations, such as the office of mayor and the like. Even if coupled with a mandamus and injunction, this writ cannot be used to test the right of the register of voters to hold office. 17 A. 306, *Terry v. Stauffer*. See INTRUSION IN OFFICE. OFFICE AND OFFICER.

2. Under section 130 of the charter of New Orleans of 1856, the right of any municipal officer to hold office, may be tested at any time by a writ of *quo warranto*. 18 A. 517, *State ex rel. Staes v. Gastinel*. See NEW ORLEANS, II. (g).

3. Any citizen, by writ of *quo warranto*, may test, under section 130 of the city charter of 1856, the right of any city officers to hold office. 20 A. 114, *State ex rel. Staes v. Gastinel*.

4. Private citizers of a municipal corporation, cannot contest or enquire into the right of municipal officers to the offices by them held, by the writ of *quo warranto*. 23 A. 25, *Voisin v. Leche*; 14 A. 506.

5. For amount of appeal bond, see APPEAL, III. (c); No. 27.

RAILROADS.

1. See CARRIERS. OBLIGATIONS, VIII. (e), No. 12. TAXES, II. (b), 3), No. 4.

2. Franchises, privileges, etc., transferred to purchasers, when sold under foreclosure of mortgage, acts 1877, p. 48; may consolidate, acts 1877, p. 50.

3. For incorporation of railroads, see INCORPORATION, IV.

RAPIDES.

1. Burnt records, 1868, p. 129; 1876, p. 126; parish of, to levy a tax to build a court house, 1870, E. S., p. 200; three additional justices, 1876, p. 120.

RATIFICATION.

1. For ratification of contracts, see OBLIGATIONS, IV.

2. For ratification of agent's acts, see MANDATE, II. (b); V. (d).

3. For ratification of judicial sales, see EXECUTION, V. (d), 10). MINORS, III. (g), 2); 4). PARTITION, III. (c).

4. A *fidei commissa* cannot be ratified. DONATIONS, III, (b). SUCCESSION, VIII. (e), 7), d.

5. For other matters, see ATTORNEY, II. (a), 2); 3). CONSTITUTION, II. (c), 2). EVIDENCE, XXVIII. NULLITY.

6. Ratification which will bind a corporation. See CORPORATIONS, II. (c), No. 6. MANDATE, V. (d), No. 6.

7. Ratification of a theft. See ESTOPPEL, No. 17.
8. Parol is admissible to prove a ratification of the sale of real estate. See EVIDENCE, XIV. (c), No. 2.
9. A ratification relates back to the date of the act. See MARRIAGE, IX. (a), No. 2.
10. A contract for Confederate money cannot be ratified. See OBLIGATIONS, III. (c), 1), No. 26.
11. An heir, whose suit against his co-heir, for his share in the property, is dismissed, does not ratify the partition. See PARTITION, III. (c), No. 2.
12. The heirs of age who claim the proceeds, ratify the sale. See SUCCESSION, VIII. (e), 7), A. No. 1.
13. An executrix cannot ratify a sale. See SUCCESSION, VIII. (e), 7), D. No. 3.

REBELLION.

1. Articles 148 and 149 of the constitution of 1868, validate the acts of the legislature of 1861 and 1862, creating the corporation of Amite. 24 A. 27, *Amite City v. Clementz*.
2. See CONFEDERATE STATES. CONFISCATION.

REAL.

1. For real actions, see COURTS, II. (a); (g), 2). EXECUTORY PROCESS. PETITORY AND POSSESSORY ACTIONS. MORTGAGE, VI. (c). PRESCRIPTION, III. (g), 2); IV. (c), 2). OBLIGATIONS, VIII. (a).
2. For real contracts, see DEPOSIT. LOAN. OBLIGATIONS, VII. (b), 2); VIII. (a). PLEDGE. RENT.
3. For real property, see THINGS, II. (a).
4. For real statutes, see LAWS, IV.

RECEIPT.

1. See EVIDENCE, XV. (i). MINORS, III. (f), 4). PAYMENT, I. SALE, II. No. 9.
2. Warehouse and press receipts, 1876, p. 113.

RECEIVER.

1. No receiver can be appointed to collect rents and revenues of property sought to be partitioned, where no loss or damage is likely to arise. 26 A. 439, *Malady v. Malady*.
2. CORPORATIONS, VIII. (b). PARTNERSHIP, IV. (e), 2). SUCCESSION, VIII. (a), Nos. 17, 18, 19, 20.

RECORD.

See APPEAL, XIII. ATTACHMENT, VI. (c). EVIDENCE, XV. (j); XXII. XXIII. XXVII. REGISTRY.

RECORDER.

1. The recorder of mortgages is liable in damages only to the purchaser of the property against whom he does not mention a mortgage existing thereon, and if the claim for damages be not subrogated, no damage can be recovered by subsequent vendors. 23 A. 380, *Morano v. Shaw*. See MORTGAGE, VIII. PRESCRIPTION, III. (c), 1), Nos. 7, 8, 9, 10.
2. Act of 1870, directing the parishes to pay the clerks and recorders for recording the mortgage of minors, is not unconstitutional. 24 A. 312, *Southworth v. City*.
3. HOWELL and WYLY, JJ., *dissenting*: The act is unconstitutional. *Id.*
4. The mayor may act as recorder in criminal cases. See NEW ORLEANS, II. (g), 1), No. 3.
5. In case of vacancy, the governor may appoint the recorder of the Sixth District. NEW ORLEANS, II. (g), 1), No. 5.

6. See EVIDENCE, XXIII. (c). NEW ORLEANS, II. (g), 1); 4). REGISTRY, II. (c); (e).

7. Deputies, 1860, p. 30; transfer from Jefferson to Orleans, 1870, E. S., p. 104.

8. Recorders court abolished; municipal police courts created in New Orleans, 1873, p. 170; 1874, p. 119; recorders court created, 1877, E. S., p. 202; 1878, p. 61; parish recorder ineligible to a parish office, 1877, E. S., p. 7.

RECUSATION.

1. A judge who has been of counsel in the case is incompetent to try it. 19 A. 381, *Amacker v. Varnado*.

2. When the judge has been attorney in the case, and is not personally interested, he should appoint a lawyer of proper qualifications in his place. 29 A. 593, *State v. McCoy*.

3. Whenever the judge of the district court is personally interested in a suit pending before him, he shall call upon the parish judge to try the case. Constitution 1868, article 90; 21 A. 51, *State ex rel. Welsh v. Judge of the Ninth Judicial District Court*.

4. Section 1068, of the Revised Statutes, of 1870, is unconstitutional. When a judge is recused, if he be not personally interested, he must select a lawyer of proper qualification; if he be personally interested the parish judge must preside. District judges cannot interchange. 29 A. 785, *State ex rel. Hunter v. Judges of the Ninth and Seventeenth Judicial Districts*.

5. Section 1067, of the Revised Statutes, does not repeal article 338, Code of Practice, but simply added to the causes, for the recusation of the judge, that of being connected by blood or marriage with the accused in any degree. 27 A. 225, *State ex rel. Provosty v. Judge Seventh Judicial District Court*.

6. The parish judge who is recused, but not personally interested in a cause, shall select a lawyer to try the cause. Constitution 1868, article 90; R. S. section 2024; 27 A. 272, *Succession Mrs. Fuqua*. See No. 13.

7. Although the judge recused himself properly on the trial of the merits, yet he must try a rule afterwards taken, when he is not personally interested, nor related to the parties interested; nor been employed or consulted as an advocate. 29 A. N. R., *Succession Pinaud*.

8. Act 124 of 1874, relative to the appointment by the judge, of a lawyer, to try all cases before the Superior Criminal Court, is unconstitutional. See COURTS, II. (e), No. 2.

9. A mandamus will not issue to compel a lawyer, acting as judge *ad hoc*, to try the cause. See MANDAMUS, I. (a), 2), No. 20.

10. Whenever the parish judge is interested in a case, he should call on the district judge to sit in his place, and not on an attorney at law. 28 A. 637, *Succession Cabrol*.

11. The judge of the Superior Criminal Court, in case of sickness or absence, had no power to select a lawyer to act in his place. The power so given by the legislature is null. 27 A. 689, *State v. Fritz*; 663, *State v. Phillips*.

12. In the absence of the district judge, and recusation of the parish judge in the cause brought before the district court, the parish judge of the adjoining parish may issue the injunction. 30 A. 372, *Klein v. Cramer, sheriff*.

13. Where a parish judge is recused by reason of interest in the cause, he cannot select a lawyer to act as judge *ad hoc*. 30 A. 460, *Succession S. M. Hyams*. See No. 6.

14. Suit, where a parish judge is recused, how transferred, 1876, p. 111; when to be recused, 1877, p. 35.

RED RIVER.

1. Act 59, of 1868, for the improvement of Red River, should be followed in its express terms, to entitle relators to the compensation therein provided. 24 A. 429, *State ex rel. Allan v. Graham*.

2. The parish of Red River, is attached, not to the eighteenth, but to the eleventh judicial district. See PARISH, No. 1.

3. Created, 1871, p. 86; amended, 1872, p. 147; 1873, p. 142; 1878, p. 108; bonds, 1872, p. 48; appropriation for mouth of Red River, 1877, E. S., p. 188; memorial, 1878, p. 142; improvement of Red River, 1868, p. 68.

REDEMPTION SALES.

See SALE, VI. (a).

REGISTER.

See PUBLIC LANDS, III. (b); (c); IV. (c). RECORD. REGISTRY.

REGISTER OF VOTERS.

See ELECTION BY THE PEOPLE.

REGISTRY.

I. IN GENERAL.

II. OF THE REGISTRY OF MORTGAGES AND PRIVILEGES.

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| <p>(a) <i>Necessity of inscription and effect of non-inscription.</i></p> <ol style="list-style-type: none"> 1) Privileges. 2) Mortgages. 3) Non-inscription as between the parties; who are third persons; and the rule, that notice is equivalent to registry. 4) Mortgages or privileges originating out of the State. <p>(b) <i>Time and place of registry.</i></p> <p>(c) <i>Mode and requisites of registry; in what book or office; and on what evidence or authority.</i></p> | <p>(d) <i>Re-inscription; its necessity and requisites.</i></p> <p>(e) <i>Recorder of mortgages; the erasure of mortgages and privileges.</i></p> <ol style="list-style-type: none"> 1) Office of recorder; his powers, duties and liabilities; and how far mortgage rights are affected by his acts or omissions. 2) Right to make or claim the erasure. <ol style="list-style-type: none"> A. <i>In general.</i> B. <i>Insolvent and mortuary proceedings.</i> C. <i>Execution sales.</i> 3) Proceedings to erase; the parties and decree. |
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III. OF THE REGISTRY OF SALES AND OTHER CONTRACTS, TITLES, OR EQUITIES.

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| <p>(a) <i>Registry of sales.</i></p> <ol style="list-style-type: none"> 1) Necessity, time, and place of registry; and effect of non-registry. <ol style="list-style-type: none"> A. <i>In general.</i> B. <i>Forced sales.</i> C. <i>Time of registry; possession and its effect with registry on an anterior title unregistered.</i> D. <i>Non-registry as between the parties; who are third persons; and the rule, that notice is equivalent to registry.</i> 2) Mode and requisites of registry; in what book and on what evidence. <p>(b) <i>Registry of other contracts, titles or equities</i></p> <p>(c) <i>Register's office and liability.</i></p> |
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I. IN GENERAL.

1. The Civil Code of 1825, requires a registry, as regards third persons, *only* of instruments made under private signature. Articles (2242), (2417). The recording of other acts is provided for by legislative enactments. Acts of 1855, No. 274, p. 335, and No. 285, p. 345. The first of these two acts is a substantial re-enactment of the seventh section of the act of 1810, p. 60, and of the first section of the act of 1813, p. 206. See to the same effect Revised Statutes of 1856, *verbo*, recorder, p. 475, sections 1 and 2. 16 A. 229. *Anderson v. Sparrow*.

2. No registry of a sale is necessary as to the vendor's donee. See DONATIONS, I. (b), No. 1.

3. For registry of bonds of officers, see acts 1877, No. 11.

4. The objection of want of registry goes to the effect. See EVIDENCE, XXIV. (b), No. 3.

5. A sale not registered, is of no effect. See EXECUTION, V. (a), 3), & No. 9.

6. The judgment as recorded must speak for itself. See JUDGMENT, XII. No. 3; *infra*, II. (a), 1), No. 6.

7. Nothing supplies the want of registry, and of re-inscription as to third persons. 30 A. 10, *Watson v. Bondurant*; 29 A. 314, *Adams & Co. v. Daunis*.

II. OF THE REGISTRY OF MORTGAGES AND PRIVILEGES.

(a) *Necessity of inscription, and effect of non-inscription.*

1) Privileges.

1. Registry is not necessary as between the parties, to confer a privilege under a building contract. 15 A. 51, *Roberts v. Hyde*.

2. Where the contract to furnish timber and labor in repairing of buildings, exceeds five hundred dollars, and is not reduced to writing nor registered, plaintiff can have no privilege. 16 A. 306; *McRae v. His Creditors*. See BUILDERS AND BUILDINGS. PRIVILEGE, III. (f).

3. The vendor's lien of five days on agricultural products sold in New Orleans, in 1869, was not required to be recorded. 24 A. 364, *Tyrie & Co. v. Sands & Co.*

4. Such lien must be recorded. See PRIVILEGE, III. (b), 3), No. 2.

5. A lease need not be recorded, because the lessor has a right of pledge. 23 A. 453, *Johnson v. Tacnau*; 605, *Arick v. Walsh & Boisseau*; 24 A. 143, *Burnett v. Cleneay*.

6. The registry of a contract to secure an indefinite amount, gives effect to no privilege. 25 A. 335, *City of Baltimore v. Parlange*. See JUDGMENT, XII. No. 3; *infra*, II. (a), 2), No. 12; (c), No. 11.

7. Pending a devolutive appeal, execution may issue and property validly sold. The plaintiff who purchased the property will owe to the defendant the difference between the price brought by the property and the amount of the judgment, but this amount is not secured by vendor's privilege as to third persons, unless recorded. 25 A. 516, *McWaters v. Smith*. See PRIVILEGE, III. (b), 2), A.; B.; C.; 3).

8. A privilege for building a levee, which was not recorded, according to article 3240-3241, C. C. of 1825, is lost. 23 A. 286, *Foley v. Hagan*.

9. To give effect to city taxes, the registry should be made in accordance with the general laws, in the books of mortgages and privileges. A register of taxes prepared by the recorder, who followed the provisions of section 12 of act No. 73 of 1872, is without effect. The work was to be performed, under that section, by city officials and employees. 25 A. 334, *Southworth v. City of New Orleans*.

10. Unrecorded taxes, at the date of the sale, cannot be enforced against the property which is acquired free from any incumbrance by the purchaser. 26 A. 592, *Adams & Co. v. Wakefield*; 30 A. 296, *Marin v. City and Sheriff*.

11. The city has no privilege on a tax judgment not properly recorded, and cannot compete with a mortgage creditor. The deed of sale may be executed by the sheriff without paying said unrecorded taxes. 28 A. N. R., *J. C. Moore & Co. v. The Delta Oil Company, City of New Orleans, third opponent*.

12. Registry is necessary to preserve the privilege for taxes; a registry, subsequent to the mortgage, of taxes due previously, can have no effect. 28 A. 496, *New Orleans Savings Institution v. P. W. Leslie*.

13. The advances made by the consignee for freight, duty, brokerage, etc., should be recorded, to have preference over a seizing creditor. 25 A. 233, *Loeb & Co. v. Blum*.

14. A privilege on merchandise, about to be shipped, must be recorded to affect the third holder of the bills of lading. 26 A. 350, *Glover & Odendahl v. Shute*.

15. For registry of a privilege for paving, see MORTGAGE, VII. No. 8.

16. The factor's accounts, to affect third persons, must be recorded. R. S. section 3093; 23 A. 270, *White v. Bird*; 695, *Beard v. Gatlin*.

17. A factor's lien on cotton, not recorded, is of no effect as to the seizing creditor. 26 A. 501, *Ferguson & Clay v. Johnson & Son*.

18. WYLY, J., *dissenting*: The factors holding the railroad receipt, which is the legal title, the possession of the railroad was theirs, the contract was one of pledge. *Ib.*

19. State taxes and city licenses not recorded are entitled to no privilege as to third persons. 30 A. —, *Cochrane v. Ocean Dry Dock Company*.

20. For the same subject, see PRIVILEGE, VI.

21. Privileges must be recorded within seven days, in the parish where created, and fifteen days in another parish. 1877, p. 59.

2) Mortgages.

1. A mortgage must be recorded to produce effect against a third person without actual notice. 16 A. 283, *Barelli v. Delassus*.

2. The pact *de non alienando* does not dispense with inscription and re-inscription. 21 A. 204, *Britton & Koontz v. Janney*.

3. A judicial mortgage recorded against the judgment debtor, previous to the sale, by said judgment debtor, to the tutor, will outrank the minor's tacit mortgage. 21 A. 241, *Smith v. His Creditors*.

4. Under the constitution of 1868, and act of 1869, a failure to inscribe the tacit mortgage before the 1st of January, 1870, is fatal. 22 A. 278, *Taylor v. Ealer*; 26 A. 584, *Rochereau v. Delacroix*; 534, *Succession Cordeviolle v. Dawson*.

5. The mortgage of third opponent being recorded twelve days after that of plaintiff, is inferior in rank, and the proceeds of the sale should be paid to plaintiff. 23 A. 206, *Silliman v. Mills, Norwood, third opponent*.

6. A tutor's bond, recorded at any time before January 1, 1870, preserves the minor's mortgage. 23 A. 363, *Succession Labry*.

7. The mortgage granted by article 3282, of the Civil Code, in favor of tutors, on the property of minors, as a security for the advances which they may have made, and which is therein declared to be like the mortgage, in favor of the minors, should be recorded to have force and effect, (even before the constitution of 1868). 22 A. 390, *Boisdoré v. Malcolm*.

8. The mortgage granted by article (1626), of the Civil Code, in favor of legatees, on the property of the succession withheld by the heirs, can only be preserved by recording in the mortgage office, the evidence of the legatee's claim on the property of the succession, within three months after it is open. 22 A. 391, *Ogle v. King*.

9. The mortgage granted by law, to a particular legatee, on the property of the succession, in the possession of the universal legatee, need not be recorded within three months after the opening of the succession. The universal legatees are not third persons. 23 A. 99, *Doyal v. Doyal*.

10. If, pending an hypothecary action, based on a mortgage not recorded against the ostensible owner, the property be sold, the purchaser acquires it free from incumbrance. 16 A. 283, *Barelli v. Delassus*. See (b), No. 3.

11. The registry of an extract of the inventory, containing simply the name of the deceased's succession, the amount of property inventoried, without describing the real property, and mentioning that the minors, (by name), have a mortgage thereon, will be sufficient to preserve the minor's mortgage. 24 A. 190, *Donnell v. Gant*.

12. A legal registry alone gives effect to the mortgage against third persons, as to whom it is valid, not as executed between the parties, but as recorded. 2 A. 917; 25 A. 181, *Fisher v. Tunnard*. See II. (a), 1), No. 6.

13. The property passes free from the minor's mortgage, if the same be not recorded at the time of the transfer. 27 A. 392, *Skinner v. Sibley*.

14. The wife's mortgage does not cease to exist for want of inscription, but it only has effect and existence as to third persons, from the day of its recording. 28 A. 363, *Manheim Berwin v. B. Weiss et als*.

15. A notarial act executed by the parties holding the legal title to a piece of real estate, which recites the execution and recording of a mortgage thereon, and the destruction of the mortgage record by fire, recited the reestablishment thereof, according to law, admitted a specified sum to be due on said mortgage, which sum the parties of the notarial act agreed to pay in installments, is itself

a mortgage, and its inscription is effectual under the law of Louisiana, to preserve its lien for ten years. 2 Woods, 103, *Hunt v. Innis*. See MORTGAGE, IX.

16. Registry of tacit mortgages, 1869, p. 114; amended, 1870, p. 107.

3) Non-inscription as between the parties; who are third persons; and the rule, that notice is equivalent to registry.

1. Neither the contracting parties, nor their heirs, nor those who are witnesses to the act of mortgage, can take advantage of its non-inscription. 16 A. 207, *Brown v. Saddler*.

2. As to the witnesses to the act of mortgage, no registry is necessary, they are not third persons, in the sense of articles 3342, 3343, of the Civil Code. 25 A. 495, *McDaniel v. Stoval*.

3. Registry is not necessary as to the parties to the act. Witnesses are parties. 28 A. 662, *McDaniel v. Lalanne*.

4. A mortgage has no effect against third parties, until recorded in the parish where the property is situated. Knowledge is not equivalent to registry. 21 A. 426, *Harang v. Plattsmier*; 14 A. 838; 29 A. 315, *Adams & Co. v. Daunis*. *Per contra*, see III. (a), 1), D. No. 1.

5. The act does not give a mortgage, unless registered, and a subsequent mortgagee, although affected with notice, will have precedence. 21 A. 204, 427; 22 A. 403; 23 A. 534, *Succession Simon, Sr.*

6. Mortgages must be recorded as against third persons, not as regards the parties thereto. 23 A. 98; C. C. (3314, 15, 16); 23 A. 555, *Thompson v. Comeau*.

7. Notice is not equivalent to registry, notwithstanding the decision in 8 Wallace, 299. Federal courts, in construing local statutes respecting real property, should be governed by the decisions of State tribunals. 23 A. 261, *Levi v. Mentz*.

8. Knowledge of existing mortgages is not equivalent to registry. 26 A. 584, *Rochereau v. Delacroix*; 21 A. 425; 22 A. 402; 23 A. 533; 24 A. 78; 30 A. 11, *Watson v. Bondurant*.

9. Knowledge is not equivalent to registry. 28 A. 775, *Villavaso v. Walker, Hernandez, third opponent*.

10. Notice is equivalent to registry. 8 Wall. 292, *Patterson v. De la Ronde*.

11. The recording, prior to 1870, of a minor's judgment against her tutor, recognizing the tacit mortgage, will be a sufficient compliance with the requirements of the constitution to preserve the tacit mortgage, it is not merely a judicial mortgage. 27 A. 405, *Morrison v. Citizens' Bank*.

4) Mortgages or privileges originating out of the State.

1. Privileges must be governed by the *lex fori*. See PRIVILEGE, I. No. 1.

(b) Time and place of registry.

1. Registry of mortgages in the parish where is situated the immovable, is sufficient, even if the property mortgaged should be afterwards transferred to another parish. 22 A. 471, *Elison v. Iler*.

2. A tutor's bond, recorded at any time before the 1st of January, 1870, preserved the legal mortgage of the minor. 23 A. 363, *Succession Labry*.

3. The seizure of land, by virtue of a judgment obtained against the ostensible owner, after the institution of a suit for the recovery of the land, will not defeat the claimant's title, although judgments recorded prior to the institution of the suit, were paid out of the proceeds of sale, and a seizure thereunder would have defeated the claimant's title. 19 A. 356, *Denton v. Woods*. See (a), 2), No. 10.

4. To preserve his privilege as to third persons, the builder, etc., must have his contract recorded in the mortgage office within six days of its date, adding one day for every two leagues, from the place where the act is passed to the office of the recorder. 20 A. 485, *Kohn v. McHatton*. See acts of, 1877, p. 59, giving seven days for towns and fifteen days for the country.

5. To have precedence over a prior mortgage, the mechanic's lien must be

recorded on the day the contract was entered into. 27 A. 290, *Gay & Co. v. Bovard*; 276, *Adams v. Adams*.

6. The privilege is lost if not recorded on the day the contract is entered into. 18 A. 143, *Succession O'Laughlin*; 12 A. 778.

7. A privilege recorded a long time after the execution of the contract giving rise to it, but previous to a mortgage executed on the same property, ranks the mortgage. 28 A. 534, *State ex rel. Chs. Prager v. The Recorder of Mortgages and Samuel Johnston*.

8. The impossibility of recording the contract on the day it is entered into, does not change the law; the privilege is lost. 28 A. 305, *Executors of Bird v. Lobdell, Ocean Saw Mill, third opponent*.

9. A mortgage executed the day before its recording, and recorded at the same time as a statement for a privilege for extra work on a previous contract, will out-rank the privilege so recorded. 28 A. 534, *State ex rel. Chs. Prager v. The Recorder of Mortgages and Samuel Johnston*.

10. The privilege for repairs, to affect anterior mortgages, must be recorded the day on which the contract was entered into. Recording on the 19th, a contract dated the 17th, is too late. 27 A. 460, *Citizens' Bank v. St. Louis Hotel Association*.

11. Where the account was not definitely stated and recorded, until a few days after the sale, it will nevertheless, bind the property for the paying. See NEW ORLEANS, II. (e), 4), No. 11.

12. Construing articles 3273 and 3274 C. C., so as to give effect to both, the court concludes that privileges have effect as to third persons, generally from the date of their registry; but for a privilege to have a preference over an existing mortgage, it must be recorded on the day the contract is entered into. 27 A. 245, *Bank of America v. Fortier*; 23 A. 271, 694, 286; 24 A. 610; 25 A. 232; 26 A. 80.

13. Where the vendor failed to record his privilege, in the manner and at the time required by law, the wife's mortgage will outrank the same. 20 A. 79, *Lombas v. Collet*.

14. The vendor's privilege is lost by failure to record the act the day the contract is entered into. 27 A. 407, *Morrison v. Citizens' Bank*, C. C. 3240.

15. Although the act of sale and vendor's privilege, and mortgage are not recorded, if the vendee grants a mortgage to a third person, who records it immediately, such mortgage is good and valid, and has precedence over the vendor's privilege. 24 A. 79, *Gaienné v. Gaienné*.

16. The act of sale not having been recorded, either in the conveyance or mortgage books of the parish recorder, until years after the sale, when it was simultaneously recorded in both sets of books, will protect the vendor's privilege as against a prior mortgage recorded against the vendee. 27 A. 462, *Jumonville v. Sharp*.

17. The act of sale and mortgage, to secure the price being recorded simultaneously, the judicial mortgage recorded against the purchaser did not attach to the prejudice of the mortgage and vendor's privilege, even where the act was not recorded the same day the contract was executed. 27 A. 337, *Roche-reau & Co. v. Colomb*.

18. The registry as to third persons takes rank from the moment of actual inscription in the proper book and not from the time the act is deposited with the recorder. 30 A. 833, *State ex rel. Slocomb v. Roggillo*. See (c), No. 13.

(c) *Mode and requisites of registry; in what book or office; and on what evidence or authority.*

1. The registry of a certificate given by the notary, before whom the mortgage is executed, showing the necessary facts, is not sufficient to create a mortgage. C. C. 3345, 3336; 23 A. 533, *Succession Simon, Sr.*

2. Even if for several years the recorder kept only one set of books, making entries only in the books of alienations, a subsequent mortgagee, who was misled by the clear certificate of the recorder, and whose mortgage was properly registered, is entitled to priority. 24 A. 76, *Verges v. Prejean & Bernard*.

3. A sale containing a mortgage should be recorded both in the conveyance and mortgage books. The recorder should keep the two sets of books. *Ib.*

4. The recording of the tutor's bond, in the "book of bonds" in the recorder's office, does not suffice to operate a notice of the minor's mortgage, where in the same office are kept the books in which the law directs the inscription to be made. 25 A. 180, *Fisher v. Tunnard*.

5. The recording in the mortgage book prior to 1870, of the judgment adjudicating the minor's property to the mother, and an extract of the inventory, preserves the minor's mortgage. 25 A. 611, *Winter v. Tournoir*.

6. The bond of a tax collector, recorded in the bond book, but not in the mortgage book, does not operate a mortgage. 26 A. 243, *Clements v. Biossat*.

7. The registry of the marriage contract in the book of donations, in the parish of Orleans, did not preserve the mortgage of the wife. 26 A. 535, *Succession Cordevielle v. Dawson*; 20 A. 571.

8. A book of donations when closed, and afterwards called and used as a mortgage book, cannot benefit the wife, whose mortgage had already perished for want of registry. 26 A. 584, *Rochereau v. Delacroix*.

9. A judgment may be recorded as soon as rendered, and before signature. C. C. 3321, (3289); C. P. 538, 546, 346; 9 A. 344.

10. Until signed, the judgment, although recorded, could not operate as a judicial mortgage. 27 A. 454, *Marshall v. Hooker*; 5 N. S. 105.

11. The registry of a judgment condemning defendant, as prayed for, without any specified amount, creates no judicial mortgage. 27 A. 299, *Lirette v. Carrane*; 23 A. 132; 2 A. 917. See (a), 1), No. 6; 2), No. 12.

12. An affidavit by the tutrix, recorded prior to January, 1870, to preserve the tacit mortgage of her children against her, will be of no effect; an extract of the inventory should have been recorded, even if it had been destroyed. 28 A. 265, *Noémie Hickman v. A. B. Thompson*; 7 A. 535; 22 A. 278; 23 A. 57; 1869, No. 95.

13. The act of sale having been deposited in the office of the recorder prior to the registry of the judgment against the vendor, no hypothecary action lies against his property, although the act so deposited was recorded in the books of conveyance, long after the registry of the judgment. 29 A. 116, *Payne v. Pavey and Husband*; C. C. 2264, 2254, 2266. See (b), No. 18.

14. The records in the recorder's office of the parish of Rapides having been destroyed by fire, an act of the legislature was passed providing for re-establishing said records by proceedings before the district judge of the parish; *Held*: That the inscription, in the proper office, of a decree of said judge re-establishing a mortgage, the record of which had been burned, had the same effect as a re-inscription of said mortgage. 2 Woods, 103, *Hunt v. Innis*.

15. The judgment, as recorded, must speak for itself. See EVIDENCE, XV. (j), No. 4.

16. A certified copy of an act, under private signature, recorded on the oath of a subscribing witness, is not admissible; the original must be produced. See EVIDENCE, XXV. (c), No. 6.

(d) *Re-inscription; its necessity and requisites.*

1. The rule requiring the re-inscription of mortgages at the expiration of ten years, does not apply to mortgages given by stockholders to the property banks, to secure the amount of stock subscribed. 15 A. 630, *Haynes v. Courtney*.

2. To have effect, mortgages must be re-inscribed within ten years, notwithstanding the pendency of a suit to enforce them. 2 A. 100, 523, 800; 9 A. 194; 16 A. 283, *Barelli v. Delassus*.

3. Where the mortgagor fails to re-inscribe his mortgage within the ten years, and the property has been sold by the mortgagee, to a third person, who did not assume the mortgage; *Held*: That after the ten years, the property remains free in the hands of the purchaser. 20 A. 216, *Delony v. George*.

4. Inscription ceases to be evidence of a mortgage after the lapse of ten years, and it is not subject to the rules of prescription. 20 A. 223, *Kohn v.*

McHatton; C. C. (3333); 2 A. 100; 6 A. 321; 10 A. 596; 12 A. 216; 11 A. 390; 13 A. 569.

5. The inscription of a mortgage ceases to have effect after ten years. 20 A. 486, *Brown v. Johnson*; 508, *Britton & Koontz v. Norment*.

6. The registry of a judgment or mortgage, lapses by ten years. 23 A. 246, *Slocumb v. Williams*; 261, *Levi v. Mentz*.

7. A privilege, if not re-inscribed within ten years, is lost. 27 A. 371, *Nicholson & Co v. Citizens' Bank*.

8. If the mortgage be not reinscribed *after* the ten years, all the subsequent mortgages not preempted take priority, and a sale under the preempted mortgage, does not release the property of the other mortgages. 23 A. 276, *Byrne v. Citizens' Bank*; 24 A. 193, *Aillet v. Woods*; 22 A. 336, *Gegan v. Bowman*.

9. A mortgage must be re-inscribed within ten years, or it will lose its rank. 22 A. 205, *Johnson v. Lowry*.

10. The renunciation of the wife, in favor of a mortgage creditor, ceases to be of any effect by failure of re-inscription of the mortgage. 22 A. 336, *Gegan v. Bowman*.

11. The original vendors who have failed to re-inscribe their mortgage within the ten years, can, nevertheless, avail themselves of it, in preference to the mortgage notes executed by several subsequent vendees of the same property, who assumed, as a prior mortgage, that held by the original vendors. 20 A. 385, *Batey v. Woolfolk*; 2 A. 100, 520, 799; 4 A. 411; 17 L. 60; 6 N. S. 716; 7 R. 44; 6 R. 419, 522.

12. Those who acquire from the mortgagor property, under the special obligation to discharge the mortgage recited, are placed in the same position as the mortgagor; therefore there is no need of re-inscription as to them. 23 A. 546, *McDaniel v. Guillory*.

13. The obligation of an adjudicatee under execution, to pay concurrent mortgages with that of the seizing creditor, springs from his purchase. An hypothecary action is provided against him. The mortgage, therefore, as to him, requires no re-inscription. 24 A. 382, *Johnson v. Duncan*; 16 L. 163; 5 A. 306; 4 R. 44.

14. Neither inscription nor re-inscription is necessary, so far as the parties to the mortgage or their heirs are concerned. 25 A. 486, *Seyburn v. Deyris*.

15. The recital, in an act of mortgage, that a previous mortgage had been inscribed against the property, does not bind the mortgagee, or act as a re-inscription. 21 A. 204, *Britton & Koontz v. Janney*.

16. The registry of a judgment, obtained on an act of mortgage, does not satisfy the law of re-inscription; the latter can be made only in the manner that the inscription is made. 22 A. 402, *Rochereau v. Dupasseur*; C. C. (3333).

17. The re-inscribed act being an exact reproduction of the first inscription, it matters not if it be a copy of a copy. 22 A. 453, *Thompson v. Lizzie Simons*.

18. In re-inscribing a mortgage given by a tutor to his ward, mention of the date, the amount in principal of the debt, together with a description of the property subject to the mortgage on the books, will suffice. 25 A. 643, *Poutz v. Reggio et als*.

19. If new obligations were accepted in lieu of the mortgage, its re-inscription would be of no avail. 27 A. 276, *Moore v. Beelman*.

20. If the mortgage be not re-inscribed, although it contains the *pact de non alienando*, its effect is lost as to a purchaser from the mortgagor. 30 A. 11, *Watson v. Bondurant*.

21. Re-inscription must be made in the same manner as the first inscription. The assumption in an act of sale of a preexisting mortgage of which description is given, will not be sufficient. 28 A. 775, *Villavaso, Zuntz, subrogated v. A. W. Walker, Jos. Hernandez, 3d opponent*; 21 A. 204; 20 A. 385; 22 A. 402, 453.

22. When a mortgage against a succession is preempted, it cannot be revived by re-inscription; the mortgage creditor must rank as an ordinary creditor. 27 A. 630, *Sorrells v. Stamper*. See (e), 2), B. No. 1.

23. The registry preserves the evidence of the mortgage, and ten years from the date of registry, it ceases to have any effect. The mortgage may continue to exist between the original parties. 29 A. 315, *Adams & Co. v. Daunis*.

24. The object of requiring the re-inscription of mortgages in Louisiana, is to dispense third parties with the necessity of searching for the evidence of a mortgage more than ten years back. 8 Wall. 292, *Patterson v. De la Ronde*.

25. A mortgage is not prescribed by the failure of the parties to have it re-inscribed within ten years. It is the effect of re-inscription which ceases after that period, not the mortgage itself. 8 Wall. 292, *Patterson v. De la Ronde*.

26. The re-inscription of the mortgage is necessary, and prescription is not interrupted by the death of the mortgagee, whose succession is represented by an administrator, but who leaves a minor as a sole heir, unprovided with a tutor. 28 A. 811, *Leonard v. Smith*.

27. A re-inscription after ten years, and when the property is owned by another than the mortgagor, will not affect his title. 30 A. 11, *Watson v. Bondurant*.

28. Re-inscription of a sheriff's bond, within ten years of its registry, is necessary to preserve the legal mortgage resulting from its registry. 30 A. 351, *Succession Gale*.

(e) *Recorder of mortgages; the erasure of mortgages and privileges.*

1) Office of recorder; his powers, duties and liabilities; and how far mortgage rights are affected by his acts or omissions.

1. One in whose favor a mortgage on the property sold to him, has been fraudulently erased, and who was cognizant of the fraud, cannot avail himself of such erasure. 15 A. 4, *Bachemin v. Chaperon*.

2. Where the mortgage has been cancelled without authority, on the books of the recorder of mortgages, even on a regular, but false certificate, given by a notary public, the mortgage exists unimpaired, even against the innocent vendee, who has bought on the faith of a clear certificate of mortgage. The notary or recorder, is responsible in damages. 20 A. 425, *St. Romes v. Blanc*; 8 R. 130.

3. The erasure or cancellation of a mortgage, by a recorder, will not bind the mortgagee, when done without his knowledge, and he may enforce his rights. 29 A. 548, *Mechanics' Building Association v. C. L. Ferguson, J. D. Pugh, third opponent*.

4. The action against a recorder and his bondsmen, for failure to perform an official act, is one *ex contractu*, and as such, not prescribed by one year. 26 A. 677, *Brigham v. Bussey et al.* See further, PRESCRIPTION, III. (c), 1); Nos. 7, 8, 9, 10.

5. Plaintiff, who ordered the re-inscription of his judgment, and afterwards failed to see whether it had been done, does not contribute by his negligence, to the loss falling on him by the non-re-inscription, and may recover his damages against the recorder. The case is different, when the rights of third persons are at stake. 26 A. 678, *Brigham v. Bussey*.

6. Under a general denial, the sureties of the recorder, cannot show that the deputy recorder, who caused the damages, was appointed without their consent. 26 A. 679, *Brigham v. Bussey*.

7. A proceeding by rule is not proper to annul tax judgments and erase their inscription. See JUDGMENT, XI. (a), No. 3.

2) Right to make or claim the erasure.

A. *In general.*

1. The recorder is bound on the application, even of the contracting party, to erase the inscription of a mortgage recorded more than ten years, without re-inscription. 20 A. 508, *Britton & Koontz v. Norment*.

2. A judgment rendered on notes given for slaves, is void *ab initio*. The court will order the erasure resulting from the inscription of this judgment, on a rule. 25 A. 227, *Consolidated Association v. Blanc*. See OBLIGATIONS, III. (c), 1), No. 6. JUDGMENT, XI. (b), Nos. 7, 8, 9.

B. Insolvent and mortuary proceedings.

1. The re-inscription of a mortgage after peremption, subsequent to the death of the mortgagor, does not affect the property of his succession with a mortgage. 27 A. 552, *Succession Gayle*; 28 A. 811, *Leonard v. Smith*. See (d), No. 22.

2. The privilege of clerks and employees should be recorded, to be classed as privileges in the succession. 29 A. N. R., *Succession Byerly*.

C. Execution sales.

1. The seizing creditor may, by sale, call upon those claiming prior mortgages or privileges, to show cause why they should not be erased. The defendants are bound to show the validity of their prior incumbrances before excepting to this mode of proceeding. 24 A. 256, *Merrick v. Causeland*; 29 A. 355, *New Orleans National Bank v. Raymond*.

3) Proceedings to erase; the parties and decree.

1. For proper proceedings, see MANDAMUS, I. (b), Nos. 22, 23, 24. REGISTRY, II. (e), 2), A. No. 2.

III. OF THE REGISTRY OF SALES AND OTHER CONTRACTS, TITLES OR EQUITIES.

(a) Registry of sales.

1) Necessity, time, and place of registry; and effect of non-registry.

A. In general.

1. A sale of immovables has no effect as against third parties, until recorded in the proper office, in the parish where the property is situated. 21 A. 591, *Meyer & Bro v. Simpson*.

2. The debtor's real estate may be seized, notwithstanding the sale made by him, but which is not recorded. 25 A. 290, *Doughty v. Sheriff*.

3. A promise to sell to one is not binding on another who purchased, unless a fraud has been committed. See SALE, I. (f), No. 1.

4. An unrecorded title is valid, except as regards the creditors of the vendor and his *bona fide* vendees. 30 A. 727, *Logan v. Herbert*.

5. The registry of a judgment against the purchaser, will, as to the latter, affect the property with a judicial mortgage. *Ib.*

B. Forced sales.

See SALE, X. EXECUTION.

C. Time of registry; possession and its effect with registry on an anterior title unregistered.

1. A title acquired by prescription, need not be recorded. 30 A. — *Gusman v. Berryman*.

D. Non-registry as between the parties; who are third parties; and the rule, that notice is equivalent to registry.

1. Where notice of title has been directly brought home to a party, it supplies the place of registry, and although the knowledge has not been directly brought home to such party it may be inferred from the circumstances of the case. 15 A. 566, *Smith v. Lambeth*; but see II. (a), 3), Nos. 4, *et seq.*

2. An unrecorded sale is binding on the vendor's donee. 16 A. 96, *Zunt v. Courcelle*.

3. The act or proces-verbal of sale can have no effect as to third persons, until duly recorded in the parish where the property is located. 2 A. 278; 1 A. 249; 6 A. 772; 21 A. 591; 22 A. 113, *Lyons v. Cenus*.

4. The United States are not third persons in matters of confiscation. See CONFISCATION, No. 36.

2) Mode and requisites of registry; in what book and what evidence.

1. The recording of the proces-verbal of sale of succession property, in the parish where the property lies, is notice to third persons. 19 A. 353, *Wright v. Cummings*.

2. The recording of an act under private signature, produces its full effect, even if recorded without the proof required by article 2253, R. C. C. 25 A. 111, *Pierce v. Clark*.

3. A sale or exchange of real estate, under private signature, although recorded, can have no effect against creditors or *bona fide* purchasers, unless previous to its being recorded, it was acknowledged by the party or proved by the oath of the subscribing witnesses, and such acknowledgment or proof be recorded with the act. 28 A. 725, *Frederick Fairthorne v. S. H. Davis, Jr.*; 14 A. 599, 797; 4 N. S. 355.

(b) Registry of other contracts, titles, or equities.

1. Donations *inter vivos*, are neither mortgages nor alienations, they need only be recorded in the book of donations, in the mortgage office, under the act of 1855. 20 A. 572, *Bank of New Orleans v. Toledano & Taylor*; 14 A. 414; C. C. (1541), 1554. But see C. C. 2255.

2. A donation should be recorded in the book of donations, which is kept in the parish where the property is situated. C. C. 1544, 1541, 1542, 1545; acts, 1851, p. 335; 22 A. 391, *Ogle v. King*.

3. The transfer of a lease need not be recorded so as to preserve the crop raised by the transferee from seizure by the creditors of the transferor. 28 A. 227, *Gay v. Sheriff et als*.

4. A lease must be recorded in the conveyance office. See act of 1804. Bullard and Currey's Digest, p. 539, as found in 10 A. 627, *Talley v. Alexander*.

5. When the lease is not recorded in the conveyance office, the seizing creditor of the leased property, has the right, through the sheriff, to collect the rent from the lessee, although the latter had paid in advance or furnished his negotiable notes; garnishment process is unnecessary. 30 A. 437, *Summers & Branins v. Clark*.

(c) Register's office and liability.

1. The recorder of mortgages not being mentioned in the fifty-second section of act No. 42, of 1874, relative to costs, cannot share in the benefits of the act. 25 A. 286, *State ex rel. Recorder v. Clinton*.

2. What actions against the recorder are *ex contractu*. See II. (e), 1), No. 4.

REHEARING.

See APPEAL, IX. (i). NEW TRIAL.

RELEASE.

See ATTACHMENT, IX. BILLS AND NOTES, IX. EVIDENCE, XVI. (b), 2), H. EXECUTION, VI. (b). MORTGAGE, IV. (b), 2); VIII. PROVISIONAL SEIZURE. REGISTRY, II. (e). REMISSION. SEQUESTRATION, II. (d). SHERIFF, II. (b), 2), B. SURETYSHIP, III.

RELIGION.

SEE CORPORATIONS, X. (d); (e). DONATIONS, III. (c); V. (c).

REMISSION.

1. The remission of a cause of action must be clear and explicit. 24 A. 42, *Prather v. City*.

2. See OBLIGATIONS, VIII. (b), 2), B., § 7. PLEADING, IV. REMITTITUR. ABANDONMENT.

REMITTITUR.

1. If, after a judgment in his favor, a plaintiff enters a *remittitur* of interest allowed in the judgment, he will not be bound by the *remittitur*, and precluded from recovering interest, in case the judgment is set aside and a new trial granted *per curiam*. If it takes effect at all, it must take effect in its entirety. 16 Wall. 483, *Planters' Bank v. Union Bank*.

2. See APPEAL, I. (a), 1), No. 4, about *remittitur* to deprive the Supreme Court of its jurisdiction.

3. See APPEAL, IX. (g), 1), No. 3, about notice to be taken of *remittitur* not copied in the transcript.

4. See DISCONTINUANCE.

REMOVAL.

5. See COURTS, IV. (b). APPEAL, I. (b), 2), H. CLERKS OF COURT, II. CONSTITUTION, II. (c), 5). CORPORATIONS, III. COURTS, II. (d), 2); IV. (b). CRIMINAL LAW, XIII. (b). DOMICILE. MARRIAGE, XV. (b), 2), D. MANDAMUS, I. (a), 1). MINORS, I. (b); (c). NEW ORLEANS, II. (g). RECUSATION. SUCCESSION, VII. (f).

RENT.

1. It is the essence of the contract that it conveys the property in perpetuity; that the rent reserved is a charge imposed upon the property itself, which is inherent to it, to which it is perpetually subject, and which follows it into whatever hands it may pass. 23 A. 21, *Heirs of Bourgeois v. Thibodeaux*; C. C. 2752, 2758, 2763.

RENUNCIATION.

1. For renunciation of prescription, see PRESCRIPTION, VI.

2. For renunciation of community, see MARRIAGE, XIII. (e), 3). SUCCESSION, VIII. (f), 2), No. 8.

3. For wife's renunciation of the community, see SUCCESSION, V. (d). MARRIAGE, VIII. (c). MORTGAGE, IV. (c), 4).

4. The mortgage given by a minor and his tutor, to a third person, is not a waiver of the minor's mortgage on his tutor's share. See MORTGAGE, IV. (b), 1), No. 7. SURETYSHIP, I. (b).

5. For other matters, see OBLIGATIONS, VII. (b), 2), B. § 7.

6. The homestead exemption cannot be renounced. See HOMESTEAD, II. No. 21.

REPETITION.

1. Of the restitution of what has been unduly received. See QUASI CONTRACTS, II.

2. Of money paid under duress or error. See PAYMENT, I.

3. A voluntary execution of a judgment does not entitle appellant to a repetition, if the judgment be reversed on appeal. See APPEAL, VII. (c), No. 1.

4. An illegal tax once paid can, and cannot, be recovered. See QUASI CONTRACTS, II. Nos. 3, 4. TAXES, I. No. 4.

5. Money paid in satisfaction of a tax judgment cannot be recovered. 30 A. 259, *First Presbyterian Church v. City of New Orleans*.

REPORTER.

Of the Supreme Court, 1877, E. S., p. 165; short hand reporters, 1876, p. 149.

RES.

1. For *res gestæ*, see EVIDENCE, X. XV. (a).

2. For *res inter alios* and *res judicata*, see EVIDENCE, X. XXII. JUDGMENT, XV.

RESCISSION.

See COURTS, I. OBLIGATIONS, III. IV. VII. (a). VIII. (b). PARTITION, III. (b), IV. SUCCESSION, VIII. (e), 7).

RESPITE.

1. If the case be originally commenced by an application for respite, which the debtor fails to obtain, the meeting of creditors may resolve themselves instantaneously into a *cessio bonorum*, although the bankrupt law was enacted before the meeting, but since the institution of the proceedings. 19 A. 497, *Meekins, Kelley & Co. v. Their Creditors*; 5 R. 261; 8 R. 123; 4 A. 490; 15 A. 602. See BANKRUPTCY. INSOLVENCY.

2. Article 3095, Civil Code, does not exempt privileges growing out of a seizure, and given by article 722, Code of Practice, from the effects of a respite. 24 A. 359, *Huppenbauer v. Durlin*.

3. The claim of an embarrassed debtor, to exhibit the condition of his affairs to a court, with a view to obtain its assistance, to convoke his creditors, that they may deliberate upon a proposition to grant him a delay or respite, and to bind the minority to the conclusions of a consenting majority, is one which has no recognition in the common law. 18 H. 497, *Beauregard v. City of New Orleans*.

4. Proceedings in a Louisiana court, in a case of respite, are not binding upon creditors who had no notice of the proceedings. Advertisement in a paper is not sufficient; notice must be given to a resident within the parish, by process, to a non-resident, by letter from the notary. 7 P. 413, *Breedlove v. Nicolet*; 18 P. 283, *Haydel v. Girod*.

5. The judgment dismissing the opposition of a privileged creditor on questions relative to the regularity of the proceedings, is not *res judicata* on the question of privilege. See JUDGMENT, XV. (c), 3), No. 5.

RESTITUTIO IN INTEGRUM.

1. In case of nullity of the judgment, by virtue of which, execution issued, and plaintiff purchased, defendant is entitled to a restitution in integrum. See EXECUTION, V. (d), 9), No. 1. REPETITION. SALE, VI. (c), No. 2.

RETURN.

See APPEAL, II. (c); III. (e); IV. (b), (c); VIII. (d). ATTACHMENT, VI. (e). CITATION, III. CRIMINAL LAW, XIX. (a), (d). EXECUTION, V. (f); VI. (a). SHERIFF, II. (b).

RETURNING BOARD.

1. A commission issued by the governor, before the returns published by the returning board, is a nullity. 26 A. 375, *State ex rel. Carroll v. Jorda*. See ELECTIONS BY THE PEOPLE. GOVERNOR. OFFICE AND OFFICER. INTRUSION IN OFFICE.

REVENUE.

1. The act of March 3, 1863, entitled an act to punish and prevent frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes, authorizing the solicitor of the treasury, "with the approval of the secretary of the treasury," to sell at public sale, after three months advertisement, certain lands acquired by the United States for debts, and qualifies and limits the power of the said solicitor, given to him by the act of May 29, 1830, creating his office and prescribing his duties, and authorizing him to sell such lands at private sale; and, *pro tanto*, repeals it. 19 Wall. 598, *United States v. Jonas*. See TAXES, III. (d), 2), Nos. 13, 14.

2. The former act being thus repealed, and the latter one only in force, the approval of the secretary of the treasury is an indispensable condition to the validity of a sale made under the act by the solicitor. *Ibid*.

3. The purchaser is not bound to accept a deed, unless there be written evidence of this approval. *Ibid.*

4. The approval of the secretary is not a fact to be presumed, because the deed of the solicitor is the deed of an official person, nor even because it recites that the sale was made in pursuance of the act of 1862. *Ibid.*

5. An appeal to a commissioner of internal revenue, for the refunding of a tax illegally collected by the collector of internal revenue, dates from the time the application to have the tax refunded is filed in the office of the commissioner, and not from the time it is lodged with the collector of internal revenue. 1 Woods, 296, *Cotton Press Company v. The Collector.*

6. See LICENSE. MINORS, III. (d); (e). MORTGAGE, VI. (b). SALE, III. (c), 3), B. TAXES.

7. Revenue act of 1869, p. 146; amended as to founderies, refineries and manufacturing mills, and excepting sugar houses and cotton gins on plantations, 1870, p. 52; revenue acts, 1870, E. S., p. 126; 1871, p. 104; 1872, pp. 49, 55.

REVISED STATUTES.

See LAWS, III. (c).

RICHLAND.

Parish of, created 1868, p. 151.

RIOT.

Acts 1873, p. 45.

ROADS AND LEVEES.

I. IN GENERAL.

II. OF THE POWERS, DUTIES AND LIABILITIES OF MUNICIPAL AUTHORITIES; THE SERVITUDE DUE BY THE PROPRIETOR; AND HIS INDEMNIFICATION.

III. OF THE COST OF THEIR CONSTRUCTION AND REPAIR; ADJUDICATION OF THE WORK; AND PROCEEDINGS TO ENFORCE PAYMENT.

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| (a) <i>In general.</i> | (c) <i>Proceedings to enforce payment;</i> |
| (b) <i>Liability for the work; and duties of the proprietor.</i> | <i>and sale of the land.</i> |

I. IN GENERAL.

1. When a carriage driver attempts to pass a vehicle going in the same direction as himself, he must go to the left; when they meet, each must go to the right. 25 A. 235, *Avegno v. Hart.*

2. See LEVEES.

II. OF THE POWERS, DUTIES AND LIABILITIES OF MUNICIPAL AUTHORITIES; THE SERVITUDE DUE BY THE PROPRIETOR; AND HIS INDEMNIFICATION.

1. See NEW ORLEANS, II. (e).

III. OF THE COST OF THEIR CONSTRUCTION AND REPAIR; ADJUDICATION OF THE WORK; AND PROCEEDINGS TO ENFORCE PAYMENT.

(a) *In general.*

1. A contract made with a levee inspector of a parish to construct a levee under an ordinance of the police jury, is not affected by the subsequent repeal of the ordinance. 23 A. 168, *Kennard v. Lafargue, president, etc.*; 24 A. 272, *Cavalier v. Police Jury Jefferson.*

2. Act No. 312, of 1855, authorizing police juries to pass necessary ordinances relative to roads and levees, is repealed by act, 17th February, 1866, so far as the delegated parochial authority conflicted with the latter statutes, therefore, they are authorized to order certain levees to be built, and to bind the parish for payment thereof. *Ib.*

3. If the police jury orders the building of a levee, it is bound to pay the contractor a fair remuneration, after accepting the work. 24 A. 272, *Cavalier v. Police Jury Jefferson*.

4. If the work adjudicated by the inspector of levees was not authorized by the police jury, no recovery can be had against them. See POLICE JURY, No. 23.

5. See LEVEES.

(b) *Liability for the work; and duties of the proprietor.*

1. In an action to recover the amount for which work has been adjudicated on a road, to be made as required by the regulations of the police jury, to render the owner of the land liable, it must be shown that the forms of the law were complied with, when the adjudication was made, and that the work has been done in conformity to law, and to the terms of adjudication. 15 A. 181. *Grass v. Haynes*.

2. The act of the legislature, approved February 17, 1866, confirming the appointment of a board of levee commissioners, which had been previously made by the governor, and authorizing the appointment of others, when their terms of office expired, repealed all former laws, authorizing the parochial authorities to construct levees at the cost and expense of the front and riparian proprietors of the lands leveed. After the passage of the act of February 17, 1866, the parish cannot force the front proprietor to pay the cost of the levee, which she has ordered to be constructed along his front line. 22 A. 58. *Police Jury Parish of Jefferson v. J. J. Tardos*; 24 A. 613, *Surgi v. Mathews*.

3. The police jury is liable for work. See POLICE JURY, No. 1.

4. The contractor can only be paid according to his contract. See POLICE JURY, No. 5.

5. See LEVEES.

(c) *Proceedings to enforce payment; and sale of land.*

See EXECUTORY PROCESS, II. (a), No. 1. LEVEES.

RULE.

See INJUNCTION, VII. SUMMARY PROCESS.

ST. BERNARD.

Court house removed and ward division, 1874, p. 230; boundaries changed, 1875, p. 54; court house removed back, 1877, p. 34.

ST. CHARLES.

Tax for redemption of warrants, 1873, p. 119; road from Boutte to Bayou des Allemands, 1874, p. 260.

ST. HELENA.

Amite, boundaries of, 1870, p. 76.

ST. JAMES.

Court house, 1868, p. 77; road to Vacherie, 1869, p. 76; 1870, pp. 72, 73; donating same, 1874, p. 247; election to decide whether Gentilly shall be incorporated, 1873, p. 177; road to Grand Point, 1874, p. 247.

ST. JOHN THE BAPTIST.

Justice at Frenière, 1870, E. S., p. 60.

ST. LANDRY.

Wards, 1870, p. 66; justice of the peace wards, 1876, p. 77; justices may commit for any crime, 1877, p. 60; tax, 1878, p. 45.

ST. MARY.

To drain swamp lands, 1860, p. 34; Franklin, 1871, p. 169; road along Bayou Têche, 1873, p. 181.

ST. TAMMANY.

See POLICE JURY, No. 2. Covington incorporated, 1870, E. S., p. 60; special tax, 1878, p. 41:

SABINE.

Acts of Judge McNeely approved, 1874, p. 266.

SALARY.

See CORPORATIONS, VIII. (b). EXECUTION, V. (a), 3), c. § 3. LEASE, II. (c). PRESCRIPTION, III. (c), 4); (e). PRIVILEGE, II. (d); III. (e). PUBLIC EDUCATION.

SALE.

I. OF ITS NATURE AND REQUISITES.

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|------------------------|---|
| (a) <i>In general.</i> | (d) <i>Price.</i> |
| (b) <i>Parties.</i> | (e) <i>Consent, and sale of immovables.</i> |
| (c) <i>Thing.</i> | (f) <i>Promise to sell or buy.</i> |

II. OF THE RISK AFTER THE SALE IS COMPLETED.

III. OF THE OBLIGATIONS OF THE VENDOR.

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|---|---|
| (a) <i>In general.</i> | A. <i>In general.</i> |
| (b) <i>Delivery.</i> | B. <i>Price and increased value; fruits and improvements.</i> |
| 1) Mode and place of delivery. | 4) Partial eviction. |
| 2) What passes by delivery; quantity to be delivered; and boundaries. | (d) <i>Warranty against hidden defects; and actions of redhibition and quanti minoris.</i> |
| A. <i>In general.</i> | 1) <i>In general.</i> |
| B. <i>Accessory rights; and sales with reference to plans or other acts.</i> | 2) <i>Redhibitory defects.</i> |
| C. <i>Excess or deficiency of quantity; and sale per aversionem.</i> | 3) <i>Vendor's representations, and obligation to disclose defects; apparent defects and exclusion of warranty.</i> |
| 3) When vendor may refuse to deliver. | A. <i>In general.</i> |
| 4) Effects of delivery and non-delivery. | B. <i>Exclusion of warranty.</i> |
| A. <i>In general.</i> | C. <i>Apparent defects, and those known or declared to the vendee.</i> |
| B. <i>Effects as to third persons of vendor's possession after the sale.</i> | 4) <i>Sale of several things together.</i> |
| (c) <i>Warranty against eviction.</i> | 5) <i>Loss and return of the thing.</i> |
| 1) <i>In general.</i> | A. <i>In general.</i> |
| 2) <i>Exclusion or loss of warranty and right to sue thereon; its falsification and the evidence thereof.</i> | B. <i>Sufficiency of the tender; and what will excuse its omission.</i> |
| A. <i>In general.</i> | 6) <i>Evidence.</i> |
| B. <i>Exclusion of warranty.</i> | A. <i>In general.</i> |
| C. <i>Vendee's subrogation to vendor's right of warranty.</i> | B. <i>Rescission of the sale of slaves and animals.</i> |
| D. <i>Loss of warranty; its falsification and the evidence thereof.</i> | 7) <i>Measure of damages.</i> |
| 3) <i>Measure of damages.</i> | A. <i>In general.</i> |
| | B. <i>Interest; expenses of suit; and those consequent on the redhibitory defects of slaves.</i> |

IV. OF THE OBLIGATIONS OF THE VENDEE.

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|---|--|
| (a) <i>In general.</i> | A. <i>In general.</i> |
| (b) <i>Obligation to pay the price and accept delivery.</i> | B. <i>Vendee before acceptance, or after consummation, of the contract.</i> |
| 1) <i>In general.</i> | C. <i>Vendee with notice or without warranty; those who buy up other titles; and estoppel or waiver of the right to suspend payment.</i> |
| 2) <i>When interest is due on the price.</i> | D. <i>Vendor's assignees.</i> |
| 3) <i>Vendee's relief and right to suspend payment or exact security.</i> | |

V. OF THE RIGHTS AND OBLIGATIONS OF VENDEES IN GOOD OR BAD FAITH AS TO THIRD PERSONS HOLDING THE PRIOR TITLE OR LATENT EQUITIES.

- (a) *In general.* (b) *Evidence of bad faith; and who are vendees with notice.*

VI. OF NULLITY AND RESCISSION OF SALES.

- (a) *Vente a réméré.* (c) *Other causes of nullity.*
(b) *Lesion beyond moiety.*

VII. OF SALES AT AUCTION AND A LA FOLLE ENCHERE.

- (a) *In general.* (c) *The consent; completion and evidence of the sale; proces verbal and adjudication.*
(b) *Auctioneer's authority; terms of sale; the thing sold; its title and description.* (d) *Fulfilment of the terms of sale; and sales a la folle enchère.*

VIII. OF THE ASSIGNMENT OF INCORPOREAL RIGHTS.

- (a) *In general.* (c) *Assignor's warranty; and what passes to the assignee.*
(b) *Mode and completion of the assignment; form, necessity, and effect of the notice.* (d) *Litigious rights.*

IX. OF DATION EN PAIEMENT.

X. OF JUDICIAL SALES.

I. OF ITS NATURE AND REQUISITES.

(a) *In general.*

1. A sale of movables, valid by the laws of the country where it is made, is valid everywhere. 17 A. 236, *Fell v. Darden & Co.*; C. C. (10); C. P. 13; 7 M. 213 and 355; 8 R. 262. See LAWS, IV. Nos. 5, 6.

2. The contract of sale between the parties, must be construed with the counter letter showing the true intention of the parties. 23 A. 669, *Ware & Son v. Morris.*

3. A sale conditioned to become null, if the purchaser is evicted by the enforcement of the existing mortgages, is dissolved of right as soon as the creditors sought to enforce their mortgage. 24 A. 172, *Jamison v. Barrow.*

4. An agreement to transfer the property when a certain amount should have been paid, does not transfer the ownership unconditionally. The property is not liable for the debts of the pretended purchasers, until the whole amount is paid. 26 A. 634, *Stevens v. Older & Chaud.*

5. A promissory note, given on its face "for a tract of land known as the D. place," is not a sale. 28 A. 807, *Morgan v. Locke.*

6. Where the assignment was made really for the purpose of enabling the assignee to realize a succession for the benefit of the assignor, and the whole property is turned over to the assignor, in accordance with the real intent of the parties; at the death of the assignor the assignee cannot be successful in claiming the property under his deeds. 27 A. 42, *Succession Elliott.*

7. A sale of real estate should not be executed unless all the taxes be paid. 28 A. N. R., *City of New Orleans v. George W. Campbell.* (N. B. *Justices WYLY, HOWELL and MORGAN, are of opinion that the sale, in case the taxes be not paid, is not null, but that the taxes may still be enforced.* *Ib.*) O. B. 45, fo. 481. See SHERIFF, II. (b), 1).

8. The sale of property under execution, without first paying the taxes, is not a nullity. The sheriff is authorized to suspend the completion of the deed until the taxes are paid. 29 A. 206, *Jouet v. Mortimer.*

9. B. acknowledges owing to C. eight thousand dollars, and for the purpose of securing unto C. the said sum of money, sells the undivided three-fourths of his plantation to C., which sale is made for and in consideration of said indebtedness to said C. In evidence of said indebtedness, B. furnishes his

notes, payable in one, two and three years, with eight per cent. interest, from maturity; said notes are not negotiable, and subject to all the stipulations contained in the act. It is further agreed, that in case B. shall well and truly pay unto C. the said notes, according to their tenor, then B. shall be entitled to the redemption of the property, which he conveys by absolute right and by reason of payment of the indebtedness. The right of redemption was given for a certain lapse of time, but was not exercised; *Held*: That this was a sale and not a mortgage. 23 A. 281, *Carter v. Williams*. See SALE, VI. (a). PLEDGE, II. No. 1.

10. All the stipulations relative to a sale of immovable property, should be in one instrument. 11 P. 351, *Livingston v. Story*.

11. Plaintiff admits defendant's title by purchasing from him. See EVIDENCE, XII. (a), No. 2.

12. The adjudication of property, by a family meeting, to the surviving spouse, is a sale. See MINORS, III. (g), 5), No. 2.

13. When a sale will be construed to be an antichresis. See PLEDGE, II. No. 1.

(b) Parties

1. Where the husband makes a sale of property, partly belonging to himself and partly to his wife, in which his wife joins him, and declares that she gives and grants to the vendee, "all and singular any rights, titles or privileges which she may have in her own separate right or otherwise, in and to the property mentioned in the act, and binds herself to maintain the validity of the act," it is a valid alienation of the wife's separate property, and binding on her. 15 A. 383, *Henderson v. Fort*. See MARRIAGE, VI.

2. Such a sale is binding on the wife, although by the express terms of the contract, the price is made payable to the husband. The price of her property is still subject to her separate administration whenever she pleases to demand the same, even against the will of her husband. 15 A. 383, *Henderson v. Fort*. See MARRIAGE, VIII. (d).

3. The father who receives, as tutor, property in exchange for some of his minor children, has no right to dispose of the same individually, nor does it fall in his succession. 16 A. 251, *Alexander v. Gusmann*. See MINORS, III. (g).

4. The sale of a horse by one employed as groom, is null. The horse may be recovered with damages. 19 A. 517, *Russell v. Kunemann*.

5. A contract of sale between husband and wife, can only take place in the three cases mentioned by article 2446, C. C.; therefore a sale of a plantation worth twenty-five thousand dollars, in satisfaction of a judgment of five thousand dollars made by the husband to the wife, who assumes incumbrances resting thereon for the balance of the price, is in contravention of a prohibitory law, and is therefore absolutely null. 23 A. 439, *Oliver and Husband v. Dayries, sheriff et als.*

6. A re-transfer by the wife to the husband of property given in payment to the wife, is utterly null and void, and the prescription of one year is not applicable, to debar creditors from pursuing the same. 21 A. 466, *Warfield v. Bobo*. See MARRIAGE, VI. No. 12.

7. Under the national bankrupt act, national banks may sell the real estate owned by them on terms of credit, and accept mortgages to secure payment of the price. 29 A. 355, *New Orleans National Bank v. Raymond*.

8. A political corporation may purchase real estate. See CORPORATIONS, II. (b), No. 4.

9. The managers are trustees, and cannot purchase. See CORPORATIONS, IV. (a), No. 2.

10. For contracts between husband and wife, see MARRIAGE, VI.

11. A sale by a minor after emancipation, is null, when, etc. See MINORS, IV. No. 1.

12. How minors' property may be sold at private sale, see PARTITION, III. (b), No. 6.

13. How the ostensible owner may sell partnership property, see PARTNERSHIP, II. (d).

14. If the charter of the bank had expired when the transfer was made it will be maintained if made in good faith. See PLEADING, I. (d), No. 1.

(c) *Thing.*

1. The purchase of one's own property, is null. 16 A. 230, *Alderson v. Sparrow*. See PRIVILEGE, III. (b), 1), No. 2.

2. The exhibition of a sample implies a warranty that the thing sold by it shall be in some measure in conformity to it. This warranty is limited to the condition of the goods at the time of the sale. C. C. (2449); 19 A. 11, *Hall, Kemp & Co. v. Plassan*.

3. When a certain number of bales of cotton are sold, not expressly restricted to a certain lot, the purchaser cannot compel the delivery out of that particular lot. 24 A. 150, *Warren & Crawford v. Kirk*.

4. The machinery of a refinery was sold and delivered, but the vendors remained in possession as lessees, and acquired more machinery of the same nature; *Held*: That the machinery lastly purchased could not have belonged to the vendees of the original machinery. 27 A. 451, *Edwards v. Fairbanks et als.*

5. The adjudication of a slave woman at a sheriff's sale does not pass the title to her child, under ten years of age, who has been neither seized, advertised nor sold. 15 A. 293, *Nouvet v. Bollinger*.

6. A contract for the sale of slaves cannot be enforced. 19 A. 234, *Wainright v. Bridges*; 352, *Addison v. Settoon*; 377, *Gremillon v. Croussilac*; 518; 309, *Austin v. Sandell*; 106; 20 A. 357, *Burbridge v. Harrison*; 152, *Delaporte v. Bourg*; 153, *Bourgeois v. Billiu*; 343, 344, 402, 230; 21 A. 567, *Groves v. Clark*; 325, *Campbell v. Waters et als.*; 164, *Thomas v. Hackett*; 538, *Dranguet v. Rost*; 643, *Bedell v. Hays*; 517, *Haden v. Philips*; 666, *Nunez v. Winston*; 193, 371, 384; 25 A. 477, *Duperier v. Darby*; 612, *Winter v. Tournoir*; 26 A. 386. See OBLIGATIONS, III. (c), 1), Nos. 4, 5, 6.

7. These contracts are valid. 25 A. 350, *Henderson v. Merchants' Mutual Insurance Co.*, as reversed in 18 Wallace, 546, *Boyce v. Tabb*.

8. A sale of slaves, at probate sale, after the proclamation of emancipation, by the president, confers no title. 20 A. 199, *Posey, adm'r v. Driggs*.

9. Slaves purchased by the heirs from the succession, are not to be deducted from their share. 21 A. 661, *Succession Patin*.

10. In a sale of land and slaves, where the amount already paid exceeds the value of the land, the balance due cannot be recovered. 21 A. 517, *Haden v. Phillips*. See OBLIGATIONS, III. (c), 1), No. 6.

11. A note given for the purchase price of a plantation and slaves, will be enforced *pro rata* on the value of the land. 25 A. 405, *Lalande v. Poydras*.

12. For sale of succession rights, see ALEATORY CONTRACTS, No. 5.

(d) *Price.*

1. Where real property belonging to an insolvent estate was adjudicated to a certain person, and in consequence of his failure to comply with the terms of the first sale, the property was re-adjudicated to the same person for a lesser amount, and suit being brought against such purchaser for the difference in the prices of the two sales, the matter was compromised by his paying a certain amount, which fell short of the deficiency; *Held*: That this sum was due by him as part of the price which he had stipulated to pay for the property, and must therefore be classed on the syndic's tableau as the proceeds of immovable property. 15 A. 705, *Shropshire v. His Creditors*. See INSOLVENCY, XI.

2. Where the consideration of the sale is Confederate money, the contract cannot be enforced. 20 A. 451, *Howard v. Yale*. See No. 5. CONFEDERATE MONEY, Nos. 3, 4. BILLS AND NOTES, IV. (a). EXECUTION, V. (d), 8), A. No. 10. MANDATE, V. (b), 1), No. 1. MINORS, III. (g), 4). SALE, X. Nos. 16, 17.

3. A transfer of real estate as a recompense for services, signed by the vendor before two witnesses, with no fixed price, and no delivery, is unknown

to our law and vests nothing in the pretended vendee. 21 A. 196, *Kleinpeter v. Harrigan*.

4. The complaint of an overcharge in the price, is not entitled to much weight when made for the first time, after the institution of the suit, to recover the price. 21 A. 411, *Morris, Tasker & Co. v. Fleming, agent*.

5. A contract wanting the price to be paid, in money, is not a sale. 23 A. 700, *Siebernagel v. Baker, administrator*. See No. 2.

6. An instrument pretending "to transfer, sell and assign" all the rights of the debtor to a succession, for no fixed price, is neither a sale nor a giving in payment—and is without effect. 24 A. 85, *Warner v. Burke*; 27 A. 534, *Lee v. Cummings*. See ALEATORY CONTRACT, No. 5. TRANSACTION. No. 6.

7. Plaintiff who paid a part of the price in Confederate notes, and the balance in United States currency, is entitled to the ownership of the land. 28 A. 259, *Schollars, administrator, v. Hardee, et als*. See X. Nos. 16. 17. CONFEDERATE MONEY.

8. A notarial act by which A. conveys to B. a certain lot of ground in consideration of another lot therein specified, but which contains no conveyance from B. to A., is not an exchange, nor does the recital of consideration bind B. to make that consideration good. His having the notarial act, imports merely an acceptance of the conveyance of A. 14 P. 133, *Preston v. Keene*.

(e) *Consent; and sale of immovables.*

1. The acceptance of a contract of sale need not be expressed in the sale, nor signed by the party in whose favor it is made; it is sufficient that he should do something which clearly indicates his acceptance. 23 A. 272, *Balch v. Young, tutrix*.

2. Where the vendor represents himself as being the legatee of the testator, whose property he purchased at the succession sale when he was the executor thereof, and afterwards it is shown that he was not a legatee, the sale of the same property to others will be null for want of consent. 27 A. 491, *Formento v. Robert*. See SUCCESSION, VIII. (e), 6). SALE, III. (c), 2), A. No. 1.

3. How the intention of the parties is to be construed, see (a), No. 2.

4. For consent in contracts, see OBLIGATIONS, III. (b).

(f) *Promise to sell or buy.*

1. Where a party has made a promise to sell property to one person, and sells it to another, such sale will operate a translation of the property to the latter, although he may have had knowledge of the existence of the promise of sale to the other, unless a fraud has been committed by the vendor and vendee upon the promisee in order to defeat his title. 15 A. 483, *Garrett v. Crooks*.

2. A promise of sale does not put the thing at the risk of the promisee, nor does it transfer to him the ownership or dominion of it. 15 A. 483, *Garrett v. Crooks*.

3. A promise to sell must be proven by written evidence. Parol is not admissible to show a contract of sale of immovable, and damages resulting from the non-compliance. 17 A. 140, *Harris v. Peel*. See EVIDENCE, XIV. (a), 2).

II. OF THE RISK AFTER THE SALE IS COMPLETED.

1. Where property in a government warehouse, remained therein, for the mutual convenience of both the vendor and vendee, the vendee not requiring the importer to pay the duties and perfect the delivery for a certain time, it was found that the warehouseman had made away with a portion of the goods: *Held*: That the property was at the risk of the vendee, and that in the absence of any want of care on the part of the vendor, he is not responsible. 15 A. 438, *Meeker v. Vredenburg*. See III. (b), 1), No. 3.

2. Goods sold by weight, must be weighed before being at the risk of the purchaser, and the latter must be put in default, to be liable in damages. 17 A. 146, *Seris v. Bellocq, Noblom & Co.*

3. When the cotton, without being weighed, is by special agreement placed at the risk of the purchaser, the agreement is valid. 19 A. 116, *Clark & Thieneman v. Norwood*.

4. The property sold is at the risk of the purchaser, after delivery, although it be cotton sold by the pound, and not weighed. 20 A. 391, *Hamilton v. Eimer & Co.*

5. Although cotton sold by weight is at the risk of the purchaser only after weighing, yet the parties, by their agreement, may shift the responsibility. The weight and quality in case of loss will be fixed by proper evidence. 20 A. 111, *Kelham & Co. v. Carroll, Hoy & Co.*

6. The stipulation in a contract of sale, that delivery is accepted, will dispense the vendor from further delivery, and the property is at the risk of the purchaser. 21 A. 534, *Dupleix v. Gallien*.

7. When goods are sold in lump, they are at the risk of the purchaser, from the day of sale, *aliter* if sold by weight or measure. 19 A. 123, *Rhea v. Otto*; C. C. 2233.

8. By the terms of sale, the purchaser had three days to remove the articles purchased; they were destroyed before the expiration of the delay; the loss is that of the seller. 18 A. 627, *Gleason & Clark v. Sykes*.

9. The risk, after the sale and delivery, of the warehouse receipt, is on the purchaser. 20 A. 379, *Nusbaum v. Marks & Co.*

10. In case of non-delivery by reason of the loss of the ship, of goods sold, by sample and to be delivered, the loss falls on the seller. 21 A. 412, *Mail-lard v. Max Nihoul*.

11. The defendants having ordered goods from New York with an order "not to insure," are liable to the vendors for their value, if the goods be captured before arrival. 23 A. 479, *Elmore v. Kearney, Blois & Co.*

12. Until delivery, the goods sold are at the risk of the seller. 24 A. 150, *Warren & Crawford v. Kirk*.

13. Except where there is an express agreement to the contrary, goods sold by weight or measure, are not at the risk of the purchaser, until weighed or measured. 30 A. 894, *Peterkin v. Martin*.

III. OF THE OBLIGATION OF THE VENDOR.

(a) *In general.*

1. Dispossession is not always required to constitute eviction, but those principles are not applicable to the case of purchasers, under the *Maison Rouge* grant, who have availed themselves of the act of congress passed for their relief, and have acquired the superior title of the United States. Such purchasers cannot be considered as having been evicted by the superior title of the United States, and have not the right to demand the repetition of the amounts paid by them on their purchases, from a party holding title under the grant. The title from the government must be considered as inuring to the benefit of their vendor, in aid and completion of the imperfect title transferred by him, or payment of the entrance money and legal interest thereon from date of the receiver's receipt. 15 A. 514, *Succession of Coxe*.

2. Title acquired by the vendor subsequent to the sale, inures to the benefit of the vendee. 16 A. 36, *Zuntz v. Courcelle*. See No. 4; VI. (c), No. 1.

3. The seller who commits an active violation of his part of the contract, is in default, and the buyer has a right to have the sale rescinded. C. C. (2041); 2 R. 536; 9 A. 144; 5 R. 246; 2 A. 475; 3 M. 244, 249; 22 A. 363, *Brandon v. Hughes*.

4. The moment the vendor acquires title, it instantaneously inures to the benefit of his previous vendee, and his subsequent sale to another person transfers nothing. 25 A. 159, *Crocker v. Hoag et als.*; C. C. 3144, 3304; 18 A. 321; 9 L. 99; 5 A. 532; 12 L. 170; 5 N. S. 247; 12 M. 187. See No. 2; VI. (c), No. 1.

5. If one who promises to sell and give a clear title by an appointed day, fails in his contract, the other party is released. 29 A. 663, *Bennett v. Fuller*.

6. When the owner of a patented machine sells the exclusive right to use

and dispose of the machine within a certain territory, he thereby excludes himself and all others from selling within said territory any other machine called by a different name, and differing slightly in its construction and method of operation, but which is substantially the same machine, performing the same useful purpose. 29 A. 811, *Ferree v. Smith*.

(b) *Delivery*.

1) *Mode and place of delivery*.

1. Where a cargo of goods, deposited in a government warehouse, is sold, the sale is perfect by the consent of the parties, the price having been paid, and delivery made fictitiously by the transfer of the warehouse receipt. 15 A. 438, *Meeker v. Vredenburg*. See No. 3.

2. Where a bill of sale of a slave did not declare that the property was delivered, but contained the declaration that it was bargained and sold to the vendee, and concluded with the usual warranties; *Held*: That such a contract of sale was complete, and the property was at the risk of the buyer. 15 A. 640, *Walker v. Hayes*; 1 N. S. 528.

3. There can be no constructive delivery of imported merchandise, as long as the duties are not paid. Acts of congress, March 2, 1799, § 62; 18 A. 308, *United States v. Murdock*.

4. Where no time is mentioned, an immediate delivery cannot be enforced. 19 A. 130, *Pratt v. Craft*.

5. Defendants having accepted the note of a third person, with the indorsement of plaintiff, for the purchase price of a carriage, failed to take the necessary steps to hold plaintiff liable; as indorser he is therefore released, and defendants are bound to deliver the carriage or return the purchase price, if they have disposed of same. 26 A. 382, *Longstreet v. Denman & Co*.

6. The delivery is constructive when the vendor of a twelve months bond, held by the sheriff, notifies the sheriff of the sale of the bond, and the latter receives instructions from the vendee. 28 A. 838, *Morgan v. Richmond, sheriff*; C. C. 2247.

7. The consignee, who ordered goods, is liable for their value when lost, *in transitu*. 28 A. 804, *Cazeaux & Vergnole v. Filliquier*.

8. A vendor, in making a contract of affreightment with a common carrier, acts as the agent of the vendee, although the vendee may be a stranger to the carrier. 1 Woods, 64, *Blum, Frank & Co. v. The Caddo*.

2) *What passes by delivery; quantity to be delivered; and boundaries*.

A. *In general*.

1. Where the land sold is described in the act of sale, by reference to adjoining tenements, and sold from boundary to boundary, no action can be maintained for a diminution of price on account of deficiency in quantity. 15 A. 76, *Zeringue v. Williams*.

2. There can be neither increase nor diminution of price on account of disagreement in measure, where the object is designated by adjoining tenements, and sold from boundary to boundary. 16 A. 116, *Barrow v. Miller*; C. C. (2471); 15 A. 76.

B. *Accessory rights; and sales with reference to plans or other acts*.

1. The sale of a note includes the mortgage securing its payment. 18 A. 192, *Jeckell v. Fried*; 1 Woods, 214, *Ellett v. Butt et al.* See VIII. (c), No. 2.

2. The plan exhibited at the public sale, in accordance with the advertisement, is part of the description of the land. 18 A. 290, *Lallande, ex. v. Wentz & Pochelu*; 3 A. 1; 6 L. 551.

3. Where a notary, by error, described the lot sold as containing more depth than was delivered and described on the plan and act of sale referred to in the act, the vendee has no action for a diminution of the price. 20 A. 415, *Wurzberger v. Meric*.

4. In a sale *per aversionem*, with reference to the plan and to the streets bounding the square, they control the expressions of measurement. 26 A. 40, *Whitney v. Saloy*.

5. The sale of "a tract of land acquired by the vendor by deed from the sheriff of — parish, on the — day of —, under seizure in — suit, in — court, and containing — acres, more or less; also of another tract adjoining containing — acres, being the same acquired, etc.," is a sale *per aversionem*. 26 A. 254, *Gay v. Larimore*. HOWELL, J., *dissenting*: Such a sale is one per acre. *Ib*.

6. See EVIDENCE, XXIII. SALE, V. (b), No. 4.

c. *Excess or deficiency of quantity; and sale per aversionem.*

1. Where the land sold is described by reference to adjoining tenements, and sold from boundary to boundary, no action lies for a diminution of the price. See SALE, III. (b), 2), A, Nos. 1, 2.

2. Where fraudulent concealment by the vendor, as to the real quantity, is not charged, in a sale *per aversionem*, the vendee is not entitled to a diminution of price. 19 A. 134, *Ragan v. Gwinn*; 5 N. S. 212; 13 L. 100.

3. In an action for diminution of the price, evidence is admissible to prove that the surplus sold was inserted in the act by an error of the notary. See EVIDENCE, XV. (f).

4. An executor who advertises property of the succession for sale *per aversionem*, well knowing that the tract contains a great deal more than advertised, to the prejudice of the creditors and heirs, should be destituted from his trust. 21 A. 455, *Rogers v. Morrison*.

5. The purchaser cannot obtain a reduction of the price, when the deficiency does not exceed one-twentieth part of the property sold. C. C. 2494; 26 A. 40, *Whitney v. Saloy*.

6. The price should be reduced in proportion to the land not delivered. 28 A. 617, *Cade v. Malain*.

3) When vendor may refuse to deliver.

1. The discovery of the insolvency of the vendee before delivery and after the sale, will entitle the vendor to stop his goods *in transitu* and to recover them, notwithstanding that they have been attached. 21 A. 268, *Blum & Co v. Marks*. See PRIVILEGE, III. (b), 1), No. 4.

2. The *transitu* is not at an end before delivery of the goods to the consignee. *Ib*.

3. Our courts will recognize and enforce the right of stoppage *in transitu*, arising from a sale of goods in another State, to an insolvent here. 21 A. 268, *Blum & Co. v. Marks*. See No. 5.

4. The purchaser having failed to accept delivery of the cotton, although notified that such delivery should be accepted at a stated time, or not at all, the vendor could dispose of the same to other parties. 27 A. 720, *Tabary & Amory v. Thieneman*.

5. The right of stoppage *in transitu*, does not affect the ownership in the vendee. 1 Woods, 64, *Blum, Frank & Co. v. The Caddo*.

6. A transfer of a bill of lading, as a mere collateral to previous obligations, without anything advanced, given up or lost on the part of the transferee, does not constitute such an assignment as will preclude the vendor of the goods from exercising the right of stoppage *in transitu*. 2 Woods, 35, *Lessa-sier & Wise v. The Southwestern*.

4) Effects of delivery and non-delivery.

A. *In general.*

1. A purchaser in good faith, of movables, duly delivered, without notice of a prior sale, cannot be sued by the first purchaser for a dissolution of the sale. 18 A. 608, *E. North Cullom v. Guillot*; 7 A. 373.

2. Whenever the thing sold remains in possession of the vendor, the law presumes that the sale is simulated, and as against third persons, this presump-

tion must be rebutted. 19 A. 53, *Keller v. Blanchard*. See EVIDENCE, III. (b).

3. A sale of cotton for Confederate treasury notes, being null, the vendor refused to deliver, but the vendee, with the assistance of some soldiers, obtained possession thereof by violence, and shipped the same to New Orleans, where it would have been turned over to the vendor but for a sequestration by the vendee who claimed the same; *Held*: That the cotton was the property of the vendor. 21 A. 720, *Duperier v. Flanders*.

4. A sale under private signature has no effect against third persons if the vendor remains in possession of the property sold. 23 A. 646, *Morgan v. Kinnard*.

5. The sale of a movable is not complete until delivery, and that of an immovable is not binding on third persons until recorded. 27 A. 276, *Adams v. Adams*; 18 A. 606, 608; 1 A. 59; 3 A. 462; 19 A. 459. See ATTACHMENT, VII. (a), 1).

6. The interference of the military, which prevented the delivery of the merchandise purchased, relieved the obligor from penalties, but he must return the price received by him. 27 A. 438, *Denny v. Simons*.

7. In the State of Mississippi, a sale of personal property is complete, by consent of parties, without delivery. 26 A. 247, *Taylor v. Twenty-five Bales Cotton*.

8. The vendee, who wishes to recover property in possession of the vendor, must prove the reality of the sale. See EVIDENCE, VIII. No. 6.

9. As between the parties and their heirs or representatives, possession, after the sale, is not a presumption of simulation. 29 A. 512, *Hebert v. L  g  *.

10. Between the parties, delivery is not necessary for the validity of the giving in payment of movables. See OBLIGATIONS, III. (c), 2) A. No. 12.

11. The vendor, who remains in possession, as lessee, and buys other effects, is the owner of the last. See SALE, J. (c), No. 4.

12. For presumption of simulation, see EVIDENCE, III. (b).

B. Effects as to third persons of vendor's possession after the sale.

1. The sale of movables is not complete until delivery. 18 A. 606, *Tanneret v. Edwards, sheriff*; 608, *E. North Cullom v. Guillot*; 1 A. 59; 3 A. 462; C. C. (1917), (2243); 19 A. 459, *Platt v. Maples*; 27 A. 276. See ATTACHMENT, VII. (a), No. 1.

2. Where there is neither actual nor constructive delivery, and the vendor retains possession of the movables sold, not under a precarious title, but a precarious possession, the movables can be seized and sold by the vendor's creditors. 16 A. 286, *McCloskey v. Central Bank*; 6 A. 753; 4 L. 340; 1 A. 61.

3. Movables sold, but remaining under the control of the vendor, may be seized by the vendor's judgment creditors. 19 A. 78, *Pointer v. Roth*; 1 A. 59; 3 A. 462.

4. Where the vendors remain in possession of the movables sold, as the pretended agents of the vendees, the property may be seized by the creditors of the vendors. 26 A. 382, *McCarthy v. Baze*.

5. In a sale of cotton by the pound, until delivery, it may be seized by the creditors of the vendor. 21 A. 414, *Abat & Cushman v. Atkinson*.

6. The sale of machinery, and transfer of the lease of the building to the vendor, who sub-leases to the vendor, constitutes a delivery. 27 A. 450, *Edwards v. Fairbanks et als.*

7. Where the giving in payment of the mules, and the sale thereof to the debtor, was made without any real delivery, no vendor's privilege attaches as to third seizing creditors. 28 A. N. R., *Sentell & Co. v. Borron*.

8. The non-delivery raises the presumption of simulation. See EVIDENCE, III. (b), No. 2.

9. Until delivered, the movables may be seized by the creditors of the vendor. See EXECUTION, V. (a), 3), A. Nos. 5, 6.

10. When the vendor, who was captain of the boat sold, engaged his services as such, to the vendee, the presumption of simulation does not arise. See SHIPPING, II. No. 2.

(c) *Warranty against eviction.*

1) In general.

1. Actual dispossession is not always required in order to constitute an eviction, a purchaser may be evicted, although he continues in possession of the property, if that possession be under a different title; as, for instance, if the vendee should subsequently hold under the true owner, either by inheritance, or otherwise. 15 A. 514, *Succession of Coze*; 23 H. 132, *Flowers v. Foreman*. See POSSESSION, I. No. 3.

2. Warranty has two objects, security for the buyer's peaceable possession and against hidden defects. 18 A. 133, *Morphy v. Blanchin*.

3. One who causes his own property to be sold, and purchases the same with other parties, becomes joint owner, and as such, loses his absolute control thereof. He is bound to warrant the other purchasers. 25 A. 529, *Littel v. Wackerhagan*.

4. After the transfer, the transferrer can do no act to injure the rights of the transferee. 28 A. N. R., *State ex rel. Richard v. Parish Judge of St. Charles*.

5. Warranty of title by an heir who has accepted the succession. See ESTOPPEL, No. 14.

6. For warranty in forced sales, see EXECUTION, V. (d), 8), B.

7. The purchaser of goods, who knew that the duties had not been paid thereon, has no action of warranty against the vendor. See OBLIGATIONS, III. (c), 2), B., Nos. 2, 3.

8. Plaintiff, in a petitory action, cannot recover his property, sold under execution. See PETITORY AND POSSESSORY ACTIONS, II. (a), No. 8.

9. For warranty in probate sales, see SUCCESSION, VIII. (e), 7), D.

2) Exclusion or loss of warranty, and right to sue thereon; its falsification and the evidence thereof.

A. In general.

1. Where, by his fraudulent representations, the vendor induced the vendee to believe that he was the owner of the property sold, the latter may sue for a rescission of the sale, without having been threatened with eviction on discovering the error. 27 A. 491, *Formento v. Robert*. See I. (e), No. 2; IV. (b), 3), B.

B. Exclusion of warranty.

1. Where there is an exclusion of warranty in an act of sale, the vendee, on eviction, can only recover, besides costs, the price which he paid, with interest from the date of the eviction. 16 A. 45, *Buch v. Miller*.

2. Although it be agreed that the seller is not subject to any warranty, he is, however, accountable for whatever results from his personal act, and any contrary stipulation is void. 17 A. 50, *Huntington v. Brown*; C. C. 2480.

3. The renunciation of warranty is not binding on the purchaser when the seller knew, or had good reasons to believe, that the goods sold were unsound. The sale cannot be enforced. 18 A. 232, *Bevans & Co. v. Farrell*; 5 A. 491.

C. Vendee's subrogation to vendor's right of warranty.

1. An express subrogation is necessary to enable a purchaser of land to exercise the rights of his vendor, arising from a deficiency in the quantity delivered. See PAYMENT, II. (a), No. 2.

D. Loss of warranty; its falsification and the evidence thereof.

1. The exhibition of a sample, implies a warranty that the goods sold are of the same quality. 19 A. 11, *Hall, Kemp & Co. v. Plassan*.

3) Measure of damages.

A. In general.

1. If the vendor who caused property to be sold at auction, fails to comply

with the adjudication, he is responsible to the vendee for such damages as the latter has suffered. 29 A. 286, *Doriocourt v. Lacroix*.

2. Measure of damages due to the purchaser of merchandise, by the vendor, who grossly violated the revenue laws of the United States. See OBLIGATIONS, III. (c), 2), B. Nos. 4, 5.

B. *Price and increased value; fruits and improvements.*

1. When a sale of immovable is annulled by reason of the fraudulent misrepresentation of the vendor, the vendee is entitled to a reimbursement of the price paid, although he has not been evicted. 27 A. 492, *Formento v. Robert*.

4) Partial eviction.

1. A purchaser may be evicted, although he has continued in possession, if that possession has been under a different title. See POSSESSION, I. No. 3. SALE, III. (c), 1), No. 3.

(d) *Warranty against hidden defects; and actions of redhibition and quanti minoris.*

1) In general.

1. If a slave, sold with full warranty, dies of a disease contracted from exposure while a run-away, the vendor will be liable to return the price, on proof that he requested the vendee not to send the slave back if caught, until a specified time, when he would either give another one in his place or return the price. 15 A. 683, *Blair v. Collins*.

2. For redhibitory defect in slaves, see 17 A. 119, *Coulon v. Semmes*; 15 A. 203, 612, 222, 264, 440, 512, 64, 65.

3. In a suit for redhibitory defects of slaves sold in block with land, the relative value of slaves must be proved. 18 A. 249, *Walker v. Cucullu*.

4. Plaintiff should recover the price of the slave afflicted at the time of sale with "chronic pleurisy." 20 A. 205, *McAllister v. Burton & Co.*

5. HOWELL, J., *dissenting*: If the price could not be recovered, the contract cannot be dissolved. *Ib.*

2) Redhibitory defects.

1. The fact that the purchaser of a slave allowed him to hire his owntime, and even permitted him to sleep from home, is not a forfeiture of the action of redhibition on account of the vice of running away. The question is, was the slave at the time of the sale in the habit of running away, and has he not acquired the habit since. 15 A. 658, *Boulin v. Maynard*.

2. The presumption of article (2508), C. C., from the appearance of a malady in a slave, within three days immediately subsequent to the sale, will give way to direct evidence, but not to the opinion of a physician who never saw the slave. 16 A. 107, *Gause v. Bulard*.

3. A sale will be annulled by reason of redhibitory vices, which became apparent a short time after the sale. 18 A. 640, *Lynch & Wieman v. Robert McRae*.

4. Even if there be redhibitory defects in the thing purchased, if the buyer resells it at full price, and is not called upon for any defect, he has no defense against the payment of the purchase price. 29 A. N. R., *Marrins' Safe Company v. Gauthreaux & Wright*.

5. The decayed condition of the hull, is a redhibitory defect. See SHIPPING, II. No. 3.

3) Vendor's representations and obligation to disclose defects, and exclusion of warranty.

A. *In general.*

1. The vendee being informed of the vice before the sale, and the slave being guaranteed in title only, has no right to the redhibitory action. 16 A. 51, *Bell v. Lacey & Co*

2. The plaintiff having bought bales of "sample cotton" in New Orleans, at the price of samples, classed them as "low middling, and shipped them to

Havre to be sold as such, he failed in this, but having still realized "samples," is not entitled to damages against the vendor in New Orleans for false packing. 23 A. 246, *Poutz v. Theard Bros.*

B. *Exclusion of warranty.*

1. Reticence as to a redhibitory defect, is fraud. 17 A. 50, *Huntington v. Brown.*

C. *Apparant defects, and those known or declared to the vendee.*

1. The purchaser cannot be exonerated from paying the price, where the defects were apparant. 17 A. 298, *McGuire v. Kearney.*

2. When a redhibitory vice is pleaded in defense to an action for the price, without further allegations, plaintiff may show that he is not bound in warranty, because the purchaser who was an experienced trader, bought the produce after inspection, without regard to class, quality or condition, for an inferior price. 18 A. 673, *Wright and Maury v. Rogers*; 10 R. 10; 17 A. 298, *McGuire v. Kearney*; 3 L. 392.

3. Where the purchaser is a ship carpenter, and the defects of the vessel are apparant, he cannot complain. 27 A. 464, *Lynch v. Kennedy and Husband.*

4. The seller is bound to warrant the thing sold against its hidden defects, which are those which could not be discovered by simple inspection; and the purchaser may retain the thing sold, and have an action for reduction of the price, by reason of the difference in value between the thing as warranted, and as it was in fact. 19 H. 390, *Bulkley v. Honold.*

5. The purchaser who pays, knowing the goods sold to be unsound, but with the reservation of his right of reclamation, is not estopped from suing for diminution of the price. 30 A. 894, *Peterkin v. Martin.*

4) Sale of several things together.

1. The purchaser at probate sale cannot be forced to comply with his bid, if the succession has no valid title to one, out of the three lots sold, and said lot is necessary for the enjoyment of the others. 27 A. 150, *Succession Trainor.* See SUCCESSION, VIII. (e), 7), D.

5) Loss and return of the thing.

A. *In general.*

1. Where plaintiff, who is in possession, has not been evicted of the land, and makes no tender of the property, his suit for a rescission of the sale must be dismissed. 26 A. 218, *Dupleix v. Deblieux, ex.*

2. The rule that he who seeks to rescind a contract of sale must first offer to return the property received, and place the other party in the position he formerly occupied, prevails equally at the civil and the common law. 6 Wall. 254, *Andrews v. Hensler.*

3. See TENDER.

B. *Sufficiency of the tender; and what will excuse its omission.*

1. The slave having died four months after the sale, of the same disease with which he was affected at the time of the sale, could not and need not be tendered before instituting the redhibitory action. 18 A. 118, *Chapman v. Matthews*; 10 A. 127; 14 A. 401.

2. The vendor must be put in default to deliver the goods sold, before the price paid can be recovered. 19 A. 302, *Hart v. Adler.* See TENDER.

6) Evidence.

A. *In general.*

See EVIDENCE, XIV. (a), 1); 2); 3); (b).

B. *Rescission of the sale of slaves and animals.*

1. In a redhibitory action, where the plaintiff was allowed, without objection, to prove by parol and his own letter, that he had made a real tender of a

slave which he had purchased, to his vendor, that such vendor had received back the slave, and that he promised to return the money; *Held*: That such proof has, as to the vendor, the same effect as a written act of retrocession would have had. 15 A. 404, *Morris v. Kendig*.

7) Measure of damages.

A. In general.

1. A vendor who is ignorant of the vices of the things sold, is liable only for the difference at the time and place of sale, between the actual value of the thing sold and what it would have been worth, if sound, and the expenses connected with the sale. 30 A. 894, *Peterkin v. Martin*.

B. Interest; expenses of suit; and those consequent on the redhibitory defects of slaves.

1. The plaintiff, in a redhibitory action, is entitled to recover, as damages, interest at five per cent. per annum, on the price paid for the thing affected with the redhibitory vice, from the date of the sale. 15 A. 517, *Burnham v. Hart*.

IV. OF THE OBLIGATIONS OF THE VENDER.

(a) In general.

1. Plaintiff, having ignored the existence of a note, and sued for the stipulated price of property sold, cannot, where the defense is that the note was taken up by the defendant, insist upon the production of the note. 15 A. 319, *Forbes v. Fahrmer*.

2. Where the property was sold to one who purchased it ostensibly for himself, but really for others interested with him, and who bound themselves to him, no judgment can be recovered against any other than the ostensible purchaser for the purchase price. 27 A. 84, *Leforey v. Forstall*.

3. When the property sold is burdened with an apparent servitude, the purchaser can claim no reduction of the price. See *SERVITUDES*, II. (b), 2), No. 1.

(b) Obligation to pay the price and accept delivery.

1) In general.

1. Where a suit was brought on a note given in part payment of the price of a plantation, and the defense was that the defendant had been disgusted in his possession of the plantation, by a petitory action instituted against him; *Held* (under article 2536, C. C.): That the district court had the power to render an interlocutory judgment, ordering the defendant to deposit in court the amount of the note sued upon, to await the decision of the petitory action. 15 A. 424, *Jacobs v. Sauvé*.

2. Although the value of the portion claimed in the petitory action, does not equal the amount of the note, yet the whole sum must be deposited, to await the determination of the action, which may result in the cancellation of the sale. 15 A. 424, *Jacobs v. Sauvé*.

3. When the adjudicatee obtains possession by fraud, of the movables sold, before complying with the terms of sale, which are that he should furnish his note indorsed to the satisfaction of the vendor, previous to delivery,—a subsequent sale of the same property, by said adjudicatee, transfers no title. 18 A. 34, *Mazoue v. Caze*.

4. As long as the vendor prevents the exercise of a servitude which he bound himself to allow, the payment of the price cannot be enforced. 19 A. 511, *Fortier v. Burthe*.

5. The shipper, who received no direction to insure, and whose course of dealings with the consignee, showed that he did not otherwise insure, may recover from the consignee the value of the goods lost *in transitu*. 28 A. 804, *Cazeaux & Vergnole v. Filliquier*.

6. Compensation cannot be pleaded against the cash price of the purchase. See *COMPENSATION*, II. No. 13.

7. Defendant, who sets up the invalidity of his title, when sued for the price, is not estopped from defending it afterwards. See *ESTOPPEL*, No. 48.

8. No reduction in price can be asked, when the delivery was made according to contract. See *OBLIGATIONS*, VII. (a) 5), B. § 2, No. 1.

9. Joint purchasers cannot be condemned in solido for the price. See *OBLIGATIONS*, VIII. (e), No. 7.

10. Where the transferor's claim against a married woman was secured by a privilege, if not superior, at least of equal dignity with that of the transferee, who, by the transfer, obtained control of the crop, and whose entire privileged account, including the transferred one, appears to have been satisfied by the proceeds of the crop, judgment will be rendered for the price of the transfer, although the transferee has failed to obtain a judgment against the married woman, for the unsecured portion of his account remaining due. 30 A. 542, *Forrester v. Mann*.

2) When interest is due on the price.

1. A purchaser who fails to pay the price, owes five per cent. interest per annum on the cash, although the credit portions bear eight per cent. 28 A. 878, *Merrick, Ex. v. North*.

3) Vendee's relief and right to suspend payment or exact security.

A. In general.

1. Where property was sold with the agreement that the vendee was to retain a certain portion of the price, until the vendor had procured the release of the interests of other parties in such properties, and prior to the performance of this condition, the vendee transferred the property to another person without mention of the incumbrances; *Held*: That the fact of the subsequent purchaser's taking possession of the property, and the payment of the balance which was to have become due to the original vendor upon the performance of the condition, does not prevent him, when sued by his immediate vendor, from insisting upon the performance of the condition. 15 A. 707, *Forbes v. Drumm*.

2. The vendee has a right to enjoin the seizure and sale issued for the balance of the price, where he has reason to fear eviction; and until the danger ceases or security is furnished; the injunction should be maintained. 18 A. 609, *Thibodeau v. Thibodeau*. See *INJUNCTION*, II.

3. One who purchases a property, under a warranted title and free from incumbrance, is not bound on his note for the same, if evicted by one holding a note secured by vendor's privilege with the pact *de non alienando* on the land, nor is he bound to give notice to his vendor, or defend the executory proceedings. 25 A. 195, *Ball, Hutchins & Co. v. Owens*.

4. Where the vendor agreed to apply the price of sale to the payment of a first mortgage, his suit to enforce the vendor's notes cannot be resisted on the ground that he has not applied the proceeds to such purpose. The suit is virtually for the benefit of the first mortgagee. 20 A. 166, *Leggett v. Goodrich*.

5. The defendant cannot require evidence of the erasure of a judicial mortgage, when plaintiff sues out executory process, although the vendor agreed to have the same erased "according to law before maturity of the first note given for the price, and before payment of the same." 24 A. 309, *Umrich v. Grow*.

6. Where eviction is not alleged, and the property is not tendered back to the vendor, the purchaser cannot object to the payment of the price because the vendor has no title. 26 A. 709, *Shreveport v. Flournoy*.

7. Where the conveyance of a plantation had been obtained by fraud, and the only consideration alleged by the grantee was the cancellation of a certain bond executed by the grantor, and the court below set aside the deed and ordered that the bond, unaffected by any indorsement of credit or payment thereon, should be returned, and that it and the mortgage therewith given should have the same force and effect as if the conveyance had not been made and the bond had not been cancelled; *Held*: That the decree was proper in

not making the payment of the bond a condition precedent to the reconveyance of the plantation. 92 U. S. (Otto's), 101, *Neblett v. McFarland*.

8. The crop which the laborers are raising on shares, passes with the land to the purchaser; if the latter continues the contract, he cannot complain of part eviction of the crop. 28 A. 842, *Baird v. Brown*.

9. Parol is not admissible to show that the true intent of the parties was that the purchaser should not pay until the title was perfected. See EVIDENCE, XV. (e), No. 7.

B. Vendees before acceptance, or after consummation, of the contract.

1. A purchaser in the undisturbed possession and enjoyment of the property sold to him, can maintain no action to annul the sale, on the ground that his vendor's title is defective; he may retain the price until the vendor gives him security. 24 A. 453, *Cannon v. Female Orphan Society*. But see III. (c), 2), A. No. 1.

2. A vendor cannot recover the price of property from which the vendees have been evicted. 29 A. 628, *Wamsley v. Hunter*.

C. Vendees with notice or without warranty: those who buy up other titles; and estoppel or waiver of the right to suspend payment.

1. Where defendant was aware of the defects of his title, he has no claim by reason of eviction. 21 A. 248, *Liquidator Clinton, etc., R. R. v. Brown*.

2. The drawer of the draft cannot set up defects of title, because the draft was given in payment of a note for the purchase price of real estate, where he was aware of the defects of his title when he gave the draft. 21 A. 180, *Wimbish v. Wade*.

3. Where the purchaser has been informed, before the sale, of the danger of eviction, he cannot suspend the payment of the price. 21 A. 721, *Boisblanc v. Markey*; 22 A. 258, *Merritt v. Merle*.

4. A purchaser, not threatened with eviction, must pay the price. 25 A. 592, *Morton v. Copeland*.

5. The vendee, who allows his property to be sold, and re-purchases it, when he has a valid reason to oppose the sale, cannot plead eviction in defense to the action for recovery of the price. 26 A. 188, *Johnson v. Dunbar, ad'r*.

6. The purchase price paid during pendency of a revocatory action, cannot be the basis of a demand for restitution. See OBLIGATIONS, VII. (b), 2), B, § 4, No. 8.

D. Vendor's assignees.

1. Where the owners parted with their interest previous to the sale, but continued the partition proceeding in their name, they will be bound in warranty. See POSSESSION, II. (a), No. 3.

V. OF THE RIGHTS AND OBLIGATIONS OF VENDEES IN GOOD OR BAD FAITH AS TO THIRD PERSONS HOLDING THE PRIOR TITLE OR LATENT EQUITIES.

(a) In general.

1. Purchasers in good faith, are only liable for rent from the time they are put in default by the inception of the suit for rescission. 16 A. 290, *Collins v. Babin*. See POSSESSION, II. (a); (b).

2. The vendee who purchases, knowing the precarious title of the vendor, owes indemnity, and is entitled to no other claim for his improvements than those stated in the three first sentences of the Civil Code, article (500), relative to the putting up of buildings by third persons. 16 A. 91, *Cannon v. White*; 12 A. 545. See POSSESSION, II. (b).

3. One acquiring from a purchaser at succession sale of community property on an order rendered in the succession of the wife, has just reasons to believe his vendor to be the sole owner, and is therefore a purchaser in good faith. 18 A. 408, *Howard v. Zeyer*.

4. The sale being rescinded, the vendee may recover the costs of paying incurred by him. 18 A. 324, *Hale v. City*.

5. The liability of the purchaser of an engine and machinery subject to a

mortgage and removed from the plantation, depends upon his good or bad faith, and the damages actually suffered. 22 A. 118, *Citizens' Bank v. Knapp*. See THINGS, II. (a). MORTGAGE, II. No. 1.

6. Who are possessors in good faith. See POSSESSION, II. (b).

7. A mule and dray being sold by the street commissioner of New Orleans, at public auction, as estray, after ten days advertisement, cannot be recovered from the purchaser, although they had been stolen from the owner. C. C. 3474; 22 A. 586, *Thompson v. Cullinane*. See POLICE JURY, No. 20.

8. Where the interest of the employee in the cotton raised on the vendor's place is to be ascertained by arbitration, but previous thereto the cotton is sold to an innocent purchaser, title vests, and a subsequent sale by the employee of the same cotton to another person, is null. 26 A. 248, *Taylor v. Twenty-five Bales Cotton, et als.*

9. Where the purchaser of real estate bought from the universal legatee, duly recognized and ordered to be put in possession, was not aware that the will which had been made in another State, was in contestation in the State where it was made, his title cannot be divested, although the will was annulled. 26 A. 307, *Taylor v. Lauer*. See SUCCESSION, VIII. (c). SALE, X. No. 18.

10. The sale of another's property at probate sale does not vest title in the purchaser; the proceedings are null. 26 A. 731, *French v. Bach*. See No. 9. SUCCESSION, VIII. (e), 7), B. No. 2.

11. Persons who have purchased property from an apparent heir or universal legatee in possession of an estate, as such heir or legatee, cannot successfully oppose their title to that of the legal and actual heir, notwithstanding such purchase may have been made in good faith. 6 Wall. 642, *Gaines v. New Orleans*.

(b) *Evidence of bad faith; and who are vendees with notice.*

1. A commercial partner cannot, on the eve of failing, transfer to his co-partner, all his interest in the partnership, so as to exclude the same from his surrender. 17 A. 75, *B. Saloy, syndic v. Albrecht*. See INSOLVENCY, IV.

2. To annul a sale for fraud, it must be alleged and proved that the purchaser knew that his vendor was in insolvent circumstances and had not sufficient property to pay his debts at the time. 24 A. 158, *Levyson & Co. v. Ward*. See INSOLVENCY, IV.

3. A purchaser, desirous of avoiding litigation, does not waive his rights to have a complete title, before paying his notes, by simply asking an extension thereof. 24 A. 173, *Wade v. Percy*.

4. The co-owner who sells the property, with the improvements, to a third person, who is aware that the improvements were put up and paid for by the other co-owner, has no claim against his vendor for a re-imbursement of the price so paid. 26 A. 257, *Bayley, executor v. Denney*.

5. Fraud and simulation are peculiarly in the province of the jury. See JURY, IV. (c), No. 1.

VI. OF THE NULLITY AND RESCISSION OF SALES.

(a) *Vente à réméré.*

1. The creditors cannot make use of the right of redemption in a (*vente à réméré*) of the vendor, who is their debtor. Such a right is personal. 4 L. 141, *Morgan, syndic v. Davis*.

2. Redeemable sales, unaccompanied by delivery, the consideration of which are inadequate, courts are bound to consider, without sufficient evidence to the contrary, as contracts for which the thing nominally sold stands as security, and nothing else. 16 A. 12, *Leblanc v. Boucherau*.

3. There is nothing immoral in using the contract of sale, as security, for bona fide debt. 18 A. 733, *Bailey & McKie v. Chase*; 12 A. 531. See MORTGAGE, III. (b), No. 1.

4. A sale à réméré made for the purpose of securing a loan of money, is a serious contract which cannot be regarded by the vendor's creditors as a mere

simulation. 28 A. 29, *Theurer v. McGibbon et als.*; 30 A. 186, *Bevens v. Weill*; 29 A. 4.

5. A *vente à réméré* may be agreed upon, for a larger price than originally paid. 29 A. 161, *Soulié v. Ranson*.

6. The payments will be imputed to the cancellation of a sale *à réméré*, rather than the advances of the factor. See PAYMENT, III. No. 16.

7. After the delay granted in a *vente à réméré* has elapsed, whether the act be considered as such, or as a common law mortgage, unless fraud or want of consideration or novation be shown, the vendee's title is unassailable. 29 A. N. R., *Heurnan v. Blades*.

8. How certain conditions were construed into a sale, see SALE, I. (a), No. 9.

9. See PLEDGE, II.

10. Redemption of tax sales. See TAXES, III. (d), 1), No. 14.

(b) *Lesion beyond moiety.*

1. A sale of land for Confederate money will not be annulled for lesion. 19 A. 498, *Windham v. Cerf*. See CONFEDERATE MONEY. OBLIGATIONS, III. (b), 3).

2. The purchaser cannot claim an abatement of his contract, because he estimated the property bought in a depreciated and unlawful currency; nor can he set up that a previous holder was willing to take an unlawful currency in payment of the note. 21 A. 512, *Crosby v. Tucker*.

3. There is no lesion in judicial sales. 24 A. 616, *Weber v. Gorsuch*.

4. For lesion and violence, see OBLIGATIONS, III. (b), 4).

(c) *Other causes of nullity.*

1. The vendor who acquires a title subsequent to the institution of an action by the vendee to rescind the sale, does not defeat the action, nor transfer the ownership to the vendee. Previous to the action, the vendor's privilege would have inured to the benefit of the vendee. 18 A. 324, *Hale v. City*. See III. (a), Nos. 2, 4.

2. Where the purchase price inured to the benefit of the minors, they ought not to claim restitution *in integrum*, for alleged defects in the judicial sale, without showing injury and tendering back the amount which has inured to their benefit. 21 A. 385, *Coulson v. Wells*. See RESTITUTIO IN INTEGRUM.

3. Where a party sues for the rescission of a sale, he must, as a condition precedent, return the consideration he has received. 21 A. 425, *Latham v. Hicky*. See TENDER.

4. A vendor cannot maintain an action to rescind a sale and retake the property, without tendering the portion of the price paid. 21 A. 514, *Lee v. Taylor*. See TENDER.

5. If the wife has taken a tract of land as a *dation en paiement* of her judgment against her husband, and the land is subject to the resolatory condition, because the price has not been paid, she cannot successfully resist the payment thereof, on the grounds that the notes were given to secure a debt of her husband. 23 A. 757, *Le Bourgeois v. Emma Chenet*.

6. It is necessary to put the purchaser in default, before suing for the resolution of the sale. 23 A. 487, *Heirs of Doll v. Kathman*. See OBLIGATIONS, VII. (a); *infra*, Nos. 20, 27.

7. A vendor whose action to dissolve for non-payment of the price, has become barred by prescription, cannot, by an agreement of retrocession with the vendee, impair the rights of a mortgage creditor of the latter. 23 A. 540, *Nash v. Muggah*. See PRESCRIPTION, VI.

8. The right of the vendor to enforce the resolatory condition for non-payment, implied in all sales, commences to run from the day of the failure of payment in accordance with the contract, if there are several notes, from the failure to pay the first. 23 A. 354, *George v. Knox and Husband*; 540, *Nash v. Muggah*. See PRESCRIPTION, VIII. No. 8.

9. In order to rescind a sale, the parties must first be restored in the same condition they were before the sale. *Ib.*

10. WYLY, J., *dissenting*: The want of tender of the price already paid, is only a dilatory exception waived by going to trial on the merits. *Ib.*

11. The right to sue for the dissolution of the sale, cannot be transferred to the holder of the notes. 24 A. 500, *Swan v. Gayle*. HOWELL, J., *dissenting*.

12. A transfer or subrogation of the right by the vendor to the holder, suing for the dissolution, is not admissible in evidence, being *res inter alios acta*, and the unsworn declaration of a witness, without affording to defendant the right of cross-examination. *Ib.* See PRIVY. EVIDENCE, X. (d), No. 4.

13. The notes may be prescribed, yet the action for a dissolution of the sale for non payment of the price, will exist. 28 A. 739, *School directors v. R. K. Anderson*. See No. 18.

14. In proceedings to annul the sale of a property, the last person holding title, must be made party to the suit. 28 A. 269, *Davidson v. Davidson*. See JUDGMENT, I. No. 11. PLEADING, I. (c), 4), No. 2; V. (a), 3), E. No. 2.

15. In case of dissolution of the sale for non-payment of the price, the vendor returns the portion paid with interest, and the vendee accounts for the rents and revenues after deducting for improvements. 28 A. 739, *School directors v. R. K. Anderson*.

16. The right to sue for the dissolution, is not an accessory to the vendor's notes. 24 A. 500, *Swan v. Gayle*; 542, *Templeman v. Pegues*; 2 N. S. 159; 11 A. 655. HOWE AND WYLY, JJ., *dissenting*. See No. 28.

17. The right to sue for the dissolution of the sale, cannot be maintained if the notes are prescribed. 24 A. 537, *Templeman v. Pegues*,

18. ON REHEARING: The right to sue for a dissolution not being accessory to the notes, may be exercised even if the notes are prescribed. *Ib.* HOWE AND WYLY, JJ., adhering to former opinions. See Nos. 13, 28.

19. The sale should be rescinded when the purchaser fails to give good security for the purchase price, as agreed upon. 27 A. 322, *Chastant v. Elliott*.

20. The failure to pay the price at the time stipulated, is sufficient to authorise an action for a dissolution of the sale. The action itself is a putting in default. 28 A. 739, *School Directors v. R. K. Anderson*. 23 A. 355. See Nos. 6, 27.

21. WYLY, J., *dissenting*: The notes being prescribed, there was no default of payment. *Ib.*

22. If the notes were prescribed, it was the duty of the tutrix to plead prescription, and she may be responsible to the heirs for her neglect, but this is no cause to annul a sale made under the judgment rendered on the notes. 28 A. 569, *Routh et als. v. Citizens' Bank*.

23. The dissolving condition implied in all sales, for non-payment of the price, is peculiar to the civil law, and does not exist in the common law. 28 A. 942, *Lalanc Grosjean Manufacturing Company v. Wolf & Levy*.

24. Such an action may be amended by claiming the price. See PLEADING, IX. (c), 2), No. 5.

25. When the movables have been seized by third persons, the vendor who has not been paid, loses his right to ask for a dissolution of the sale for non-payment of the price. 28 A. 942, *Lalanc Grosjean Manufacturing Company v. Wolf & Levy*.

26. The vendor who receives a draft in payment of a sale made for cash, may sue for the rescission of the sale if the draft be not paid. 28 A. 627, *Guilbeau Bros. v. Melançon*.

27. No putting in default is necessary to maintain an action for rescission of a sale for non-payment of the price. 28 A. 582, *Aymar v. Delmas & Halley*.

28. The right to dissolve a sale for non-payment of the price, is independent of the mortgage or vendor's privilege. 28 A. 598, *Gonsoulin v. Adams & Co.*; C. C. 2561; 12 A. 778, 699; 23 A. 757. See Nos. 16, 18, 13.

29. Unless the seizing creditor has a lien superior to that of the plaintiff in a revocatory action, a sale pending the action is null. See OBLIGATIONS, VII. (b), 2), B., § 1, No. 11.

30. A sale pending a real action, is null. See PETITORY AND POSSESSORY ACTIONS, II. (d).

31. For prescription of the action for rescission of the sale by reason of the non-payment of the price, see PRESCRIPTION, VIII. No. 6.

32. When delivery becomes impossible, the vendor must return the price. See SALE, III. (b), 4), A. No. 6.

33. The sale of property in suit, is null. 1878, p. 31.

VII. OF SALES AT AUCTION AND A LA FOLLE ENCHERE.

(a) *In general.*

1. The purchaser at whose risk a property is put up *à la folle enchère*, has no right to enjoin the second sale. 16 A. 321, *Jennings v. Hodges*.

2. The remedy by sale *à la folle enchère* is a severe one, and must be confined to cases coming clearly within the provisions of the law. 17 A. 58, *Miltenberger v. Hill*; 4 A. 242.

3. When property is offered twice on the same day, the first purchaser is not liable for the difference between the adjudications. 22 A. 46, *New Orleans Mutual Insurance Company v. Ruddock, syndic*.

4. The purchaser at a valid probate sale, who pays the cash price to the auctioneer, but refuses further to comply with the terms of the sale, and allows the property to be sold *à la folle enchère*, can only recover from the auctioneer, (judicial sequestrator,) the balance of her cash payment, after deducting the amount of the loss incurred in the second sale. 30 A. 332, *Amelia Smith v. T. J. Kinney*.

5. See also, SUCCESSION, VIII. (e), 7).

(b) *Auctioneer's authority; terms of sale; the thing sold; its title and description.*

1. The discrepancy in the advertisements in English and French should be controlled by the English, and if that be correct, the purchaser at whose risk the property was resold is bound for the difference. 22 A. 585, *Lamothe, administrator v. Hausse*. See SUCCESSION, VIII. (e), 3).

2. It is not irregular to sell two pieces of property separately, which joined each other and had been described together. 28 A. 713, *Succession McCall*.

3. See AUCTIONEER.

(c) *The consent; completion and evidence of the sale; procès-verbal and adjudication.*

1. An objection raised for the first time, before the Supreme Court, that the draining privilege is reported against the property; as a cause for non-compliance with an adjudication made in the succession, will not be maintained. 28 A. 878, *E. T. Merrick, executor v. D. B. North*.

(d) *Fulfillment of the terms of sale; and sales à la folle enchère.*

1. The vendor can sue the vendee for a specific compliance with the terms of the sale, or for damages, by an ordinary action, or proceed to a re-sale at the risk of the vendee. 17 A. 58, *Miltenberger v. Hill*; 2 L. 403; 7 L. 508; 14 L. 559.

2. In case a sale *à la folle enchère*, is resorted to, the adjudicatee is not entitled to the surplus of his bid. *Ib*.

3. The purchaser should be put in default by the tender of a formal deed of sale, as a condition precedent; a passive breach, such as the promise to appear before the notary to comply, on a specified day, will not suffice. 16 A. 322, *Jennings v. Hodges*; C. C. (1906), (1907), (1908), (1927), (2589); 6 L. 152; 14 L. 559; 3 R. 401; 5 R. 117; 4 A. 242.

4. The first purchaser is responsible for the difference between the adjudication to him, and the sale *à la folle enchère*. 28 A. 878, *E. T. Merrick, executor v. Mrs. Henriette Davidson, executrix*.

VIII. OF THE ASSIGNMENT OF INCORPOREAL RIGHTS.

(a) *In general.*

1. The transfer of a draft, in order to be binding as regards third persons,

must be made by delivery of such draft to the transferee, and notice to the debtor, of the transfer. 15 A. 654, *Hill v. Hanney*. See PLEADING, VIII. (b), 2), No. 2; *infra*, (b), No. 1.

2. Plaintiff being the purchaser of a balance of account due by defendant, cannot be held liable on a reconvention for any amount due to defendant by his vendor. 16 A. 348, *Gordon v. Millaudon*. See COMPENSATION.

3. For sale of succession rights, see ALEATORY CONTRACTS, No. 5.

4. For sale of rights and franchises of a corporation, see CORPORATIONS, I. No. 10.

5. The transfer of a single item due to a factor, whose account is secured by a mortgage, does not transfer the mortgage. See MORTGAGE, III. (a), No. 4.

(b) *Mode and completion of the assignment; form, necessity and effect of the notice.*

1. In the transfer of debts or claims, notice to the debtor must be given, to affect third persons. 20 A. 282, *White v. Bird*; C. C. (2612), (1916); 14 A. 689; 7 A. 620; 5 A. 651; 8 N. S. 211; 12 R. 8; 2 L. 425. See EXECUTION, V. (a), 3), c. § 1, No. 1; d. § 1, No. 7; *supra*, (a), No. 1.

2. Until notice is given to the judgment debtor, the transferee is not possessed of the judgment as to third persons and creditors. 26 A. 302, *Dockham v. City*.

3. Service of notice of the transfer of a judgment against the deceased is good, if made on the mother of the minor children, before her appointment as such, or as administratrix of her husband's succession. A seizure of the judgment after service of said notice, will be set aside. 29 A. 257, *Aufenkolk v. Montégut*.

4. Notice of seizure so served is not sufficient. See EXECUTION, V. (a), 5), No. 4.

5. When the creditor transfers a claim, there is no necessity of a notice as between the debtor and transferee. 30 A. 386, *Pinard v. George*.

(c) *Assignor's warranty; and what passes to the assignee.*

1. The transfer, by the executrix of the rights of the succession to a certain suit to annul the sale of a lease, was not the transfer of the lease itself, which reverted to the estate on the rendition of the judgment annulling said sale. 21 A. 40, *Kellar v. Blanchard*.

2. The holder or pledgee, before maturity, of a negotiable promissory note, as collateral security, is entitled, to the extent of his debt, to all the rights of a *bona fide* holder for value, and is for all practical purposes the owner of the obligation. "The assignment of a debt, by whatever form of transfer, carries with it any bill or note by which it is secured; and such transfer carries with it all securities for its payment, whether mortgage or otherwise." 29 A. 548, *Mechanics' Building Association v. Ferguson, Pugh, third opponent*. See PLEADING, I. (b), No. 2. PLEDGE, I. (b), No. 3. SALE, III. (b), 2), b. No. 1.

3. The assignee may sue in his name. See PLEADING, I. (b), No. 5.

(d) *Litigious rights.*

1. The transfer of the rights of an estate to certain buildings, not in litigation, does not constitute the sale of litigious rights. 21 A. 40, *Kellar v. Blanchard*.

2. The sale by the bank of Louisiana, of a claim based on a mortgage already in suit, was not a sale of litigious rights. 22 A. 572, *Blake v. Bank of Louisiana*.

3. The defendant, who alleges the sale of plaintiff's rights, which are litigious, and who wishes to release himself by paying the purchase price, should do so immediately and not protract the litigation. 24 A. 249, *Evans v. De L'Isle*.

4. The transfer of a suit to an attorney for the purpose of having it dismissed in accordance with a compromise entered into with defendant, does not constitute a sale of litigious rights. 25 A. 605, *Kennedy v. Morrison*.

5. If the sale, or transfer, be null, plaintiff is bound to tender the consideration received by him, before suing for the nullity. 25 A. 605, *Kennedy v. Morrison*. See TENDER.

6. A judgment is not a litigious right; it may therefore be purchased by an attorney or other officer of the court in which it was rendered. 18 H. 507, *McMicken v. Perin*.

7. One who purchases a note on which executory process is pending, and which he knows will be contested, is bound to accept the tender made by defendant, of the amount paid by him; the more so when the evidence renders it probable that this is the balance due on the note. 30 A. 523, *Spears v. Jackson*.

IX. OF DATION EN PAIEMENT.

1. The wife, who accepts a *dation en paiement*, cannot obtain the erasure of mortgages thereon. This is not a judicial sale. 18 A. 675, *Benit v. Husband*. See No. 4.

2. The *dation en paiement* made by the husband to replace the dotal and paraphernal effects of his wife, whenever honestly made, has always been regarded in a favorable light by the courts of this State as being in the protection of the interests of married women. 22 A. 328, *Murrison v. Seiler & Co.*; 27 A. 341, *Newman v. Eaton*. See MARRIAGE, IX. (a), No. 9.

3. Actual delivery is of the very essence of the *dation en paiement*. 27 A. 617, *Schulz v. Morgan*; 3 M. 326, 269; 12 L. 375; 20 A. 282; 3 A. 280.

4. A *dation en paiement* by the husband, to restitute the paraphernal property of his wife, will debar a subsequent mortgage creditor from seizing the property given in payment. 26 A. 593, *Perrett v. Sanarens*. See No. 1.

5. The creditors of the husband cannot seize the property of the wife, acquired by a valid *dation en paiement* from her husband. See EXECUTION, V. (a), 1), No. 1.

6. When the creditor takes actual possession, the property is his. See EXECUTION, V. (a), 3), B. No. 1.

7. The wife cannot give *en paiement*, community property. See MARRIAGE, XIII. (b), 1), No. 1.

8. A debtor may give his movables in payment. See OBLIGATIONS, III. (c), 2), A. No. 12.

9. For contracts giving a preference to certain creditors, see OBLIGATIONS, VII. (b), 2), B. § 4.

10. A partner may buy his co-partners' interest, and pay them with money due to him by the partnership. See PARTNERSHIP, II. (a), No. 1.

11. Certain evidence not admissible on a plea of *dation en paiement*. See PLEADING, V. (c), 4).

12. In a revocatory action, judgment will be rendered in favor of plaintiff, when the defendant fails to prove that the giving in payment was for a stipulated price, and to show the amount of his indebtedness to the transferee. 30 A. 511, *Lovell v. Payne*.

13. Where the wife has valid claims against her husband, her judgment of separation of property may be null, and the *dation en paiement* made to satisfy the same, be valid. 30 A. 746, *Lehman, Abraham & Co. v. Levy*.

X. OF JUDICIAL SALES.

1. The waiver of advertisement, deprives the sale of its judicial character. 16 A. 165, *Esneault v. Cooley*. See MARRIAGE, IX. (a), No. 4; XI. (b), No. 18. SALE, IX. No. 1.

2. A sale clothed with judicial sanction, cannot be attacked collaterally. 25 A. 499, *Dixey v. Mandell*; 175, *Anderson v. Carroll, Hoy & Co.*; 24 A. 224, *Doherty v. Leake, sheriff et al.*

3. A judicial sale cannot be attacked in a collateral manner, in a proceeding to which the vendee is not a party. 28 A. 639, *Succession Fontelieu*. See No. 2.

4. A purchaser at a judicial sale is protected by the order of court. C. C. (2586), (2601); 6 R. 471; 1 A. 29; 22 A. 175; 25 A. 55, *Succession Pinniger*. See SUCCESSION, VIII. (e), 1), Nos. 6, 10; 2), A. No. 2.

5. The purchaser cannot be required to look beyond the order of the court ordering the sale in probate proceedings, and if the court have jurisdiction, and the order be valid, he will be compelled to comply with his bid. 28 A. 755, *Succession R. Condon*. See No. 4.

6. Under act No. 40, of 1869, succession property must be divided into tracts of from ten to fifty acres, when ordered to be sold. 23 A. 231, *Loyd's Executor v. Loyd's Executor*. But see 1877, p. 33.

7. Article 132, of the constitution of 1868, was not intended to be self acting; it is simply directory, and furnishes no *modus operandi*, and cannot affect the sale of property belonging to successions opened before 1868. Act No. 40, of 1869, also excepts that class of cases. 24 A. 214, *Bowie v. Lott*; 29 A. N. R., *Bohne applying for a Monition*. But see 1877, p. 33, repealing the sections of the Revised Statutes putting the article in operation.

8. The purchaser under the fact *de non alienando*, whose property is sold by proceedings against the original mortgagor, cannot complain that the property seized, was not divided into lots of fifty acres. 26 A. 618, *Stevens v. Pinnev*.

9. A property sold under a mortgage, created before the putting into operation of the clause of the constitution, need not be divided into lots. 26 A. 684, *Buckworth v. Payne*.

10. The property being mortgaged previous to the constitution of 1868, should nevertheless be sold in lots at the succession sale of the owner; the rights of the bank remains undivested, and undisturbed by the sale. 28 A. 771, *Citizens' Bank v. Bailey*; 29 A. N. R., *Bohne, applying for a monition*.

11. The sheriff cannot sell the land in block, and must refuse an offer to so purchase, although it is proposed to distribute the price in proportion to the lots required to be made by the constitution. 28 A. 354, *Norton v. Citizens' Bank*. But see 1877, p. 33.

12. The property of a party who died in 1871, must be sold in his succession, in lots of ten to fifty acres each. Constitution, 132, R. S. 1870, § 3452. 24 A. 454, *Succession Truxillo*. Repealed 1877, p. 33.

13. A survey of the land need not be made; it is sufficient if it be divided into lots as required by law, and that the lots be separately appraised, and the sale made by lots. 27 A. 600, *Duckworth v. Vaughn, public administrator*; 560, *Walker & Vaught v. Kimbrough, administrator*.

14. It is necessary to show, in cases of judicial sales, that all the formalities of the law have been complied with, or the sale will be annulled. 6 H. 550, *Patterson v. Gaines*.

15. Whoever claims the ownership of property which has been sold at sheriff's sale, under a judgment not absolutely null, must first bring a direct action to annul the judgment. Neither the judgment nor sheriff's sale, can be attacked collaterally. 29 A. 698, *Gillis v. Carter*.

16. A judicial sale cannot be set aside, because Confederate money was received for the price, constitution 1868, article 149. 23 A. 610, *Hastings v. Brantley*.

17. A judicial sale made for Confederate money cannot be annulled, the more so if it has been ratified. 27 A. 228, *Tilsen v. Haine*. See I. (d), Nos. 2, 7.

18. A purchase of property from the legatee, named in a foreign will, duly probated in Louisiana, on a decree of probate rendered in another State, is not annulled by the subsequent setting aside of the foreign probate by a decree to which the purchaser is not a party. 14 Wall. 113, *Foulke v. Zimmerman*. See V. (a), No. 9. SUCCESSION, VIII. (e), 1), No. 9.

19. The revenues of real estate, which belong to the owner, cannot be seized and sold separately from the land. 29 A. 355, *New Orleans National Bank v. Raymond*.

20. When a purchaser at succession sale cannot attack his own title, see ESTOPPEL, No. 53.

21. For partition sales, see PARTITION, III. (b).

22. Plaintiff cannot sue for the nullity of a sale made under his execution. See PLEADING, V. (a), 3), B. No. 1.

23. For evidence of a judicial sale, see EXECUTION, V. (d), 7), Nos. 4, 5. PLEADING, V. (b), 4), No. 7.

24. The purchaser of the land has no right to recover for the use of the tan yard, in certain contingencies. See QUASI CONTRACTS, I. No. 7.

25. The undivided part of a plantation cannot be divided into lots. See EXECUTION, V. (a), 4), No. 3.

26. Where the succession sale was not recorded, but the proceeds of sale were divided between the heirs, who were sent in possession, and discounted the notes, the holder cannot collect said notes by causing the property to be sold over, as succession property. 30 A. 727, *Logan v. Herbert*.

27. Advertised in English only, 1874, p. 113; in Orleans, three times in ten days, and once a week in thirty days, 1878, p. 157; except Orleans, 1876, p. 146.

SALVAGE.

See SHIPPING, XII.

SCHOOL.

See PUBLIC EDUCATION.

SCHOOL FUND.

Sale of, see CONSTITUTION, II. (c), 1), No. 20.

SEAL.

1. See EVIDENCE, XIX. (d); XXI. (b). OBLIGATIONS, VI. (b), 1), No. 1.
2. Cost for affixing and raising seals. See SUCCESSION, VIII. (f), 8), A. No. 5. NOTARY, No. 6.
3. Seals of corporations. See CORPORATIONS, I. No. 11.

SECRETARY OF STATE.

Power to appoint an assistant. See CONSTITUTION, II. (d), No. 6; 1877, p. 28; 1878, p. 33; additional clerk, 1878, p. 245.

SEIZIN.

See SUCCESSION, I. (b); VIII. (f), 8), c. § 2.

SEIZURE.

See ATTACHMENT, VI. IX. EXECUTION, V. (a). EXECUTORY PROCESS. MORTGAGE, VI. (c). PROVISIONAL SEIZURE. SEQUESTRATION, II. SUCCESSION, VIII. (e), 8).

SEPARATION.

See MARRIAGE, II. XIV. PLEADING, V. (b). SUCCESSION, V. (a), No. 6.

SEQUESTRATION.

I. OF CONVENTIONAL SEQUESTRATION.

II. OF JUDICIAL SEQUESTRATION.

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| <p>(a) <i>Right to the writ; when it may be ordered; and its dissolution.</i></p> <p>(b) <i>Affidavit.</i></p> <p>(c) <i>Sequestration bond and surety; and damages for illegal sequestration.</i></p> | <p>(d) <i>Bond of release.</i></p> <p>1) In general.</p> <p>2) Right to bond.</p> <p>3) Proceedings against and liability of the surety.</p> <p>(e) <i>Rights and obligations of the sequestrator.</i></p> <p>(f) <i>Effect.</i></p> |
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- 1) In general.
- 2) Damages; and action for their recovery.

I. OF CONVENTIONAL SEQUESTRATION.

1. Under an agreement that the property attached shall remain in the possession of a third person, to be sold, and the proceeds to be deposited in the hands of the sheriff, plaintiff cannot rule the depository to deliver the funds to the sheriff previous to judgment. 30 A. 163, *Mesheuw v. Gould*.

II. OF JUDICIAL SEQUESTRATION.

(a) *Right to the writ; when it may be ordered, and its dissolution.*

1. The decision in the case of *Levois v. Gerke*, 12 A. 828, affirmed to the effect that the proceeding by sequestration under the act of 1826, against the property of an insolvent who has absconded, is a different and distinct proceeding from that under the insolvent laws for a forced or voluntary surrender. 15 A. 258, *Tufts v. Casey*.

2. The act of 1839, amending article 275 of the Code of Practice, which establishes the cases in which a sequestration may be ordered, forms part of that article, and the legal effect of the amendment is the same as if the article was re-enacted with the words of the amendatory act inserted in its text. 15 A. 562, *Maxbry v. Tally*.

3. Facts stated in an affidavit for a writ of sequestration are, by legal presumption, taken *prima facie* as true on the oath of the affiant, until the contrary is shown by sufficient proof. 15 A. 574, *Carter v. Lewis*.

4. The plaintiffs are not permitted to strengthen their sequestration on a title acquired after the issuance thereof. They must recover on the title they set forth. 23 A. 144, *Yale, Jr. & Co. v. Stevenson & May*.

5. In a suit for the settlement of a general commercial partnership, a sequestration is the only conservatory writ to which plaintiff can resort. Being an undivided owner, plaintiff may sequester the whole. 19 A. 46, *Blanchard v. Luce*. See PARTNERSHIP, IV.

6. A sequestration may issue in accordance with article 275, C. P., but the suit cannot be instituted before maturity of the obligation. 23 A. 578, *Cattlet v. Heffner & Likens*. See PLEADING, VI. (a), 3), No. 11.

7. Proceedings by sequestration against an absconding debtor, under the act of 1826, before a different tribunal from that of the domicile of such absconding debtor, are *coram non judice*. 16 A. 8, *Spear v. Hagelberg*.

8. The court to which has been referred a cause by reason of recusation, is properly seized of jurisdiction to issue a writ of sequestration to protect the property in dispute. 16 A. 335, *J. B. McClendon v. Bennett & Addison*.

9. The holder of a coupon interest on the bonds of the City of New Orleans, cannot sequester the deposit made by the City of New Orleans in a bank to the credit of the interest fund. 28 A. 97, *Southern Bank v. Louisiana National Bank*.

10. Where a suit is commenced by a writ of sequestration against defendant, who resides in another parish, the judgment of the court below should have been *in rem*, reserving to the plaintiffs their right to an action *in personam*. 17 A. 93, *Peterson v. Willard*; but see COURTS II. (a), No. 30. 1876, p 106.

11. The writ of sequestration cannot be issued by the court having no jurisdiction of the main action. 26 A. 300, *Bradley & Company v. Woodruff, etc.*; 380, *Same v. McRae*. See COURTS, II. (a), No. 30.

12. MORGAN, J., *dissenting*: The writ ought to be issued by the court where the property is situate. *Ib.*

13. A sequestration is merely a conservatory order; a court without jurisdiction of the case cannot issue the writ. 27 A. 166, *Ed. J. Gay & Company v. Eaton & Barstow*.

14. Since the law of Louisiana grants the seaman a lien and privilege for his wages upon the vessel in which he has served, the seaman may have the vessel sequestered in a suit against her owner for the recovery of his wages, and a bond given for the release of the property, under such circumstances, will be valid and binding upon the sureties. 11 Wall. 185, *Leon v. Galeran*. See PROVISIONAL SEIZURE, No. 12. COURTS, II. (a), Nos. 15, 16, 17.

15. Although when a court has no jurisdiction, it is in general irregular to make any order except to dismiss the suit; yet, this rule does not apply to the action of the court in setting aside such orders as had been made improperly before the want of jurisdiction was discovered, and restoring things to the state in which they were before the improper orders were made. Thus, where property has been taken by the marshal, under a writ of sequestration, the court, upon discovering that it had no jurisdiction of the case, should order

the property sequestered to be restored to the custody of the person in whose possession it was found. 12 Wall. 130, *Mail Company v. Flanders*.

16. Sequestration, when construed into contempt. See COURTS, III. No. 5.

17. A mandamus will not lie to compel the judge to reduce the bond to set aside a judicial sequestration. See MANDAMUS, I. (a), 2), No. 10.

18. Under certain stipulations of a contract a sequestration cannot issue. See PRIVILEGE, III. (c), 2), A. No. 3.

19. Sequestration may issue where the property is situate, or at the domicile of defendant. 1876, p. 106.

(b) Affidavit.

1. An affidavit embracing several of the alternatives of article 275, C. P., is sufficient. 15 A. 462, *Mabry v. Tally*.

2. An affidavit that defendant holds the notes claimed for collection, and that plaintiff fears he would not pay the proceeds over, will not authorize a writ of sequestration. 19 A. 195, *Baer v. Koofler*; 2 A. 961; 9 A. 535.

3. When the requisite oath to a writ of sequestration is not made, the writ should be dissolved. 26 A. 492, *Blanc & Legendre v. Wallace & Choppin*.

4. Annexing documents and swearing to petition. See PLEADING, V. (a), 4).

(c) Sequestration bond and surety; and damages for illegal sequestration.

1) In general.

1. New grounds for a dissolution of a writ of sequestration, cannot be made on appeal in the Supreme Court, especially when there has been no formal written assignment of errors. 15 A. 574, *Carter v. Lewis*.

2. A writ of sequestration cannot issue without affidavit and bond. 16 A. 335, *McClendon v. Bennett*.

3. For qualification of the surety, see APPEAL, III. (d), No. 2.

4. Defenses the surety may plead, see JUDGMENT, XV. (a), 3), No. 5.

5. The bond must be made in favor of the clerk, 1871, p. 18.

2) Damages; and action for their recovery.

1. Attorney's fees are allowed as damages in a suit on a sequestration bond, to recover damages for illegally suing out a writ of sequestration in a possessory action. 15 A. 504, *Bonner v. Copley*. See ATTORNEYS, II. (c).

2. The plaintiff is not liable for damages if entitled to a sequestration, in case the surety approved by the judge, should afterwards be found worthless. 22 A. 243, *Isaacson, Seixas & Co. v. Wall*.

3. There is no law whereby damages, as in cases of injunction, can be allowed in the judgment dissolving the sequestration. 24 A. 208, *Nuzum v. Gore*.

(d) Bond of release.

1) In general.

1. Where property sequestered is bonded, the delivery of it to the party bonding, does not make him the owner, and enable him to dispose of it at pleasure. 15 A. 451, *Pagett v. Curtis*.

2. An intervenor cannot bond property which has been sequestered. 20 A. 29, *Duperier v. Flanders*; 19 A. 463; but see acts 1876, No. 51. ATTACHMENT, IX. (b).

3. The surety under such a bond is not liable. 27 A. 557, *Alexander v. Silbernagel*; 23 A. 222; but see PLEADING, VIII. (d), No. 21. ATTACHMENT, IX. (b).

4. Where a bond made its appearance in the papers, although the writ has not been released, the sheriff may show how said bond appeared therein, if sued thereon. 22 A. 103, *Ware & Son v. Wilson*.

5. The defendant should object *in limine*, to a sequestration bond, which

does not mention the court, the date, the title of the suit nor the names of the plaintiff and defendant, but signed by the plaintiff and surety, for the amount fixed by the judge and filed by the clerk in the suit. 24 A. 153, *Vestat v. Sallis*.

6. After the setting aside of the writ, by furnishing bond, which stands in lieu of property, the defendant has the right to dispose of the property. 24 A. 570, *Warfield v. Stubbs*.

7. It is necessary to give notice to defendant, to set aside the bond given to release a sequestration, and if after the granting of a suspensive appeal, plaintiff seeks to obtain possession of the property, a writ of prohibition will lie to restrain the sheriff from acting. 27 A. 431, *State ex rel. v. Jean Porte*. See PROHIBITION.

2) Right to bond.

1. If defendant does not, within ten days after the seizure, bond the property, plaintiff may do so. 20 A. 30, *Duperier v. Flanders*.

2. The intervenor, claiming the property in the hands of the plaintiff, sequestered the same; the latter moved to bond under article 279, Code of Practice; *Held*: That the plaintiff virtually became defendant in the sequestration and fell under the application of said article. 22 A. 260, *State ex rel. City v. Dibble*.

3. Article 279 applies as well to "property," as to "obligations" and "titles" mentioned in articles 271, 272, C. P. *Ib.*

4. The defendant may release on bond, even if the order be given *ex officio* by the judge. 26 A. 65, *State ex rel. v. Judge Superior District Court*.

5. The judge cannot be forced to allow the bonding. See MANDAMUS, I. (a), 2), No. 8.

6. Nor to fix the bond when the suit has been dismissed. See *Ib.* I. (a), 3), No. 2.

7. Intervenor's right to bond. 1876, p. 92.

3) Proceedings against and liability of the surety.

1. In a suit on a sequestration bond, to recover damages for illegally suing out a writ of sequestration in a possessory action, actual damages are all that the plaintiff is entitled to recover; and the opinions of witnesses cannot form the basis of a verdict. But the witnesses should testify to the facts within their knowledge, and from those facts the jury should find the actual damages sustained by the plaintiff. 15 A. 504, *Bonner v. Copley*.

2. A suit by sequestration is a *lawful act*, and according to the general rule of law, the plaintiff would not be liable at all in damages for the exercise of this right, but is made liable in such a case for any actual damages which the sequestration may have occasioned in the event of his failure in the suit; this is an exception to the general rule. 15 A. 618, *Broxton v. Bloom*.

3. Plaintiff may proceed, immediately, on the forthcoming bond, without waiting for a return of *nulla bona* on a *fi fa*, where the defendant put it out of the power of plaintiff to realize. 21 A. 284, *Noble & Kaiser v. Warner*.

4. The surety on a forthcoming bond, is not discharged by reason of the confession of defendant for a sum of money less than the one claimed in the suit. 26 A. 692, *Harrell v. Saunders*.

5. The surety on a release bond, is liable only for the value of the movables seized, where they are not delivered according to the stipulations of the bond. If the property seized be lands, then the surety is responsible for the revenues. 26 A. 742, *Segassie v. A. Piernas*.

6. The sureties on the forthcoming bond given to release a writ of sequestration, will be liable for the value of the property sequestered. 28 A. 403, *Francis v. Martin*.

7. The surety on a forthcoming bond, is only bound for the amount of the judgment, not the value of the property, if that be greater. 28 A. 643, *Lalanne Bro. v. McKinney*.

8. A forthcoming bond, given to release a sequestration, becomes of no effect, if the plaintiff accepts the confession of judgment of defendant, making

the judgment payable in several installments, on the promise of defendant that he would give him certain claims in satisfaction thereof. 29 A. 732, *Allison v. Thomas*.

9. The moment the suit is settled, the forthcoming bond given to release sequestered property, becomes null. 28 A. 648, *Bee & Co. v. Carlin & Leslie*.

10. Without allegations of fraud, parol is not admissible to prove that less was delivered than is mentioned in the bond. See EVIDENCE, XV. (j), No. 6.

11. The liability of a surety on a forthcoming bond to release a sequestration, is the value of the property sequestered. The amount of the bond is *prima facie* the value of the property, but where the sequestration was dissolved as to a part of the property, plaintiff must show its relative value, so as to fix the sureties' liability. 30 A. 523, *Carroll & Co. v. Hamilton*.

(e) *Rights and obligations of the sequesterator.*

See CORPORATIONS, VIII. (b), No. 2. SALE, VII. (a), No. 4.

(f) *Effect.*

1. The judge has no right or authority to appoint a judicial sequesterator to property released from sequestration by the defendant furnishing bond. 24 A. 40, *Young v. Magazine Street Railroad Company*.

SERVANTS.

See LEASE, II. (c). OFFENSES AND QUASI OFFENSES, II. (h). PRESCRIPTION, III. (c), 4). PRIVILEGE, II. (d).

SERVITUDES.

I. OF PERSONAL SERVITUDES.

II. OF REAL SERVITUDES.

(a) *Legal servitudes.*

- 1) Those originating from the situation of the estates.
- 2) Those established for the benefit of estates.
 - A. *In general.*
 - B. *Servitude of way.*
 - C. *Division walls*

(b) *Voluntary servitudes.*

- 1) Their several kinds; creation; and extinction.
 - A. *Those established by title or prescription.*
 - B. *Those established by destination du père de famille.*
- 2) Their exercise and effect.

I. OF PERSONAL SERVITUDES.

1. A clause in a will dispensing a usufructuary from making an inventory, or giving security, is valid. 15 A. 588, *Breaux v. Carmouche*. See USUFRUCT.

2. If the usufructuary, who is dispensed from making an inventory, undertakes to make one, he must make it accurately. 15 A. 588, *Breaux v. Carmouche*.

3. Under the Spanish law, the usufructuary had only the right to grant leases of the property held by him, and the usufruct terminated if he alienated his rights, and it also terminated at the death of the usufructuary, as under our law. 15 A. 606, *Declouet v. Borel*.

4. A clause in an agreement establishing a usufruct, by which it is provided that such usufruct shall be inheritable, must be considered as not written. 15 A. 606, *Declouet v. Borel*.

5. The surety of the usufructuary, bound for the return in kind of the property, has the right to sue for his discharge when the property was sold with the consent of the owners. 16 A. 358, *Succession Pratt*; C. C. (3030); 2 A. 428; 6 R. 47; 1 R. 212.

6. Usufructuaries are liable for the taxes, and the paving of the street, and not the naked owners. 17 A. 325, *Coleman v. Poydras Asylum*; 20 A. 504, *City v. Wire*.

7. The usufructuary who is not the father or mother, is bound to demand the delivery of the heirs, and give security. 18 A. 288, *Westholz v. Retaud*; C. C. (1600), (1605), (551).

8. The usufructuary, a widow, was re-married, and the second community purchased the naked property from the heirs, on the dissolution of the second community; by the death of the husband the widow is still entitled to her usufruct, but she must give security. 27 A. 590, *Succession Hasley*.

9. If the usufructuary desires to be relieved from the repairs and charges of a part of the property imposed on him, he must renounce the usufruct on the whole. 18 A. 601, *Judice v. Provost*.

10. The usufructuary of the community property falling to the children, cannot be compelled to give security. 19 A. 14, *Succession Costa*.

11. The widow has her usufruct on the interest earned by the capital of the community. 21 A. 16, *Succession Samuels*.

12. The crop not yet gathered, at the death of the wife, belongs to the usufructuary. 20 A. 159, *Moore v. Moore*.

13. The surviving spouse is entitled, as usufructuary, to the revenues of the property, although she is administratrix of the estate of her deceased husband. 4 A. 389; 3 A. 489; 9 A. 107; 22 A. 446, *Boyle & Co. v. Sibley*.

14. The usufructuary, under act of 1844, p. 99, is entitled to the natural fruits, or such as are the produce of industry, hanging by branches or by roots, at the time the usufruct commences, and he is not entitled thereto, when it ends. 12 A. 457; 3 A. 489, C. C. 538; 11 A. 297; 20 A. 160; 22 A. 497; *Tutorship of Davis*.

15. Where the servitude was precarious and enjoyed at the will of the owner, the vendee of the person enjoying the servitude acquires none. 20 A. 339, *Macheca v. Avegno*.

16. Servitudes being subject to the will of the owner of the property on which they are exercised, the owner of the adjacent property can never acquire, against the will of the former, any legal title thereto. 25 A. 56, *Macheca v. Avegno*.

17. A disposition in the will that the testator's property should be administered for the benefit of his wife and children, is such a disposition as will avoid the statutory usufructuary rights of the widow. 28 A. N. R., *Ada Pierce Denegre v. Succession Jas. D. Denegre*.

18. The usufructuary rights of the surviving spouse in community, apply only to cases where the deceased has not disposed, by will, of his property. 28 A. N. R., *Ada Pierce Denegre v. Succession Jas. D. Denegre*.

19. By renouncing the legacy, the widow, to whom the husband has made a legacy, may enjoy the usufruct granted to her by law. 28 A. N. R., *Forstall v. Durel*.

20. The usufructuary can always renounce his usufruct. 30 A. 374, *Succession Dougart*.

21. For usufruct of the surviving spouse, see MARRIAGE, XIII. (e), 4), D.

II. OF REAL SERVITUDES.

(a) *Legal servitudes.*

1) Those originating from the situation of the estate.

1. A strict and rigid application of the articles of the code on the title of predial servitudes would be destructive to agricultural industry. 16 A. 152, *Minor v. Wright*; 12 L. 503; 15 A. 300.

2. The proprietor of the lower estate, has no right to erect a dam or levee, by which to prevent the exercise of the servitude of drain due to the upper estate, although such servitude may have been aggravated; in such a case the proper remedy is by injunction. 15 A. 681, *Barrow v. Landry*.

3. According to the provisions of article 656, of the Civil Code, the proprietor of the upper estate, is not prevented from cultivating his fields, and facilitating their drainage on the lower estate, but the act of draining other land than that belonging to his estate, upon the lower estate, is a violation of

this article, which declares that the proprietor above can do nothing whereby the natural servitude due by the estate below, may be rendered more burdensome. 15 A. 681, *Barrow v. Landry*.

4. A servitude of light cannot be acquired in a window cut through the wall, belonging in whole to the claimant; when the adjacent proprietor pays half of the cost, he may close the window. 26 A. 510, *Lavergne v. Lacoste*.

1) Those established for the benefit of estates.

A. In general.

1. Where a natural drain exists on one estate, in favor of another, the mere fact that the owner of the estate in favor of which such servitude exists, cuts a ditch or canal, leading such water into the drain, as would, if left in a state of nature, find its way by a slow process, is not such an aggravation as would be unauthorized, where it has for its object, the interest of agriculture, and does not tend to redeem swamp lands, or to turn the natural course of water into another direction. 15 A. 300, *Sowers v. Shiff*.

2. Where the right to open a canal on a certain tract of land, was transferred to a company, who allowed thirty years to elapse, after the contract was made, without attempting to avail themselves of their rights, but on the contrary, by their own acts, rendered the servitude impracticable; *Held*: That the right was extinguished, and the transferor entitled to receive back the land, free from the servitude created thereon. 15 A. 427, *Marigny v. Pontchartrain Railroad*.

3. The proprietor of an estate has a right to perform artificial drainage, but not so as to prevent the right of servitude, as originating from the natural situation of the place. 15 A. 497, *Hooper v. Wilkinson*.

4. A proprietor is not entitled to divert the flow of waters on his plantation from the front to the rear, so as to effect his drainage in an opposite direction, to the detriment of the adjoining proprietors. 15 A. 497, *Hooper v. Wilkinson*.

5. The upper estate is entitled to a natural servitude upon the estate situated below it, for purposes of drainage; levees or dams erected across a bayou which runs through the two estates, by the proprietor of the lower, to prevent the flow of the waters in this stream, are infringements of the rights of servitude appertaining to the upper estate. 15 A. 497, *Hooper v. Wilkinson*.

6. This is a right of servitude which the proprietor of the upper estate possesses, and in the enjoyment of this right he should not be disturbed or molested, although possibly no actual injury might result from the interruption of the right. 15 A. 497, *Hooper v. Wilkinson*.

7. A real servitude, to be valid, should express and describe the estate in favor of which it is established, especially where it is shown that the party claiming such servitude was the owner of several estates at the time the servitude was acquired. 15 A. 606, *Declouet v. Borel*.

8. The proprietor of the upper estate has no right, in the exercise of servitude of drain which exists in favor of his estate upon the lower, to divert the flow of water from their natural course, upon the ground that it is beneficial to the lower estate; this is a matter which concerns only the proprietor of such lower estate. If he prefers that the servitude be exercised at a spot more or less injurious or beneficial to himself, it is his own lookout; and the only question is how the waters naturally flow. 15 A. 681, *Barrow v. Landry*.

9. The city of New Orleans has no right to obstruct the natural drain running through the Metairie Ridge, to the injury of the proprietors along the Camp Parapet. 27 A. 502, *Bowman, et als. v. City of New Orleans*; C. C. 660; 19 L. 351; 4 A. 440; 12 A. 15.

10. Servitudes of drain may be proven by parol. See EVIDENCE, IX. (a), No. 14.

B. Servitude of way.

1. In exercising this right of passage, the road should be located in a place where it would be least injurious to the person on whose estate the passage is granted, and at the same time, proper regard should be had to the interest of the party claiming the right of way. 15 A. 67, *Littlejohn v. Cox*.

2. Article 695 Civil Code, giving to a proprietor, whose lands are inclosed, a right of way to the public road, through the estate of his neighbors, *for cultivation of his estate*, does not restrict the right of the owners of lands so situated, to claim the servitude of passage, only for planting purposes. 15 A. 67, *Littlejohn v. Cox*.

3. The purport of the law is more general, and its object is to enable the owner to enjoy his property in a manner which he may deem the most profitable. 15 A. 67, *Littlejohn v. Cox*.

4. A public road established by the police jury, is subject to the use not only of the citizens of the parish in which it is established, but of the whole State, and even of strangers or foreigners within the State. 15 A. 544, *Barbin v. Police Jury*.

5. The recognition in the act of sale of a servitude of way in an alley, common to plaintiff's and defendant's property, interrupts the prescription of non-usage; it devolves on plaintiff, who seeks to remove an obstruction erected by defendant in said alley, to prove usage during the ten years previous. 20 A. 52, *Baker v. Pena*.

6. The right of way, over defendant's land, is the forced expropriation of a participation in what belongs to him. This should never be done except in cases of extreme necessity. 21 A. 247, *Perry v. Webb*; 6 A. 119.

7. The owner has a right to enjoin the police jury from making a public road on his land, without previously allowing a jury of free-holders to assess the damages to be suffered. 27 A. 204, *Knox v. Police Jury East Baton Rouge*.

8. The State has power to grant the right of way, through a street in the city, to a railroad company. 26 A. 529, *New Orleans, Mobile & Chattanooga Railroad Co. v. City of New Orleans*.

9. WYLY and TALIAFERRO, JJ., *dissenting*: The State can grant the right of way, but the company can only get the land necessary for the tracks and depots by expropriation or purchase. *Ib.*

10. Where a lot in a cemetery is sold, with reference to a plan on which appears certain avenues leading to the lot, the purchaser acquires a servitude of way thereon which cannot be obstructed; he is entitled to an injunction. 29 A. 39 *Burke v. Wall*.

11. Servitudes of way may be proven by parol. See EVIDENCE, IX. (a), No. 14; *ib.* XIV. (a). 1), No. 12.

c. *Division walls.*

1. A party has the right of making a wall, one in common, by paying one-half its costs, although he may have a claim to the soil upon which more than one-half is built. 14 A. 338.

2. The defendant having made the wall, one in common, had no right to put his iron front beyond the centre thereof; if he does, he is responsible in actual and vindictive damages. *Ib.*

3. A party can recover from his neighbor, who uses a wall built by him, only one-half the cost of building said wall. 22 A. 114, *Flornance v. Maillot*; 20 A. 553; C. C. (672).

4. If a wall in common is not paid for by the vendor, although the vendee knew nothing of the claim, he is liable to pay one-half the costs of the portion actually used. 24 A. 113, *Winter v. Reynolds*.

5. The purchaser who acquired from the assignee of the bankrupt, can assert a claim against a neighbor who made the bankrupts' wall, one in common, before the sale. 25 A. 300, *Irvin v. Peterson*.

6. The purchaser of the adjoining lot, who had previously built a wall not made common by the vendee, does not transfer the ownership in and to the wall, by selling the lot purchased with the improvement, as acquired; and the last purchaser must pay half the cost of the wall if he desire to use it. 26 A. 510, *Lavergne v. Lacoste*.

7. WYLY, J., *dissenting*: By selling the lot with improvements thereon, the plaintiff parted with his interest in the wall which was built, one-half, on the lot sold. *Ib.*

8. A servitude can never be acquired in a division wall, which is not one in common; in making it a wall in common, the neighbor has the right to close all the openings. *Ib.*

9. The one who erects a division wall at his sole expense, is the exclusive owner thereof, and the neighbor who uses the wall as one of the sides of his building, which is not otherwise supported by the wall, must pay one-half thereof. 20 A. 342, *Costa v. Whitehead*.

10. Where a road, once dedicated to public use, has ceased to be used for public purposes, its soil reverts to the owners. 17 A. 171, *Mendez v. Dugart*.

11. If the wall, which is used, is built on the line, plaintiff can only recover one-half of the cost from defendant, who made it a wall in common. 20 A. 554, *Auch v. Labouisse & Saucier*; see 1 A. 140; 3 A. 165; 14 A. 338.

12. The purchaser is liable for one-half the costs of the wall used by his vendor, and not paid for. 27 A. 199, *Chism & Boyd v. Lefebvre*; 24 A. 113; 20 A. 553; 22 A. 114.

13. One has the right to build a fence as high as he please on his own property, without giving rise to a claim in damages by the neighbors for obstructing the light and breeze. 28 A. 424, *Andrew Parle v. Jane D'Arcy*.

14. A fence owned in common and separating rural estates, cannot be removed, *vi et armis*, by one neighbor to the prejudice of the crop of the next neighbor; such proceedings give rise to damages. 28 A. N. R., *Catherine Jones v. Joseph Henry*.

15. The owner of urban property has the right to demolish a division wall so as to build another capable of supporting the structure he intends to erect; in so doing he is liable for the actual damages suffered by his neighbor, in not exercising all the precautions which prudence may require. 30 A. 32, *Gettwerth v. Hedden*.

(b) *Voluntary servitudes.*

1) Their several kinds; creation; and extinction.

A *Those established by title or prescription.*

1. A sale of a narrow strip across a plantation, for the purpose of digging a canal thereon, to connect with those of two plantations adjoining the strip, and owned by the same parties, so as to drain therein, created a real servitude in favor of the middle tract, which the subsequent owners of the other two plantations were bound to respect. 16 A. 275, *Gillis v. Nelson*.

2. A defendant, not a party to an agreement, nor representing land burdened with a servitude, cannot be condemned to enter upon the burdened land, the property of another, and perform the works necessary for the maintenance of the servitude. *Ib.*

3. Where the sales are silent, servitudes may be proved by parol when they are based on prescription. See EVIDENCE, XIV. (c), No. 3.

B. *Those established by destination du père de famille.*

1. The servitude of light and sight is continuous and apparent, and may be imposed by the owner of two lots on one in favor of the other. But the right of way through an alley is a discontinuous servitude, and can under no circumstances result from the "*destination du père de famille*." 15 A. 316, *Clovis v. Thieneman*.

2) Their exercise and effect.

1. Where the property sold is burdened with an apparent servitude, such as a public levee, the purchaser can claim no reduction of the price. 18 A. 289, *Lallande, ex. v. Wintz & Pochelu*.

2. Where the property leased is encumbered with a servitude, the lessee must allow its exercise. 19 A. 324, *Taylor v. Mohan*.

SET OFF.

See COMPENSATION. PLEADING, VIII. (a).

SEWING MACHINE.

Lease of, when to be considered a sale, 1877, E. S., p. 102.

SHERIFF.

I. OF THE OFFICE OF SHERIFF; HIS CAPACITY AND QUALIFICATIONS.

- (a) *In general.* (b) *Vacancies; expiration of sheriff's term; and his inability to act.*

II. OF HIS RIGHTS AND DUTIES; HIS LIABILITIES AND THOSE OF HIS SURETIES.

- (a) *In general.* (c) *Failure to execute or return final process; proceedings thereon; and those to compel payment of money collected.*
 (b) *Execution and return of process.*
 1) *In general.*
 2) Sheriff's liability to parties plaintiff and proceedings against him; measure of damages and his indemnification.
 3) Liability to other parties.
 4) Liability of his sureties.
 A. *In general.*
 B. *Release or loss of property; and taking of sureties.*

III. HIS COSTS.

I. OF THE OFFICE OF SHERIFF; HIS CAPACITY AND QUALIFICATIONS.

(a) *In general.*

1. A deputy sheriff may sign a deed of sale. 21 A. 40, *Kellar v. Blanchard*.
2. The capacity of the sheriff cannot be tested on an injunction to a *fi. fa.* 21 A. 543, *Turner v. Hill*. See ACTIONS, Nos. 33, 34.
3. The legal right of the sheriff to the office cannot be collaterally questioned on a motion to quash the venire of jurors. 22 A. 424, *State v. Ferray*.
4. Sections 1177, 3592, 3593, Revised Statutes of 1870, authorizing the judge to suspend the sheriff from office, are not unconstitutional. 29 A. 705, *State ex rel. Vaughn v. Richmond, sheriff*. But see CONSTITUTION, II. (c), 5), No. 1; *infra*, (b), No. 1.
5. EGAN, J., *dissenting*: A sheriff is a constitutional officer, and can only be removed in the mode provided for by the constitution.
6. The obligation of a deputy sheriff to his principal, arises *ex contractu*. See OBLIGATIONS, II. No. 1.
7. Cannot hold a parish office, 1877, E. S., p. 7.

(b) *Vacancies; expiration of sheriff's term; and his inability to act.*

1. Under the provisions of act No. 123 of 1868, if the sheriff be suspended by the judge of his court, and, after due report, the legislature failed to take action thereon, he is entitled to resume the functions of his office. 22 A. 562, *State v. Schwab*. See (a), No. 4.
2. An outgoing sheriff may retain in his hands and pay over to the parties legally entitled to receive the same, money which he has on hand; he cannot be compelled to pay the same to his successor in office. 26 A. 281, *Sauvinet v. Maxwell*.
3. An outgoing sheriff, who turned over to his successor the receipt of his keeper for property attached and still in suit, is released from all further responsibility. 26 A. 629, *Coleman v. Hope*.

II. OF HIS RIGHTS AND DUTIES; HIS LIABILITIES AND THOSE OF HIS SURETIES.

(a) *In general.*

1. Where a party, in the capacity of sheriff, has the custody of slaves, the mere fact of his removing them from the parish prison to his own place, will not make him liable for their hire; he only becomes responsible for their forth-

coming, and for the value of such services as he might have derived from their labor. 15 A. 467, *Callaway v. Bobo*.

2. A deputy sheriff may, with a deputy clerk and the parish judge, draw the jury. 25 A. 473, *State v. Jean Gay, fils et al.*

3. The presumption is, that all taxes due are included in the charges paid by the purchasing plaintiff. See EVIDENCE, III. (d).

(b) *Execution and return of process.*

1) In general.

1. The sheriff, when resisted in the execution of a writ, is justifiable in using so much force as is necessary to make the seizure commanded in the writ. 15 A. 473, *Flournoy v. Millings*.

2. The instructions of plaintiff's attorney will protect the sheriff, who, in obedience thereto, retains in his hands the writ of *fi. fa.* after the return day. 21 A. 590, *Simons v. White*. See 2), c. No. 3.

3. The sheriff being a ministerial officer, cannot treat as a nullity a mandamus from the district court, and in order to recover a slave, who had been ordered into the custody of the sheriff, by a justice of the peace, in a prosecution against a wife for cruel treatment, the only remedy of the plaintiff is in a mandamus. 15 A. 603, *Ney v. Richard*.

4. The sheriff must pay the State and city taxes, before passing a deed of sale. 25 A. 337, *Baltimore v. Parlange*.

5. The judgment obtained by the State for taxes, may be null, but the sheriff should nevertheless pay the taxes due out of the proceeds of sale of the property sold at succession sale, before passing the deed. 28 A. N. R., *State v. Fassman; City v. Campbell*, N. R. See SALE, I. (a), No. 8.

6. See also EXECUTION.

2) Sheriff's liability to parties plaintiff and proceedings against him; measure of damages and his indemnification.

A. In general.

1. The sheriff is only liable for such damages, arising in the discharge of his official duty, as shall be proved to have been actually sustained. 15 A. 163, *Bogel v. Bell*. See OFFENSES AND QUASI OFFENSES, II. (g), 3).

2. In the execution of a judgment on the official bond of a sheriff, all the lands which may have belonged to him at the date of registry of his official bond, may be seized and sold without regard to any subsequent transfer. The surety of the seized sheriff may plead *discussion*, and point out such property. 21 A. 560, *Stinson v. Hill*.

3. A sheriff who received Confederate money in satisfaction of a writ of *fi. fa.*, when plaintiff knew he could not, with safety, have demanded any other money, is presumed to have accepted it with the consent of plaintiff, and is not bound for anything towards plaintiff in execution *aliter*, if plaintiff; were absent. 23 A. 162, *Harvey v. Walden*; 475, *Spalding & Rogers v. Walden*.

4. The sheriff cannot be held liable in damages, when executing the orders of a court of competent jurisdiction. 26 A. 464, *Rau v. Katz*.

B. Release or loss of property; and taking of sureties.

1. Where the sheriff has no control over the property seized, by reason of agreements entered into between plaintiff and defendant, he will not be held liable for its loss. 20 A. 88, *Pepin v. Dunham*.

2. When it is ascertained that the property released under bond by the sheriff, was not liable for the seizure, the sheriff cannot be made liable for having accepted an insufficient bond. 22 A. 183, *Sanarens & Company v. True*.

C. Failure to execute or return final process; proceedings thereon; and those to compel payment of money collected.

1. Where a sheriff, after having satisfied all the prior mortgages, pays over the entire balance of the proceeds of sale to one of several seizing creditors,

whose mortgages are concurrent, he is responsible to the others for the amount, or *pro rata* of the proceeds to which they were entitled at the time of the sale and distribution. 15 A. 513, *Ethridge v. Milling*. See No. 7.

2. Where the plaintiff enters into agreement with the purchaser, that the latter shall retain the balance of the adjudication in his hands until the erasure of the tacit mortgage, and the sheriff recites in the deed that the purchaser paid the whole amount, the latter will be compelled to pay to the seized debtor the surplus of the adjudication, after satisfaction of plaintiff's claim. 18 A. 167, *Parker v. Grelier*. See EXECUTION, V. (d), 11).

3. A sheriff who fails to return a writ of *fiери facias* within the legal delay, becomes *prima facie* responsible for the debt, and it is incumbent on him to show a legal excuse for his neglect. 19 A. 466, *Taylor, Knapp & Co. v. Hancock & Co.*; 11 A. 273; 12 A. 419; 13 A. 153, 329. See 1), No. 2.

4. A sheriff who gives to his predecessor in office a receipt for money made on an execution, without mentioning that the same was in Confederate money, is liable to the plaintiff for the amount of the execution. 22 A. 155. *Sadler v. Gayle*.

5. The court will take judicial notice that the sheriff could receive only Confederate money. See EVIDENCE, II. No. 7.

6. The sheriff is bound to pay the money realized on execution to the seizing creditor, after deducting his costs. See EXECUTION, V. (d), 8), A. No. 4.

7. He cannot pay, where conflicting claims arise. See *Ib.* No. 5.

8. The prescription of one year is applicable to a sheriff who received Confederate notes. See PRESCRIPTION, III. (c), 1), No. 5.

3) Liability to other parties.

1. Where an order of a judge has been granted in error of fact, although that error of fact is known to the sheriff when he executes the order, his duty is to obey and execute the lawful mandates of the court, and in the discharge of his duty he is justified and protected by law, and cannot be held liable in damages. 15 A. 489, *Brainard v. Head*. See OBLIGATIONS, VIII. (e).

2. If a sheriff makes a seizure of property, after he has been informed that the title is not in the debtor, but in some third person, he is bound *in solido*, with the seizing creditor, to indemnify such third person in damages. 15 A. 491, *Atkinson v. Atkinson*.

3. The sheriff is the officer of the law, charged, under the writ of execution, with certain duties, and his acts (where there is no improper interference on the part of the creditor), are at the risk of the defendant in execution, who has it in his power to dispense with the services of the sheriff by paying the debt. 16 A. 157, *Baham v. Langfield*; 2 L. R. 280.

4. The sheriff who sequesters property illegally, and without right, and puts under arrest the third person in whose possession it is, makes himself liable in damages. 24 A. 339, *Frazier v. Parsons, sheriff*.

5. The plaintiffs have entire control of the *fiери facias* in the hands of the sheriff; he is only responsible to them for any neglect in the execution of the writ. The indorser of the note upon which judgment was previously rendered, and execution issued against the drawer, has no cause of action against the sheriff and his sureties for his neglect, even when condemned to pay the note. 26 A. 78, *O'Hara v. Schawb*.

6. A sheriff is bound to refund to an absent defendant in attachment, lawful currency, for defendant's property sold, when the attachment is dissolved, although he may have received at the time Confederate money. 23 A. 475, *Spalding & Rogers v. Walden*.

4) Liability of his sureties.

1. The cancellation of the official bond of the sheriff, by the governor, and the erasure of the mortgage in the manner indicated by act 12th March, 1855, discharges the sureties. 22 A. 29, *Lockwood, Voochries & Co. v. Penn*.

2. The sureties of a sheriff cannot be held liable where the property seized was by agreement, shipped to a commission merchant, who sold the same and afterwards failed. 26 A. 250, *E. J. Gay & Co. v. Lejeune, Jr., sheriff*.

3. The sureties on the official bond of a sheriff, are liable for money received by him before they signed the bond, but not accounted for while the bond was in force. 24 A. 130, *Wentz v. Ledoux, sheriff*.

4. See PRESCRIPTION, III. (d).

III. HIS COSTS; HIS CAPACITY AND QUALIFICATIONS.

1. Where a sheriff has not been authorized as the legal agent of the seizing creditors, to insure property in his custody, he has no authority under the law to effect such insurance, and his claim for the return of the premium paid, cannot be allowed as costs of suit. 15 A. 22, *Owens v. Davis*.

2. When an appeal has been taken from a judgment rendered in the district court, pending the appeal, the sheriff cannot by an *ex parte* motion, obtain judgment, and issue execution for his costs, against the party cast; he should take a rule, and notify the party before having his compensation fixed. 15 A. 216, *Decuir v. Lejeune*.

3. Sheriffs are not entitled to more than their disbursements for keeping property under seizure. His responsibility and care are remunerated by the emoluments of his office. 16 A. 233, *Wilkouski v. Wilkouski*; but see acts of 1877, allowing him two dollars per day.

4. The overcharge of any item, works the forfeiture of that particular item. 1855, p. 166; 1867, p. 341; R. S. 1869, p. 151. 22 A. 194, *Ware & Son v. Wilson*.

5. The sheriff is, by law and the writ under which he sells, authorized to pay his own and the clerk's costs, out of the proceeds of the property sold by him. Code of Practice, 704. 22 A. 330, *Connors v. Citizens' Mutual Insurance Company*.

6. The costs of advertising in papers other than the official journal, is an expense the sheriff has no right to incur in executing the process of court. 25 A. 337, *Baltimore v. Parlange*.

7. The sheriff need not take corporeal possession of real estate in the parish of Orleans; the seizure is complete by recording the notice in the mortgage office. R. S., sections 3625, 3626, 362. *Ib.*

8. The charge for appraiser's fees is prohibited by article 671, C. P. *Ib.*

9. Plans and surveys are also unauthorized. *Ib.*

10. The sheriff of another parish cannot be held liable for failure to serve process of court, when no deposit has been made, or a sufficient surety given for payment of his fees. The deposit in the clerk's office where the process emanated, is not sufficient. 26 A. 628, *Adams v. Dinkgrave*.

11. The sheriff cannot collect his costs by mandamus against the city of New Orleans. See MANDAMUS, I. (b), No. 54.

12. He may so proceed to compel the parish treasurer to register his claim. See MANDAMUS, I. (b), No. 57.

13. The service by the sheriff of "road notices" and the calling of jurors, cannot be included in the bill of costs for criminal cases, which the sheriff is authorized to charge against the parish. Such items, included in his bill, duly approved by the judge and clerk, may be rejected by the parish treasurer, when the application is made to have the same recorded. 30 A. 519; *State ex rel. Barrow v. Fisher, treasurer*.

14. Section 179, R. S., relative to the time within which certain claim against the State must be presented to be audited, has reference to claims which must be supported by evidence, not to those of clerks and sheriffs, who are allowed, the former fifty and the latter one hundred dollars per annum, for criminal cases. 30 A. 339, *State ex rel. Samuels v. Jumel, auditor*.

15. Fee bills, 1870, p. 163; 1877, E. S., p. 162; compensation of the criminal sheriff, parish of Orleans, 1877, p. 85; 1877, E. S., p. 86.

SHIPPING.

I. IN GENERAL.

II. OF THE TITLE TO SHIPS AND ITS TRANSFER BY THE OWNER OR REGISTRY AND ENROLLMENT AND THEIR EFFECT.

III. OF THE RIGHTS, POWERS, AND OBLIGATIONS OF PART-OWNERS.

IV. OF REPAIRS AND NECESSARY SUPPLIES AND EXPENSES; HYPOTHECATION OF THE SHIP; HER SALE AND THAT OF THE CARGO BY THE MASTER.

- (a) *In general.* (b) *Hypothecation of the ship; her sale and that of the cargo by the master.*

V. OF THE OFFICERS AND CREW.

- (a) *In general.* (c) *Duties and powers of the master and other officers.*
 (b) *Their employment, discharge and wages.*

VI. OF PILOTS.

VII. OF COLLISION.

VIII. OF TOWBOATS AND STEAM VESSELS.

IX. OF THE CONVEYANCE OF PASSENGERS.

X. OF THE CONVEYANCE OF PROPERTY; AND THE CONTRACT OF AFFREIGHTMENT.

- (a) *In general.* 3) Their duties during the voyage; exceptions to their liability; and burden of proof in relation thereto.
 (b) *Creation, evidence and construction of the contract.* 4) Re-shipment and forwarding of goods.
 1) *In general.* 5) Delivery.
 2) *Bill of lading.* 6) Measure of damages and mode of their liquidation.
 3) *Charter-party.* 7) Gratuitous bailees.
 (c) *Obligations of the master and owners of the ship.* (d) *Obligations of the shipper.*
 1) *In general.* 1) *In general.*
 2) *Preparation for, and commencement of the voyage; receipt and description of the goods.* 2) *Freight, primage and demurrage.*

XI. OF GENERAL AVERAGE.

XII. OF SALVAGE.

I. IN GENERAL.

1. One suing for damages, as owner, cannot prove he was a charterer. See EVIDENCE, VII. No. 28.
2. See PRIVILEGE, III. (c), 2), A.

II. OF THE TITLE TO SHIPS AND ITS TRANSFER BY THE OWNER; OF REGISTRY AND ENROLLMENT AND THEIR EFFECT.

1. Where a vessel has been attached and released and upon a final judgment, decreeing her to be liable, was again seized, she having in the meanwhile passed into the hands of different owners; *Held*: That the presumption was that she belonged to the same owners with whom the contract of affreightment had been made, and that her registry not being recorded in our custom-house, her owners at the time of the last seizure were bound to make proof of the change of ownership, and the seizing creditors could not be held liable for more than nominal damages. 15 A. 715, *Hunter v. Bennett*.

2. Where there was an actual delivery by the vendors of a steamboat, to the vendee, and the vendors, who were captain and clerk of the boat at the time of the sale, afterwards engaged their services to the vendee, and took charge of the boat for him; *Held*: That it could not be considered possession of the vendors, by a precarious title, giving rise to the presumption of simulation. 16 A. 6, *England v. Commercial Insurance Co.* See SALE, III. (b), 4), B.

3. The decayed condition of the hull, rendering a vessel unseaworthy, is a redhibitory defect. 18 H. 390, *Bulkley v. Honold*.

4. Sales of vessels in Louisiana, are governed by the Civil Code of that State, and not by the general commercial law. 19 H. 390, *Bulkley v. Honold*.

III. OF THE RIGHTS, POWERS, AND OBLIGATIONS OF PART-OWNERS.

1. Part-owners of a ship can only sell their respective shares, but where the ship belongs to a partnership, one partner may sell the whole ship. 5 Wall. 377, *The William Bagaley*.

IV. OF REPAIRS AND NECESSARY SUPPLIES OR EXPENSES; HYPOTHECATION OF THE SHIP; HER SALE AND THAT OF THE CARGO BY THE MASTER.

(a) *In general.*

1. Where a ship was chartered, and by the terms of the charter party it was stipulated that the charterer should advance the expenses of the ship to a certain amount, and he consigns her to a person at the port from which the cargo is to be shipped, who makes these advances in his stead; *Held*: That if the consignee was cognizant of the terms and conditions of the charter party, in the absence of any express agreement to the contrary, he must be considered as having advanced funds for his principal, the charterer, and has no action for reimbursement against the ship owner or captain; *Held, also*: That although the captain had requested him to have his bill made out, and had stated that it would be paid by a party, whom he named, yet this would give him no right of action against the captain. 15 A. 430, *Maury v. Watts*.

2. An engagement to advance the expenses of a ship, under such circumstances, cannot be understood as giving the party advancing, the right to instant payment, where the advances are made, and, as a consequence, the right to attach the ship. 15 A. 430, *Maury v. Watts*.

3. A contract to furnish a boat with timber, and other materials for her repairs, is not a maritime contract. 20 A. 432, *Avrill v. Steamer Alabama Belle*; 22 Howard, *Roach v. Chapman*; 20 Howard, 400. See ADMIRALTY LIEN.

4. Material-men furnishing repairs and supplies to a vessel in her home port, do not acquire thereby any lien upon the vessel, by the general maritime law as received in the United States; but liens granted by the laws of a State in favor of material-men for furnishing necessaries to a vessel in her home port, in said State, are valid, though the contract to furnish the same is a maritime contract, and can only be enforced by proceedings *in rem* in the district courts of the United States. 21 Wall. 558, *The Lotawana*; 22 A. 624, *Southern Dry Dock Company v. Gibson, Rodney et al.*

5. The case of repairs made upon a ship in the port or State to which the ship belongs, is governed by the local law of the State, and no lien is implied unless it is recognized by that law. But if the local law gives a lien, it may be enforced in the admiralty court. 7 P. 324, *Peyroux v. Howard*. See V. (b), No. 1.

6. An express contract entered into by workmen to repair a ship for a specific compensation, is no waiver by the workmen of their lien upon the ship, unless the contract contain some stipulation inconsistent with the continuance of such lien, and from which it may fairly be inferred that the personal responsibility of the ship owners was alone relied upon. 7 P. 324, *Peyroux v. Howard*. See PRIVILEGES, III. (c), 1); 2).

7. One who has caused repairs to be made on the credit of his ownership, is bound. See ESTOPPEL, No. 16.

8. Advances made in a foreign port to equip a vessel, are presumed to be made on the credit of the vessel, on which they are secured by a lien. See INSURANCE, I. (b), No. 5.

9. For privileges on vessels, see LIEN, No. 1. PRIVILEGE, III, (c), 2), A; B.

(b) *Hypothecation of the ship; her sale and that of the cargo by the master.*

1. The necessity for a sale cannot be denied when the peril, in the opinion of those capable of forming a judgment, makes a loss probable, though the

vessel may a short time afterwards get afloat. 17 A. 47, *Graham v. Ledda*; 13 Curtis, p. 217.

2. The vessel having been mortgaged in the State of Maine, and afterwards attached in New Orleans, the mortgagee's claim being perfect, and his title to the brig established, the attachment levied on the vessel will be set aside. 19 A. 513, *Dobbin & Co. v. Hewett*.

3. The owners of a sea going vessel are responsible, *in solido*, as common carriers for money or gold taken on board as freight and used for the expenses of the vessel. 22 A. 6, *Sulakoski v. Flint et al.* See OBLIGATIONS, VIII. (e).

V. OF THE OFFICERS AND CREW.

(a) *In general.*

1. When a seaman, while in the discharge of his duty, is injured by reason of the neglect or carelessness of an officer of the boat, the boat is liable for his wages until restored, and for his subsistence and medical attendance in the meantime. 1 Woods, 170, *Myers v. The Lizzie Hopkins*.

2. Responsibility of the ship for expenses incurred by a mariner injured whilst in the discharge of his duty, see OFFENSES AND QUASI OFFENSES, II. (g), 2), A. No. 3.

3. The ship is not liable for a defect not apparent in the tackle, see *ib.*, Nos. 4, 5.

4. Nor for the injury done to a roustabout by the mate, see *ib.*, II. (h), No. 6.

(b) *Their employment, discharge and wages.*

1. The fact that the law of Louisiana grants the master of a steamboat a lien upon the boat for his wages, will not give the admiralty court jurisdiction of a suit brought by the master *in rem* to recover his wages, unless the master's services be essentially maritime. But if the admiralty jurisdiction has once attached (the contract appearing to be substantially maritime), the State law may be enforced in the admiralty court. 11 P. 175, *Steamboat New Orleans v. Phœbus*. See IV. (a), No. 4.

2. A mariner having repeatedly asked for his wages without receiving them, and being in a strange land and in great need of money, agreed to take one-third of the amount due him in full payment, and release the ship and owners; and on payment of one-third of the amount due, signed a receipt in full; *Held*: That the agreement to take less than the whole amount due was *nudum pactum*, and the receipt no bar to a recovery for the balance due. 1 Woods, 300, *Savin v. The Juno*.

3. Sailors not to be employed at any work, 1874, p. 123.

(c) *Duties and powers of the master and other officers.*

1. Liability of master for loss of a hired slave. See MANDATE, II. (a), No. 1. In other cases. *ib.* No. 2.

VI. OF PILOTS.

1. The pilot should not be held liable to the owner, unless by reason of gross negligence. See MANDATE, V. (a), No. 2.

VII. OF COLLISION.

1. Where a vessel is aground and entirely helpless, it is the bounden duty of all other vessels to do her no harm. 17 A. 7, *Green et al. v. Croce et al.*; 9 L. 430; *Story on Bailments*, 386.

2. Where an accident is unavoidable, even with due precautionary measures, it is incumbent on the owners of the vessel causing it, to show this exculpatory fact; but where, on the contrary, it is shown that the whole damage inflicted was occasioned by the willful obstinacy, fault and negligence of the master of a vessel; *Held*: That the owners of that vessel are responsible, as common carriers, to the vessel sustaining the damage. 17 A. 7, *Green et al.*

v. *Croce et al.*; 9 L, 428; C. C. 2294; 1 La. 350; 6 R. 256; 6 R. 541; 3 A. 668; acts of 1855; R. S. 1856, sec. 1, p. 537.

3. Under rule six, adopted by the board of supervising inspectors, in 1865, under authority of an act of congress, ordering boats nearing a short bend or point, where another boat going in an opposite direction cannot be seen, to give one long sound of the whistle, the officers of the boat are to discriminate the short bends. 27 A. 27, *Kennett & Bell v. Union Insurance Company*.

4. A case of collision on the Mississippi river above the ebb and flow of the tide, is within the admiralty jurisdiction of the United States. 5 H. 441, *Waring v. Clarke*.

5. The admiralty jurisdiction of the courts of the United States extends to collisions on the Mississippi river above the ebb and flow of the tide. 12 H. 466, *Fretz v. Bull*.

6. A schooner carried no lights until she spied a steamer coming towards her, then showing a white light in front while the steamer showed all the lights required by law, she struck the steamer amidship, the wheel passing over the bowsprit and bow of the schooner, sinking her; *Held*: That the steamer was not in fault. 22 A. 625, *Miller v. Morgan*.

7. No damages can be recovered in case of collision, if the plaintiff has, by his fault, negligence or mismanagement, contributed to the collision. 19 A. 304, *Kellogg v. Hine*; 1 A. 372; 3 A. 48, 441; 6 A. 71, 425; 7 A. 277; 11 A. 325.

8. A neglect to keep a proper lookout, which does not in any way contribute to a collision, cannot be allowed as a ground on which to recover damages caused by the collision. 2 Woods 58, *Shirley et als. v. The Richmond*.

9. A neglect of the well-established rule, for navigating the Mississippi river, that ascending boats shall run the points, and descending boats the bends, which results in a collision and loss, renders the boat which disregards the rule liable for the damages. 2 Woods, 58, *Shirley v. The Richmond*.

VIII. OF TOW-BOATS; AND STEAM VESSELS.

1. A steam tug having the vessel or barge towed, under its full control, must be considered as a common carrier. 24 A. 165, *Bussey & Company v. Mississippi Valley Transportation Company*; 18 A. 683; 20 A. 495.

2. *Aliter*, if the bailor remains in possession of the vessel, using the tug simply as a means of locomotion under the entire control of the towed vessel. *Ib.*

3. Whilst a ship is being towed in port, she is not responsible for the damages occasioned if a collision should happen. 20 A. 495; 22 A. 389, *Young v. Ship Princess Royal*.

4. The duties of a common carrier and those of a vessel hired for towing are different; the former is bound to furnish a seaworthy craft, but the latter is not responsible for the qualities of the towed vessel. 29 A. N. R., *Mississippi Valley Transportation Company v. Fosdick & Company*.

5. Where the vessel in whose charge the towed barge was left, did all that could be expected to preserve the barge from sinking, after arrival at the place of delivery, and the charges were incurred by reason of the failure of the exercise of due diligence of the consignees to receive the towed vessel, the latter will be bound to pay all the expenses incurred in preventing the towed vessel from sinking. 29 A. N. R., *Mississippi Valley Transportation Company v. Fosdick & Co.*

6. Tow boats are common carriers. See CARRIERS.

7. Their private book of rules and regulations, not admissible in evidence. See EVIDENCE, X. (c), No. 4.

8. See CARRIERS.

IX. OF THE CONVEYANCE OF PASSENGERS.

1. Where it is the custom of common carriers to allow the baggage of passengers to be taken in charge by servants in their employ, to be delivered by them at a certain place and in a certain manner, they are liable for the loss of the baggage arising from the neglect of their employees to make the delivery according to custom. 15 A. 14, *Fisher v. Geddes*.

2. By mistake of the porter, the boat landed plaintiff's trunk at another landing; and the boat, on discovering the error, agreed to forward the trunk to plaintiff's destination, which was accordingly done. But the contents had been robbed and the carrier was held responsible for the missing articles. 16 A. 160, *Blossman v. Hooper, Captain Steamer Laurel Hill*.

3. The carrier is liable for the loss or damage done to the passenger's baggage whilst in charge of the proper officer. 20 A. 402, *Moore v. Evening Star*; 1 M. 196; 18 A. 664; C. C. (2723).

4. Where the plaintiff contributed by the negligence of his clerk, in the delay in transporting a trunk, he can recover no damages against the carrier. 28 A. 67, *Gonthier v. New Orleans, Jackson and Great Northern Railroad Company*.

5. The act of congress entitled, "An act for the better security of the lives of persons on vessels navigated in whole or in part by steam," may be invoked, as the basis of civil action, to remedy a private grievance or wrong, caused by a failure to comply with its provisions. 15 A. 304, *England v. Grippon*.

6. The responsibility of a common carrier, in transporting slaves, is the same as that of carrying passengers. 19 A. 199, *Folse v. New Orleans, Coast and Lafourche Transportation Co.* See SLAVES, I. (d), 3), B.

7. To render the carrier liable for baggage, it must be entrusted to the carrier; else the responsibility does not extend beyond the value of reasonable articles of apparel or convenience; according to the passenger's condition in life. 27 A. 90, *Yznaga Del Valle v. Steamer Richmond*.

8. A passenger, who is maimed by the carelessness of the employees on board the common carrier, without contributory negligence on his part, has a right to recover damages. 27 A. 378, *Julien v. Captain and Owners of Wade Hampton*.

9. An agreement, conditioned that the carrier shall not be liable for any accident, is valid, unless it should happen from the fraudulent, willful or reckless misconduct of the carrier. 28 A. 133, *Higgins v. N. O., M. & C. R. Co.*

10. WYLY, J., *dissenting*: Such a condition is null; no man can imperil his life nor authorize others so to do. *Ib.*

X. OF THE CONVEYANCE OF PROPERTY; AND THE CONTRACT OF AFFREIGHTMENT.

(a) *In general.*

1. Damages will not be allowed for the libel of a boat, by reason of the non-delivery of freight, beyond the damages actually sustained, unless a want of probable cause and malice be shown in the resort to the compulsory process. 15 A. 16, *Carter v. Tufts*.

2. A railroad company which undertakes to transport cattle, is bound to furnish a suitable and safe car, and is responsible for any loss arising from the neglect of duty in this particular, and the mere presence of the owner does not lessen this responsibility, for he had no power over the train, which was under the control of the company. 16 A. 223, *Peters v. Jackson Railroad Co.*

3. If articles of greater value are packed in the same box with ordinary freight, the carrier will nevertheless be responsible for the loss of the latter. 17 A. 29, *Hyde & Goodrich v. New York and New Orleans Steamship Co.*

4. A contract of affreightment in Havana, to be executed here, should be governed by the laws of Louisiana. 16 L. 589; 18 A. 14, *Galliano v. Leon Pierre*.

5. Where the goods were shipped on one vessel, instead of another, with plaintiff's consent, and the vessel was lost, plaintiff cannot recover their value. 18 A. 354, *Hedricks v. Morning Star*.

6. To recover from the carrier, for damages done to the merchandise, it must be shown that they were caused by his negligence or want of skill. 18 A. 621, *Clastrier v. Sun Mutual Insurance Company*.

7. The Jackson railroad undertook to transport some freight, but through

its delays, the freight being lost, the road is responsible for the value thereof. 23 A. 353, *Flash, Hartwell & Co. v. N. O., J. & G. N. R. R. Co.*

8. In an employment requiring skill, "gross carelessness," is the failure to exercise skill. 24 A. 167, *Bussey v. Mississippi Valley Transportation Co.*

9. In accordance with his contract, defendant is liable for the difference between the freight actually procured and that which he bound himself to procure. 28 A. N. R., *Meeker, Knox & Co. v. C. Carlos.*

10. If the carrier employs for the transportation of goods, an unseaworthy vessel, and the goods are lost with the vessel, before delivery, he is liable for their value. 23 A. 50, *Hirsch v. Leathers.*

11. When B. F. & Co., in New Orleans, sold goods to G. D., in Jefferson, Texas, on credit, and charged the price against G. D., on their books, and delivered the goods for transportation, to a common carrier, directed to G. D., and consigned to S. & P., at an intermediate port; *Held:* That B. F. & Co., could not maintain an action against the common carrier for the loss of the goods. 1 Woods, 64, *Blum, Frank & Co. v. The Caddo.*

12. Certificates of the master and clerk, that nothing had been abstracted on the boat, are not admissible. See EVIDENCE, X. (e), No. 3.

(b) *Creation, evidence, and construction of the contract.*

1) In general.

1. It is not necessary that the contract of affreightment, should be in writing; parol evidence of any special agreement is, therefore admissible. 15 A. 103, *Roberts v. Riley.*

2. Bailees are not responsible for non-insurance of goods under their charge, unless under special instructions to insure. 17 A. 273, *Duncan v. Boye.*

3. The contract may be made and proved by parol. See EVIDENCE, IX. (a).

4. For bills of lading, see EVIDENCE, XV. (i).

2) Bill of lading.

1. The master has no general authority as such, to sign a bill of lading for goods which are not put on board the vessel, and the owners cannot be made liable on a bill, signed without delivery of the goods. 16 A. 316, *Fellows v. Steamer Powell.* See Nos. 7, 8.

2. The bill of lading can have no effect until its delivery to the consignee. 17 A. 47, *Graham v. Ledda.*

3. The consignee who has possession of the bills of lading, is in full control of the consignment, and a garnishment in his hands will be effectual when made previous to the seizure of the merchandise itself. 18 A. 478, *Schindler v. Smith, Bullins & Co.*; 1 A. 80; 4 A. 452; 9 L. 322.

4. One who lends money on the transfer of a bill of lading, of merchandise sold for cash, but not paid for, should be paid by preference over the vendor. 25 A. 84, *Delgado & Co. v. Wilbur & Co.*

5. A bill of lading, calling for cotton as marked in the margin, there being no mark on said margin, nevertheless gives complete title of the cotton shipped thereunder to the owner of the bill. 26 A. 6, *Horrell v. Louisiana National Bank.*

6. After signing a bill of lading for freight, which violates the contract of affreightment, it is too late for the owner to protest. Protest should have been made at the time of signing. 27 A. 85, *Rogers v. Roberts.*

7. A common carrier will not be held liable for the value of property never received by it, but for which the agent erroneously gave a receipt or bill of lading, upon the faith of which a loan was obtained from an innocent party. 29 A. 446, *Hunt & Macaulay v. Mississippi Central Railroad Company.*

8. DEBLANC and SPENCER, JJ., *dissenting:* The agent acted within the scope of his authority, and bound his principal, the carrier; moreover a bill of lading under the act of 1868, is negotiable, and no equities can be pleaded when held by a *bona fide* third person, for value. *Ib.*

9. For bills of lading and receipts, see EVIDENCE, XV. (i).

10. Not admissible in evidence without proof of signature. See EVIDENCE, XXV. (c), No. 5.

3) Charter party.

1. The bursting of a boiler is not *prima facie* evidence of negligence, as between the owner and charterer; the burden is on the owner to prove negligence. 27 A. 380, *Wilkinson et al. v. Dalferes & Johnson et als.*

2. The owner of a ship, who charters her to another, tacitly agrees that she is in suitable condition for the use to which she is to be put. 1 Woods, 271, *Werk v. Leathers.*

3. If there is a defect in a ship by which she becomes disabled, even though it may not be apparent upon examination, the charterer cannot recover the charter money, and he will be liable for damages occasioned by the defect. *Ib.*

4. A. in Boston, was in correspondence with B. in New Orleans, in reference to the chartering of a ship to B, to carry freight from New Orleans to Europe, and represented that the ship would sail from Boston for New Orleans on a day certain; *Held:* That the representation amounted to a warranty, that the ship should sail on that day. The ship did not sail for two days after the time fixed; therefore B. was not bound. 1 Woods, 286, *Deshon v. Fosdick & Co.*

(c) Obligations of the master and owners of the ship.

1) In general.

1. The carrier, who by falsely representing to plaintiff that his goods were insured, and induced him to ship without insurance, is responsible for the goods when lost by one of the perils to be insured against. 18 A. 46, *Bissel v. Terrel.*

2. The carrier, without instructions to insure the goods, cannot be held liable for their loss. 25 A. 453, *Hanan v. Bowles.*

3. Cotton on board of a ship, is under the control of the master, who holds it subject to the owners of the bill of lading. 26 A. 6, *Horiell v. Louisiana National Bank.*

2) Prescription for, and commencement of, the voyage; receipt and description of the goods.

1. Low water is not to be classed among the dangers of the river, which absolve the carrier from delivering freight in good order. 18 A. 108, *Mahon v. Steamer Olive Branch*; 12 A. 783.

3) Their duties during the voyage; exceptions to their liability, and burden of proof in relation thereto.

1. The common carrier may restrict his liability by express, special contract. 15 A. 103, *Roberts v. Riley.*

2. The first obligation of the common carrier is to indemnify the shipper, for the loss or injury of goods committed to his charge, unless occasioned by accident, and uncontrollable events. 15 A. 436, *Cranwell v. Ship Fanny Fosdick.*

3. Where flour was stowed upon a vessel, either improperly, or in such proximity to an offensive and injurious oil, as to suffer damage, and it was shown that the common carrier had been put on his guard, as to the danger from such oil to the flour; *Held:* That he was responsible for the damage sustained by the flour. 15 A. 436, *Cranwell v. Ship Fanny Fosdick.*

4. Damages will not be allowed against a vessel, when the damages have been caused by stress of weather. 17 A. 34, *Marey v. Warner*; 9, *Letchford v. Ship Golden Eagle.*

5. Common carriers are not liable for damages caused by accidental and uncontrollable events. 17 A. 270, *Cochran & Hall v. Bark Cleopatra*; 290, *Medina & Clohecy v. Hanson.*

6. The exemption of leakage in the bill of lading, does not authorize the carrier to deliver empty casks, in the absence of stress of weather or other perils. 18 A. 266, *Brauer v. Bark Almoner.*

7. The carrier is not answerable for the destruction of the freight which occurred from an uncontrollable event. 18 A. 279, *Frank v. Adams Express Company.*

8. The bill of lading excluding the risk by fire, the carrier is not liable,

unless his fault or negligence be shown. 20 A. 302, *New Orleans Mutual Insurance Co. v. N. O., J. & G. N. R. R. Co.*; 7 R. 251.

9. An express company is responsible for a package containing gold, when this fact was made known to it, although its receipt showed the package to be an ordinary one, valued at fifty dollars. 22 A. 158, *Kember & George v. Southern Express Co.*

10. When the bill of lading exempts the carrier from liability on account of fire, and the evidence shows that the fire was not attributable to the fault of the carrier, he is exonerated. 23 A. 477, *Levy & Dieter v. Pontchartrain Railroad Company.*

11. The perils of navigation being excepted in the bill of lading, the owners will not be held liable for goods lost by the sinking of the boat, if no fault is imputable to them. 23 A. 585, *Kirk v. Folsom.*

12. If there be no neglect on the part of the common carrier, and if the bill of lading exempt them from damages arising by accidents of machinery, boilers, steam or dangers of the sea, the carrier is not liable for such. 24 A. 100, *Kelham v. Kensington and owners.*

13. A carrier failing to transport the freight delivered, should prove a legal excuse so as not to be responsible for the value of the freight. 21 A. 224, *Chapman v. New Orleans, Jackson and Great Northern Railroad Company.*

14. A common carrier is, notwithstanding a special agreement, liable for the carelessness or unskillfulness of his crew. The injury being proved, the burden of proof is on the carrier to show that it was caused by accident or *vis major*, or where the shipper has, by contract, undertaken the exclusive management of the things shipped during the voyage, then it must be shown that the injury has occurred by the fault of the shipper or his servants. 15 A. 103, *Roberts v. Riley.*

15. The common carrier is responsible for loss or damage resulting to the cargo, confided to him, from neglect, imprudence or want of skill, notwithstanding the stipulation to the contrary in the bill of lading. 25 A. 304, *Newman & Co. v. Smoker et al.*

16. Not however, where the shippers or their agents were present at the taking of the cotton on board during a rain storm, and rolled through slushy mud where they prepared the bill of lading, exempting the boat from damage by rain or mud. *Ib.*

17. Under directions of the principal, the factor sends a package of money on a boat to the address of his principal; before delivery to the boat, the clerk carrying the package, is knocked down and the money stolen; *Held*: That the loss is that of the factor. 26 A. 751, *Parker & Co. v. Harrison & Co.*

18. Where everything was done by the officers of a boat, which reasonable care and skill required in the navigation, neither the boat nor her owners will be liable for damages to freighters which may result from her grounding. 2 Woods, 33, *Levy v. The Great Republic.*

19. An insurance company paying for merchandise destroyed by fire, *in transitu*, is not subrogated to the right of the shipper against the carrier. See PAYMENT, II. (b), 1), No. 6.

4) Reshipment and forwarding of goods.

1. Goods were shipped at New Orleans on "The Caddo," for Jefferson, Texas, and a through bill of lading given. At Shreveport the trip of "The Caddo" terminated, and all the goods, with the bill of lading, were transferred to "The Powell." She delivered part of the goods and demanded freight from the owner. In a suit to recover the value of a portion of the goods, which was not delivered by "The Powell;" *Held*: That she was liable for the goods lost and could not turn the libellant over to "The Caddo" for his remedy. 1 Woods, 99, *Maxwell v. The Powell.*

2. Where several carriers unite to complete a line of transportation, and receive goods for one freight and give through bills of lading—each carrier is the agent of all the others to accomplish the carriage and delivery of the goods, and is liable for any damage to them on whatever part of the line the damage is received. 1 Woods, 184, *Harp v. The Grand Era.*

5) Delivery.

1. In contracts of affreightment, which do not stipulate a time for delivery, the merchant or shipper is entitled to a reasonable time, after the ship or other vessel is ready to receive on board the goods, to make a delivery of the same; and he is entitled to his delay, whether the contract of affreightment be by charter-party or for the conveyance of goods in a general ship, or other vessel. 15 A. 94, *Williamson v. Dolsen*.

2. The carrier having delivered the goods in externally good condition, it must be clearly established that the contents were damaged during the voyage to enable the owner to recover their value from the carrier. 18 A. 621, *M. Clastrier v. Sun Mutual Insurance Company*.

3. Where plaintiff received the bill of lading after delivery of the freight to the holder, the carrier cannot be held liable for a second delivery. 19 A. 262, *Adams & Co. v. Steamer Trent*.

4. The *transitu* is not at an end before the goods have been delivered to the consignee. 21 A. 268, *Blum & Co. v. Marks*.

5. The non-delivery of the goods must be shown, to enable the shipper to recover their value from the carrier. 21 A. 299, *Schneidau & Co. v. Pennington*.

6. When, by the fault of the carrier, the merchandise is not delivered, the exceptions in the bill of lading, placing the property at the risks of the consignees, as soon as delivered from the tackles of the steamer, will not protect them, although part of the goods are afterwards found with an auctioneer. 21 A. 363, *Simon & Loeb v. Steamship Frung Shuey*.

7. To deliver the freight there must be notice to the consignee, and a reasonable time given to make the necessary preparations to receive the goods. 19 A. 519, *Kennedy & Co. v. Roman et al.*; 3 L. 227; 6 A. 579.

8. The consignee should have time and opportunity to remove the goods, before the responsibility of the carrier ends. 24 A. 334, *Maignan & Laborde v. New Orleans, Jackson and Great Northern Railroad Company*.

9. A common carrier, to whom goods are delivered for carriage, cannot, of his own motion, set up title in another, as a reason for not delivering the goods to the shipper or his consignee. 1 Woods, 131, *Rosenfield v. The Express Company*.

10. But when the carrier, upon demand made, or suit brought by the real owner, delivers the goods to him, such delivery will be a defense to an action brought by the shipper, or his consignee, for the value of the goods. *Ib.*

11. As to the vendor and vendee, after shipment, the goods are at the risk of the vendee. See SALE, II. No. 11; III. (b), 1), No. 7.

6) Measure of damages and mode of their liquidation.

1.) The goods were condemned by the port wardens, and sold as goods damaged by "contact with salt water;" under these circumstances the consignee must show, to recover the difference of the value of the goods and their proceeds at auction, that the contents of the box were in good order and condition when shipped. 16 A. 18, *Wentworth v. Ship Realm*.

2. The damaged goods should be sold to ascertain with exactness the extent of the damages, for which the carrier is liable. 18 A. 724, *Smith v. Bark Wall, etc.*; 12 A. 352; 14 A. 647.

3. Where the common carrier, detained at the bar of the Mississippi River, failed to air the cargo suffering from fog and heat, and the same is thereby lost, the value of the merchandise at the market value, at the port of delivery, is the standard by which the damages for the loss are to be estimated. 18 A. 1, *Lewis & O'Neil v. Ship Success*.

4. The net value of the goods at the place of delivery, is the measure of damages against the carrier for non-delivery of freight. 21 A. 363, *Simon & Loeb v. Steamship Frung Shuey*; 18 A. 1.

5. The common carrier, who received cattle for transportation, and turns them off the boat to lighten her, is responsible to the shipper, for their value. 21 A. 679, *Pitre v. Offut*.

6. Neither the prescription of one year, nor that of five, will release the carrier for non-delivery of freight. See PRESCRIPTION, III. (c), 1), No. 6.

7) Gratuitous bailees.

1. "A." was the purser of a steamship about to sail from New Orleans to New York. A package marked with his name was delivered to him, for which he gave a bill of lading, whereby he agreed to deliver the package to L. in New York, on payment of the value thereof, and in default of payment, to return the package to the consignor. The bill of lading indicated that freight had been paid on the package, but no freight was in fact paid or tendered, nor was there any agreement or expectation that freight was to be paid. The package was not placed on the ship's manifest, nor stowed with the other freight. "A." was not authorized to sign bills of lading. He delivered the package to the proper person in New York, but neglected to collect its value; *Held*: That the package was delivered to "A." as the bailee of its owner, and was not delivered to the steamship, and that the latter was not liable for its value. 1 Woods, 96, *Suarez v. Steamship George Washington*.

(d) Obligations of the shipper.

1) In general.

1. The shipper is not bound to disclose the value of the goods; but when asked, if he deceives the carrier, the latter will not be responsible. 17 A. 302, *Levois v. Gale*.

2. Where plaintiff did not comply with his agreement as to the time and place of shipping the goods, and they were damaged, the defendant is not liable on his contract for refusing to accept delivery. 28 A. N. R., *Leberman & Company v. Smith & McKenna*.

2) Freight, primage, and demurrage.

1. Where freight is delivered and received without objection or protest, on the part of defendant, it is too late afterwards to dispute the bill for freight. 17 A. 34, *Marcy v. Warner*.

2. The carrier is responsible to the consignees, for damages caused by failure to deliver freight as specified in the bill of lading. 20 A. 257, *Mahan v. Steamer Olive Branch*.

XI. OF GENERAL AVERAGE.

1. Where the accidents to the machinery are excepted in the bill of lading, as one of the dangers for which the common carrier is not bound, and it is shown that the vessel and cargo were saved by being towed into port, this is a case for general average, and the bond given to secure the payment of such sum as may be found due by the consignees may be enforced. 28 A. N. R., *Richard Baker et als. v. Berwin & Nathan et als.*

XII. OF SALVAGE.

1. When one of two boats, the masters of which agreed to render assistance to a third boat, leaves the enterprise, she is not entitled to a share of the salvage. See PARTNERSHIP, IV. (b), No. 2.

SHREVEPORT.

1. The lots of ground which were laid off in squares by the Shreveport company, have precedence over the ten acre lots by Hall's survey, and the deficit, if any exist between the two, should be suffered by the purchaser of the ten acre lots. 23 A. 601, *Robeson v. Howell*; 607, *Wells & Jones v. Caldwell & Cox*.

2. Under its charter, the city of Shreveport has express authority to buy real estate. 26 A. 709, *City of Shreveport v. Flournoy*.

3. The act to incorporate the city of Shreveport, define its limits, and provide for its better police and municipal government, is a sufficient title to cover the levy and collection of taxes judicially. 26 A. 708, *City of Shreveport v. Jones*. See TAXES, II. (b), 2), B.

4. Under the acts of 1869 and 1870, the mayor of Shreveport has the right

to exercise certain powers and functions as recorders; and the exercise of such rights does not give rise to an action under the intrusion act, by the recorder against the mayor. 27 A. 659, *State ex rel. Miliken v. S. J. Ward*.

5. An injunction, coupled with a suit in damages against the mayor, is not the proper remedy to test the latter's authority to arrest and fine the plaintiff for carrying on a private market in contravention to the ordinances of the city of Shreveport. 27 A. 620, *Benjamin, Levy & Co. v. Shreveport*.

6. Act No. 80, of 1870, does not repeal the ordinance taxing bankers. See LAWS, III. (a), No. 1.

7. After the passage of the new charter of the city of Shreveport in 1871, the council holding over until the appointment of the new officers by the governor, had no power to contract for the improvement of a street, because the act of 1869, under which the contract was awarded had been repealed by the new charter. 27 A. 636, *Shreveport v. Maples*.

8. A mandamus to levy a tax, cannot issue against the mayor alone. See MANDAMUS, I. (b), No. 40.

9. The corporation cannot be compelled to levy a tax to pay a judgment for notes which were to be paid by taxation, under the law, after certain delays. See MANDAMUS, I. (b), No. 41.

10. Acts 1870, p. 110; recorder's court, 1870, E. S., p. 70; incorporated, 1871, p. 218; 1878, p. 283; compromise as to batture, 1871, p. 235; 1874, p. 134; 1876, pp. 25, 128; licenses, 1878, p. 100.

SHORT-HAND REPORTERS.

Acts 1876, p. 149.

SIMULATION.

1. See OBLIGATIONS, VII. (b), 2). DONATIONS, I. (d). EXECUTION, V. (a), 3), E. MARRIAGE, XIII. (d). EVIDENCE, III. (b); XV. (d). PLEADING, V. (c), 5); (e). SALE, III. (b), 4), B.

2. Collection of note given for simulated sale. See BILLS AND NOTES, IV. (a), No. 10.

SLANDER.

See LIBEL.

SLANDER OF TITLE.

1. One in possession and owner of the land, by virtue of an entry made before the United States in 1852, of donated swamp lands, has a right to maintain an action of slander of title against one setting up title superior to him, by virtue of a patent issued by the governor, in error. 24 A. 511, *Havard v. Atkins*.

2. Defendant who answers to a suit for slander of title by setting up title, changes the suit to a petitory action, in which he becomes plaintiff. 27 A. 307, *Bidwell v. Cavaroc et al.*

SLAVES.

I. OF SLAVES FOR LIFE.

(a) *In general.*

(b) *Their status.*

(d) *Rights and obligations of the master as regards third persons.*

3) Conventional or testamentary emancipation; the right thereto; its conditions and formalities.

5) Suits for freedom; the evidence thereof, and that of emancipation.

1) *In general.*

2) Offenses and quasi offenses committed by slaves.

3) Liability of the master and owners of vessels by which slaves are illegally received or carried away.

I. OF SLAVES FOR LIFE.

(a) *In general.*

1. A slave cannot be sentenced to punishment after he has been acquitted by the finding of the jury and the magistrates. 15 A. 463, *State v. Solomon*.

(b) *Their status.*

3) Conventional and testamentary emancipation; the right thereto; its conditions and formalities.

1. Where, by the terms of a will made in Arkansas, certain slaves were to be set free as soon as two-thirds of their appraised value should be paid to the heirs of the testator for their hire; *Held*: That one of the slaves sold in this State was entitled to his freedom, upon showing that the amount required to be realized by him had been realized. 15 A. 58, *Bateman v. Frisby*.

2. Where the testator had directed his slaves, after a certain period, to be emancipated and sent to Africa, and some of them were held in division with his partner, who refused to give his consent to the emancipation, and became the purchaser from the heirs of their undivided half of the negroes; *Held*: That the provisions of the will in regard to such of the testator's negroes became inoperative. 15 A. 265, *Rost v. Doyal*.

5) Suits for freedom; the evidence thereof, and that of emancipation.

1. Under article 10 of the Civil Code, the form and effect of a deed of manumission made in another State, is governed by the laws of the State where it was made, and where it is to have its effect. 15 A. 199, *Foster v. Mish*.

2. In giving effect to such a deed, made in a State where the common law is known to prevail, the Supreme Court will judicially take cognizance of this fact, and will give full effect to the deed, if it is sufficient in form and effect in the common law States of the Union, in the absence of statutory enactments to the contrary, to confer upon a slave a full and perfect title to his freedom. 15 A. 199, *Foster v. Mish*.

3. The act of 1857, prohibiting the emancipation of slaves, does not prevent a free person of color, who has been wrongfully and illegally deprived of his freedom, from bringing a suit to recover his liberty. 15 A. 199, *Foster v. Mish*.

(d) *Rights and obligations of the master as regards third persons.*

1) In general.

1. The rule that the master is not responsible to one agent, for the injury he has sustained through the negligence or omission of duty of another agent, does not apply to the case of hired slaves. And where a slave was hired, as deck-hand, to a steamboat, and drowned through want of care on the part of the master; *Held*: That the captain and owners were responsible. 15 A. 321, *Howes v. Steamer Red Chief*.

2) Offenses and quasi offenses committed by slaves.

1. Where one slave kills another, the merits of the quarrel between them, and the fact of the slave killed being the aggressor, are immaterial, and will not be noticed in the decision of an action brought by the owner of the slave, who was killed, against the owner of the slave who killed him, for the value of the slave killed. 15 A. 100, *Maille v. Blas*.

2. The proof of the loss is sufficient to fix the liability in a case of this kind. 15 A. 100, *Maille v. Blas*.

3) Liability of the master and owners of vessels by which slaves are illegally received or carried away.

1. Where a slave belonging to a party residing in Kentucky, was hired as fireman on board a steamboat, running as a packet between Louisville and New Orleans, but occasionally making trips to St. Louis, and upon the boat making one trip to Cincinnati, the slave disappeared; *Held*: Although she was advertised for Cincinnati, to the knowledge of the lessor at the time he hired the fireman to the boat, yet, there was a great want of prudence and care in proceeding to Cincinnati with the slave on board, and that under the common, as well as the civil law, the lessees are responsible for the value of the slave. 15 A. 432, *Beverly v. Steamer Empire*.

2. The fact that the boat was in the habit of landing at points in Indiana and Illinois, does not change the case, so long as it is not shown that there was

equal risk of losing a slave there as at Cincinnati. 15 A. 432, *Beverly v. Steamer Empire*.

3. Under the act of 1840, the mere fact of a slave being found on board of a boat without a written permission, creates a presumption against the owners of the boat, that such slave was received with the intention of depriving his master of him, or of transporting him out of the State, or from one part of the State to another; and this presumption cannot be destroyed but on testimony of at least two witnesses not employed on board such vessel, and on corroborating circumstances. 16 A. 99, *Pelham v. Steamboat Messenger*.

4. The requirement in this statute of 1840, that the witnesses called to rebut the presumption, must be such as are not employed on the vessel, refers to the time when they are called to testify. The fact that they have at a period past been employed on the vessel, will be no objection to their testimony if it be shown that at the time they were summoned to give their testimony they were *bona fide* engaged in some other employment. *Ib.*

5. See SHIPPING, IX.

SMALL POX.

Police authority of the State. see CONSTITUTION, II. (c), 1), No. 19; acts 1872, No. 60; 1877, E. S., p. 21.

STAMPS, UNITED STATES INTERNAL REVENUE.

1. The order of seizure and sale will be set aside on appeal, if the note be not stamped. 18 A. 514, *McLearn v. Skelton*.

2. Bonds for the performance of the duties of an office, and letters of administration, are required to be stamped, otherwise they are null and void. 19 A. 49, *Blake v. Hall*; United States Statutes at Large, v. 13, p. 292, § 152; also, pp. 299, 300.

3. No stamp is necessary upon an instrument executed prior to the first of October, 1862, to make it admissible in evidence. 19 A. 321, *Bayly v. McKnight*.

4. A waiver of protest requires no internal revenue stamps. 20 A. 157, *Guyther v. Bourg*.

5. The act in relation to stamped instruments went into effect October 1, 1862 (United States Statutes at Large, vol. 12, p. 475), and the court will presume that copies of acts of mortgage anterior to said date, were delivered previously by the officer who did his duty, and, therefore, they require no stamp. 21 A. 32, *Citizens' Bank v. Dixey*.

6. United States internal revenue stamps, not properly cancelled on a note, do not invalidate it. 22 A. 131, *D'Armond v. Dubose*.

7. The failure to affix stamps to legal documents, during the existence of the act of congress, worked the nullity of the instruments required to be stamped, and of the proceedings. 23 A. 354, *Hoyt v. Benner*.

8. WYLY, J., *dissenting*: The act of congress is unconstitutional. *Ib.*

9. Section 163, of 1864, 13 United States Statutes at Large, p. 295, has been repealed by act 1866, section 9, 14 United States Statutes at Large, pp. 143, 144, and no written instrument requiring a stamp shall be used as evidence in any court until stamped by the collector of the district, upon payment or remission of the penalty by the collector. 23 A. 250, *Carrié v. Billiu*.

10. The note being stamped by the U. S. collector of internal revenue, the interest required by law collected, and the fine remitted; this was sufficient. 25 A. 469, *Pavy & Co. v. Bertinet*.

11. It forms no part of the duties of a State court to enquire whether the collector of internal revenue has done his duty in collecting or not; the penalty for an unstamped document, the note being duly stamped when offered in evidence, should be received. 25 A. 496, *Levy, etc. v. Loeb*.

12. The written acknowledgment of a debt interrupting prescription, need not be stamped before it can be received in evidence. 26 A. 245, *Alter v. McDougal*.

13. An agreement to sell, need not be stamped as an act of sale. 26 A. 295, *Burbank v. Pierce*.

14. If the act accompanying the note be stamped, this is sufficient. 26 A. 672. *Pargoud v. Richardson*.

15. It is sufficient for the court, if the document be stamped when the case comes up for investigation. 27 A. 609, *Chaffe & Bro. v. Ludeling et als*.

16. When the mortgage act has the necessary revenue stamps, the notes need none. 29 A. 28, *Garrish v. W. B. Hyman*.

17. A revenue stamp has never been required by the acts of congress, to an indorsement or a waiver of protest. 14 Wall. 361, *Pugh v. McCormick*.

18. The acts of congress have never required a stamp to the gratuitous extension of the time of payment of a note. 14 Wall. 661, *Delmas v. Insurance Company*.

19. A forthcoming bond need not be stamped. 28 A. 643, *Lalanne Bro. v. McKinney*.

20. Executory process may issue on an act not properly stamped. See EXECUTORY PROCESS, II. (a), No. 15.

21. Stamps not required on tax bills. See NEW ORLEANS, II. (e), 1, No. 4.

STATE HOUSE.

Commission for the purchase of lands, etc., 1871, p. 79, see 30 A. —, *State v. Bloomer & Girardey*; 1875, p. 27, see 30 A. 665; memorial to congress, 1877, E. S., p. 110; removal, 1878, p. 119.

STATUS.

See DONATIONS, I. EVIDENCE, XXII. (b). MARRIAGE, I. (a). PARENT AND CHILD, I. II. SUCCESSION, IV.

STATUTE.

See LAWS.

STOPPAGE IN TRANSITU.

See SALE, III. (b), 3).

STRAIGHT UNIVERSITY.

Incorporated, 1870, p. 111.

STRAY.

See ANIMAL. NEW ORLEANS, II. (d), 1).

STREET.

1. NEW ORLEANS, II. (d), 2); (e), (4), 5). SERVITUDES, II. (a), 2), A. THINGS, I. PAYING.

2. Street sprinkling, See WATER WORKS, No. 1.

SUBSTITUTION.

See DONATIONS, III. JURY, II. (a). NOVATION.

SUBROGATION.

See PAYMENT, II. SHERIFF, II. (b), 2). SALE, (c), 2), c. SURETYSHIP, III.

SUCCESSION.

I. OF THE OPENING AND SEIZIN OF THE SUCCESSION.

(a) *Place of opening.*

(b) *Effects of opening; and seizin of the succession.*

1) In general.

2) Seizin of executors; claims of creditors; recognition of heirs; and proceedings for possession.

II. OF THE ORDER OF SUCCESSION AMONG LEGAL HEIRS.

III. OF IRREGULAR SUCCESSIONS.

V. OF THE ACCEPTANCE AND RENUNCIATION OF SUCCESSIONS; BENEFIT OF INVENTORY; AND OF INTERMEDDLERS.

(a) *In general.*

(b) *Mode of acceptance without benefit of inventory; and of intermeddlers.*

(c) *Effects of acceptance; and benefit of inventory.*

1) In general.

2) Collation.

3) Partition.

VI. OF THE ATTORNEY FOR THE ABSENT HEIRS.

- (a) *His appointment, duties, and powers.* (b) *His fee.*

VII. OF THE APPOINTMENT AND REMOVAL OF ADMINISTRATORS, CURATORS, AND EXECUTORS; THEIR OATH, BOND AND SURETIES; AND OF THE INVENTORY.

- (a) *Appointment of administrators and curators.* (d) *Oath and inventory.*
 1) In general. (e) *Bond and sureties.*
 2) Qualification; application; an deposition.
 A. *In general.*
 B. *Qualification; order of preference; and evidence on the opposition.*
 3) Execution, amount and validity of the bond.
 4) Extent and extinction of the surety's obligation.
 5) Proceedings against the surety.
 (b) *Appointment of executors, dative and testamentary.* (f) *Their removal; forfeiture and vacation of their trust.*
 (c) *Special administrator.*

VIII. OF THE POWERS, RIGHTS, AND OBLIGATIONS OF ADMINISTRATORS, CURATORS, AND EXECUTORS; AND THEIR ADMINISTRATION.

- (a) *In general.* 2) Obligation to render, right to claim, and necessity of an account; its requisites and the distribution of funds; interest due by administrators, etc., and their personal liability.
 (b) *Duration and resignation of their trust.* A. *In general.*
 (c) *Their diligence; claims due the succession; and property subject to administration.* B. *Right to claim and necessity of an account; and personal liability of administrators, etc.*
 (d) *Deposit of succession funds; account thereof; and the official bank-book.* C. *Obligation to account; and interest due by administrators, etc.*
 (e) *Sale of succession property.* 3) Proceedings on filing the account; the citation, notice, and parties.
 1) In general.
 2) Power, obligation, and application to sell, and order of sale.
 A. *In general.*
 B. *Power to sell, and necessity of the order.*
 C. *Notice and mode of application; the parties; requisites and effect of the order.*
 3) Advertisement and description of the property.
 4) Appraisement; terms of sale; and amount the property must bring.
 5) Place of sale and by whom it may be made.
 6) Capacity to purchase.
 7) Adjudication and evidence of the sale; its ratification and avoidance; rights and obligations of the parties.
 A. *In general.*
 B. *Proces-verbal and act of sale; what passes to the purchaser; effect of adjudication and failure to comply therewith.*
 C. *Right to retain the price or plead in compensation.*
 D. *Warranty; relief granted purchasers under defective sales; ratification and avoidance thereof.*
 8) Seizure and sale of succession property by creditors.
 (f) *Rendition of accounts; debts and charges; and their payment.* (g) *Joint administrators, etc.*
 1) In general. (h) *Property of third persons found in the succession.*

IX. OF FOREIGN SUCCESSIONS; LAWS BY WHICH SUCCESSION PROPERTY IS DISTRIBUTED; AND THEIR CONFLICT.

- (a) *In general.* tions; and powers, rights, and
- (b) *Administration of the same suc-* obligations of administrators,
cession under different jurisdic- etc., creditors and legatees.

X. OF INSOLVENT SUCCESSIONS.

I. OF THE OPENING AND SEIZIN OF THE SUCCESSION.

(a) *Place of opening.*

1. The succession must be opened, in the parish where the deceased resided, if he had a fixed domicile or residence in this State; in the parish where the deceased owned movable property, if he had neither domicile nor residence; or in the parish in which it appears by the inventory his principal effects are, if he have effects in different parishes; in the parish in which the deceased has died, if he had no fixed residence, nor any movable effects within this State at the time of his death. C. C. 935 (929); 6 N. S. 345, *Johnson v. Kirkland*; 7 N. S. 52, *Harang v. Harang*; 16 L. 11, *Gray v. Sandoz*; 11 R. 67, *Beale v. Walden*; 2 L. 271, *Patuillet v. Patuillet*; 3 A. 261, *Succession Williamson*; 2 A. 236; 15 A. 699, *Succession Carney*; 18 A. 30, *Armstrong v. Bakewell*; 21 A. 364, *Succession Roffignac*; 399, *Milttenberger v. Knoz*. See COURTS, II. (d), 1), No. 1.

2. The succession having been opened in the parish where the deceased died, this gave exclusive jurisdiction to that court over the *mortuaria*, and subsequent proceedings instituted in an adjoining parish are null and void, and confer no title on property sold under the orders of said court. 26 A. 286, *Scott v. World*.

3. The succession is properly opened in the parish where the deceased had real estate, if he be a non-resident of this State. 27 A. 352, *Succession Linton*.

4. The court where the succession was opened, has exclusive jurisdiction of its settlement. See COURTS, II. (d), 2).

(b) *Effect of opening and seizin of the succession.*

1) *In general.*

1. The proof of death must be such as to leave no doubt in the mind of the judge. A mere disappearance, does not authorize the opening of the succession. 16 A. 139, *Succession Vogel*.

2. The universal legatee and forced heir becomes a creditor, in the same manner as was the deceased. 19 A. 75, *Succession Vick*.

3. It is sufficient, if from the body of the will it appears that the testator desired to give the seizin to the executor. 26 A. 195, *Succession Hale*.

2) *Seizin of executors; claims of creditors; recognition of heirs, and proceedings for possession.*

1. The doctrine of the common law in regard to the formality of *livery of seizin*, and the creation of an estate in remainder, does not apply to the creation of a trust estate in a chattel. 15 A. 471, *Rabun v. Rabun*.

2. The non-observance of the formalities required by article 1134, C. C. of the curator, in not publishing a notice of the name, death, etc., of the deceased, will not affect the right of heirs who apply to be recognized as such. 23 A. 675, *Maza, et al. v. Duke, curator*.

3. The heirs can at any time take the seizin from the executor, on offering him a sum sufficient to pay the legacies, and on giving bond, if a suit be pending, and if the plaintiff requires it. 24 A. 270, *Fowler v. Succession Gordon*.

4. The heirs can at any time take the seizin and be put in possession. The succession is then wound up. The creditors of the estate cease to be such and become creditors of each heir, for their joint proportion. The creditors cannot sue to set aside the order putting the heirs in possession, homologating the final account and discharging the administrator. 25 A. 220, *Sevier v. Sargent*.

5. It is sufficient if from the body of the will it appears that the testator desired to give the seizin to the executor. 26 A. 195, *Succession Hale*.

6. When there are debts, the heirs may end the administration and claim the seizin, by giving security. 29 A. 347, *Brashear v. Conner*; 21 A. 278; 25 A. 56.

7. A judgment recognizing heirs and ordering an account to be filed by the administrator, how construed, see JUDGMENT, III. No. 9.

8. Forced heirs may sue to have simulated sales set aside. See OBLIGATIONS, VII. (b), 2), B. § 3.

9. See also, SUCCESSION, VII. (a), 1), No. 2.

10. Funds deposited in a bank in France, form part of the succession here, and should be taken into account by the executor here. 30 A. 424, *Succession Bougère*.

11. Minors may be legally put in possession of a succession, before it is entirely administered and liquidated, where the creditors or heirs of age do not require an administration. 30 A. 93, *Soye v. Price*.

12. The legal heirs are entitled to demand the possession of a succession, from the executor, when they are joined by the legatees, and the creditors do not object. 30 A. 128, *Succession Boutté*. (N. B. *Some of the heirs were minors, see 30 A. p. 178, where this fact appears.*)

II. OF THE ORDER OF SUCCESSION AMONG LEGAL HEIRS.

1. The law of the actual domicile of an intestate, at the time of his death, will govern in matters relating to the right of inheritance. 15 A. 137, *Abston v. Rabun*.

2. Where it is shown that a person claiming an estate is the legal heir of its deceased proprietor, in the absence of proof that there are other heirs, he will be considered the sole heir. 15 A. 170, *Samford v. Toadvine*.

3. The natural parent cannot claim, as forced heir, any portion of the estate of his deceased illegitimate child, as against the universal legatee and instituted heir. 15 A. 516, *Wood v. January*.

4. Where the wife died without children, but leaving for heirs, her mother, brothers and sisters, it is not definitely settled whether the disposable portion is two-thirds or three-fourths. 18 A. 106, *Johns v. Race*; 7 N. S. 414, *Cole v. Cole*; 14 A. 381, *Barbet v. Roth*.

5. The effect of representation is to put the representative in the place, degree and rights of the person represented, and not his obligations. 23 A. 290, *Succession of Misses Morgan*.

6. The presumptions of law as to survivorship, prescribed by the Civil Code of Louisiana, where two persons perish in the same event, only apply in the absence of circumstances of the fact, and where the persons are respectively entitled to inherit from one another. 2 Woods, 178, *Robinson v. Gallier*.

7. Where a male sixty-eight years of age, and a female forty-four years of age, respectively entitled to inherit from one another, perish in the same event, the presumption raised by article 939, of the Civil Code of Louisiana, in the absence of circumstances of the fact is, that the male perished first. *Id.*

III. OF IRREGULAR SUCCESSIONS.

1. There can be no irregular succession, much less forced heirship, where the illegitimate child disposes of his whole estate by will. 15 A. 516, *Wood v. January*.

2. Representation is not admitted in irregular successions. C. C. 923, 929; 25 A. 371, *Succession Dubreuil*.

3. The wife inherits from her husband, to the exclusion of his natural collaterals. 27 A. 574, *Succession Miller*; C. C. 917.

4. The husband or wife who inherit from one another, is not considered as having succeeded from the instant of the death; they have only an action to cause themselves to be put in possession. 28 A. 859, *Willis v. Elam*. See VI. (a), No. 1.

5. Where a natural child claims his deceased mother's share in property held by his natural father, courts must exact strict proof. See EVIDENCE, XIII. (a), No. 12.

V. OF THE ACCEPTANCE AND RENUNCIATION OF SUCCESSIONS; BENEFIT OF INVENTORY; AND OF INTERMEDDLERS.

(a) *In general.*

1. If the plaintiff, in a suit against a succession, does not require security from the heirs praying to be put in possession, he must make the heirs parties, and obtain a judgment against them for their virile share. 24 A. 270, *Fowler v. Succession Gordon*. See I. (b), 2), No. 4.

2. The heirs having been put in possession by the probate court, there is no more succession to administer, and the creditors must have their recourse against the heirs, each for his virile share. 25 A. 56, *Successions Dunford and Remi*.

3. A creditor of a succession who permits the heir to take unconditional control of an estate, without causing it to be administered, loses the right to pursue the property of the succession as distinct from that of the heir. 1 Woods, 144, *Labatut v. Prewett*.

4. The possession of an executor, as executor under the appointment of the probate court, even when the executor is also heir or universal legatee, relieves the creditors and legatees of the succession from the necessity of resorting to such proceedings to protect their rights. 1 Woods, 144, *Labatut v. Prewett*.

5. In order to vest the property of a succession in a universal legatee, so as to make him the debtor of the legatees and creditors of the succession, there must be some deliberate act on his part, showing a purpose to take possession as universal legatee. 1 Woods, 144, *Labatut v. Prewett*.

6. The action for separation of patrimony, can only be maintained where the heirs have accepted the succession purely and simply. 29 A. 445, *Sevier v. Gordon*. See V. (c), 1), No. 2. PRESCRIPTION, III. (b), No. 1.

7. For renunciation of community, see MARRIAGE, XIII. (e), 3).

(b) *Mode of acceptance without benefit of inventory and of intermeddlers.*

1. The transfer in usufruct, of the effects of a succession to the widow in community made by the legal heir, is an act of heirship which vests the whole succession unconditionally in such heir; it is an acceptance of the succession pure and simple. 15 A. 170, *Samford v. Toadvine*.

2. Under such circumstances, the property is vested in the heir, and not in the succession, and the administrator cannot disturb the heir or those holding under him, in their possession. *Ib.*

3. If the averment in the petition amounts to an acceptance of the succession, plaintiff is estopped from contesting a title derived from his ancestor. 15 A. 140, *McQueen v. Sandel*.

4. The heir who occupies and controls in his own right, property which is inherited, accepts the succession tacitly. 21 A. 717, *Succession Zeringue*; 19 A. 60.

5. In an acceptance, whether express or tacit, of a succession, it must be clear that the heir intended, without legal formalities, to assume all the liabilities of the estate. 26 A. 413, *Mumford v. Bowman*.

6. By the mere use of the word heir, in certain judicial proceedings, relating to the settlement of the succession, the heir does not thereby accept purely and simply. 26 A. 415, *Mumford v. Bowman*.

7. HOWELL, J., *dissenting*: The allegation "that — is one of the legal forced heirs of her father, and a legatee under his will," is an express acceptance. *Ib.*

8. By suing for a partition, the heir accepts the succession purely and simply; it matters not, therefore, if the administration is not complete. 28 A. 713, *Succession McCall*.

9. The heir who assumes that quality in a proceeding to annul the will of his ancestor, or who sells his share in the succession, accepts it purely and simply. No administration can thereafter be applied for. 29 A. 347, *Brashear v. Conner*; 2 N. S. 475; 8 N. S. 242; 2 L. 299.

(c) *Effects of acceptance; and benefit of inventory.*

1) In general.

1. The immediate rights of an heir remain in abeyance, until he decides whether he accepts or rejects a succession. A beneficiary heir has but a residuary interest, which can only be determined when the succession has been duly administered. 17 A. 41, *Succession Lumsden*; C. C. (940), (1026), (1066).

2. The action of separation of patrimony being prescribed by three months from the date of the express or tacit acceptance of the heirs, it follows that after that time the creditors cannot compel an administration. 19 A. 59, *White, administrator v. Blanchard*. See No. 4; V. (a), No. 6. PRESCRIPTION, III. (b), No. 1.

3. A creditor who permits the heir to take unconditional control of the estate, without administration, loses the right to pursue the property of the succession as distinct from that of the heir. 21 A. 566, *James, administrator v. Hynson and Sheriff*.

4. The creditors of the deceased have no preference over those of the heir, where the separation of patrimony is not asked for, and the three months have elapsed. 21 A. 717, *Succession Zeringue*. See No. 2.

5. The individual note of the son-in-law, whose wife had died previously, being found in the succession of the father-in-law, who was in the habit of making advances to his children, in anticipation of their rights in his succession, cannot be collated, even if the advances had been made to the daughter who was then his debtor; the debt was novated by taking her husband's note. 25 A. 183, *Succession Landry*.

6. Heirs who, when sued, expressly accept the succession, with benefit of inventory, cannot be made liable for more than the value of the ancestor's estate. 25 A. 514, *Banker v. Durand, Jr.*

7. A judgment "against each of the heirs" (some of whom are minors), "to the amount of his liability as heir, to plaintiff," is proper, and must be construed as making the minor heirs liable only to the amount of the property inherited. 27 A. 300, *Succession Hebert*.

8. There being debts, part of the heirs, minors, and the heirs of age, having accepted with benefit of inventory, an administration is necessary. 28 A. 859, *Willis v. Elam*.

9. Heirs who accept the succession, with benefit of inventory, have no right to be put in possession before the administration is closed. 27 A. 352, *Succession Linton*.

10. An administration is necessary when the succession is accepted under benefit of inventory. 29 A. N. R., *Dunn v. Bird, sheriff*.

11. How a partnership in which the deceased was interested is settled, see PARTNERSHIP, IV. (e), 1), No. 2.

2) Collation.

1. Money received by one of the heirs in the distribution of the succession of a deceased ancestor in another State, forms no part of the succession in Louisiana, and the heir is not bound to collate money thus received in a partition made in Louisiana, of the Louisiana succession; but where such money was received under a clause in the will, making a donation of the amount to the heir on the illegal condition of the enforcement of a substitution in this State, the heir will not be allowed to take advantage of the legacy, and at the same time benefit by the repudiation of the illegal condition; in such case, there must be collation of the money received in the other State. 15 A. 700, *Hoggatt v. Gibbs*; 263, *Succession Tournillon*.

2. Heirs who owe interest on sums of money borrowed from the *de cujus*, but who go through the formality of paying the interest, in presence of witnesses and receive the same money afterwards, for the purpose of obtaining a remission of the debt, are bound to collate this amount of interest. 16 A. 298, *Leblanc v. Bertaut*; C. C. (1307), (1380).

3. Advances in money made by the father to his daughter, and paid over to her husband, are liable to collation unless she should renounce the succession of her father. 17 A. 229, *Pecquet v. Pecquet*.

4. Necessary expenses paid by the parent for one of the children, or by the administrator after the parent's death, should be deducted from the share of that child, in the partition of the succession. 15 A. 332, *Succession Montamet*.

5. The child is bound to collate, in the partition of the succession of his father, the amount of his debts assumed by his father and paid by the succession. 15 A. 263, *Succession Tournillon*.

6. Money paid by the grandfather for the tuition of his grandchild, although he gives his note or draft for the amount, must be collated by the child at the partition of his father's succession. 15 A. 263, *Succession Tournillon*.

7. An heir will not be relieved from the obligation of collating a debt due by him to his ancestor, on the ground of prescription acquired after the opening of the succession. 15 A. 209, *Succession Skipwith*. See No. 10.

8. It is no part of the duties of an administrator to charge an heir's share with a draft, or attempt a partition between the heirs. The questions of collation must be decided at the time of partition. 28 A. 573, *Succession Miller*.

9. Slaves donated by a father or mother to his children, having been emancipated before the opening of the succession of the donor, are not subject to collation. 29 A. 495, *Succession Guillory*; C. C. 1250.

10. The debt of the heir to his ancestor, although prescribed, should be collated. 28 A. 748, *Succession Bougère*; 9 A. 96; but see No. 7.

11. Advances made by an executor to the heirs should be collated. See SUCCESSION, VIII. (f), 5), c. No. 2.

3) Partition.

1. See PARTITION.

2. For jurisdiction of courts, see COURTS, II. (d), 4); (f), Nos. 8, 16, 17, 18, 19, 20.

VI. OF THE ATTORNEY FOR ABSENT HEIRS.

(a) *His appointment, duties and powers.*

1. The husband can only be put in possession of the community property as survivor and usufructuary of his wife, who died without heirs, contradictorily with the attorney for absent heirs. 18 A. 726, *Succession Fleming*. See III. No. 4.

2. The functions of the attorney of absent heirs ceases when the heirs present themselves. 21 A. 432, *Succession McArthur*.

(b) *His fee.*

1. The fee of the attorney for absent heirs, should be charged on the portions of the absent heirs and not the body of the succession, unless his services have proved valuable to the estate. 29 A. 746, *Succession Harris*.

2. No fee should be charged for an attorney appointed to represent the absent heirs, when the heirs are present. 29 A. 746, *Succession Harris*; 13 L. 73; 15 L. 527; 3 A. 226.

3. See ATTORNEY, II.

VII. OF THE APPOINTMENT AND REMOVAL OF ADMINISTRATORS, CURATORS AND EXECUTORS; THEIR OATH, BOND, AND SURETIES; AND OF THE INVENTORY.

(a) *Appointment of administrators and curators.*

1) In general.

1. Ten days public notice must be given before letters of administration can be granted to an applicant. 16 A. 231, *Succession Talbert*.

2. The property of the succession having been sold to effect a partition between the heirs, there being no debts or charges, an application for the appointment of an administrator should be rejected. 16 A. 192, *Alleman v. Bergeron*.

3. The act of March 5th, 1870, providing for the appointment of public administrators, is not repealed by section 3990 of the Revised Statutes, because the legislature in act 50, of 1870, regular session, expressly provided there-against by giving precedence to all acts passed during said session, over the Revised Statutes. 25 A. 217, *Succession Winn*.

4. One without interest in a succession, being neither an heir, nor a creditor, has no right to cause the appointment of an administrator to the estate; the more so, where it is already partitioned between the heirs. 26 A. 158, *Succession E. Poret*.

5. The public administrator has no right to interfere in a succession not vacant, where the executrix had properly qualified, and not been removed, and none of the opposing creditors to her account asked for her removal. 26 A. 162, *Succession Winn*.

6. Where the heir has taken possession of the succession, the public administrator cannot interfere. 28 A. 573, *Succession Miller*.

7. Letters of administration, signed by the judge and clerk, are a sufficient appointment of the administrator. 26 A. 330, *Succession E. Carlon*.

8. The appointment of an administrator, by a court of competent jurisdiction, cannot be enquired into collaterally. 28 A. 807, *Morgan v. Locke*. See ACTIONS, No. 3.

9. An agreement between the heirs, some of whom being minors, were represented by their tutor, to partition the succession *extra judicially*, will not prevent one of the heirs of age, from demanding an administration. 30 A. 388, *Blake v. Minors Kearney, etc.*

10. When the husband and the community owe no debt, and the community is duly accepted by the surviving widow, an administration by a third person is irregular and improper. 30 A. 479, *Burton and Wife v. Brugier and Sheriff*.

11. A "provisional administrator" is not now known to our law, although in the discretion of the judge, some such appointment for the preservation of an estate, might be made, pending a contest before him, and which he might revoke at his discretion. 30 A. 806, *Succession Clark*.

12. Where the creditors or heirs of age demand an administration, it should be ordered. *Ib.*

13. For right of appeal by the administrator, see APPEAL, I. (e), No. 21.

2) Qualification; application; and opposition.

A. In general.

1. It is not necessary to appoint an administrator where there are no debts; the tutor, as such, may administer. 20 A. 150, *Succession Sutton*.

2. Whenever it is necessary to protect their rights, the creditors may demand the appointment of an administrator. The tutor administering as such, who has not opposed the application in due time, cannot set this up in opposing the sale to pay debts. 24 A. 145, *Ducote v. Bordelon*.

3. The public administrator cannot be permanent administrator of a succession where the heirs are present and represented. 27 A. 524, *Successions Daigle and Roddy*.

4. The public administrator cannot be appointed dative testamentary executor, to replace the deceased executor, when the heirs are present. 30 A. 422, *Succession Bougère*.

B. Qualification; order of preference; and evidence on the opposition.

1. The first creditor who presents his demand for the curatorship, is entitled thereto over other creditors. 19 A. 75, *Succession Vick*.

2. The first applicant among creditors, is entitled to be appointed administrator without reference to the amount or dignity of his claim. 21 A. 666, *Succession Beraud*.

3. Under sec. 2, of the act of 1870, the public administrator should be appointed whenever a contestation for the administration of the estate arises, until a final decree determines the rights of the respective claimants. 23 A. 24, *Succession Supple*.

4. The judge may exercise a sound legal discretion in making the appointment, where the applicants are not entitled to preference, even if the beneficiary heir should oppose the application of one in favor of the others. 23 A. 401, *Succession Huie*.

5. The application of the public administrator to be appointed administrator, should be filed, and, after due notice, should be tried contradictorily with the application of any other party, and the rights of all parties settled by a judicial decree. 25 A. 329, *State ex rel. Leonard v. Parish Judge of Plaquemines*.

6. In the absence of proof, the laws of Mississippi will be presumed to be the same as those of Louisiana. A slave in Mississippi who lived with a woman as his wife, will not be prevented, after his emancipation, from marrying in Louisiana; and where it is not shown that his wife knew this fact, she will be entitled, in her capacity of tutrix of her minor children, the issue of her marriage, in preference to creditors, to the administration. 26 A. 163, *Succession Randall*; 5 A. 689; C. C. 1037, 1114. See EVIDENCE, XX.

7. Where there are no debts and the succession is not a vacant one, the heirs seeking to have themselves put in possession, the public administrator has no right to pray for the administration. He will be condemned to pay all costs of court, individually. 26 A. 666, *Succession Mary A. Gee*.

8. If the heir of age fails to qualify as administrator, the judge should appoint the tutor of the minor heir, not the public administrator. 27 A. 524, *Successions Daigle and Roddy*.

(b) *Appointment of executors, dative and testamentary.*

1. A power of attorney to collect a legacy creates a sufficient interest in the agent to be appointed dative testamentary executor. 21 A. 614, *Succession Rice*.

2. Under the statute of 1870, "providing for the appointment of public administrators, and defining the duties of the same," he should be appointed in all testate successions, when, from any cause, the executor cannot discharge the duties of his office. The law is clear, and there is no room for construction. C. C. 13; 23 A. 23, *Succession Milton Taylor*.

3. A married woman, who is an heir, may, with the authorization of her husband, be appointed dative testamentary executrix. 24 A. 47, *Succession of E. Cordeviulle*.

4. In testate successions, even where the widow and heirs are present, if from any cause, the executor cannot act, the judge shall appoint the public administrator. 27 A. 348, *Succession Bobb*.

5. The appointment of an executor cannot be attacked in an opposition to his account. 30 A. 269, *Succession Dougart*.

(c) *Special administrator.*

1. Pending all contestations for the administration, the public administrator should be appointed, and section 2 of act No. 87, of 1870, implies that the appointment is provisional, and the public administrator has only the powers of a provisional administrator and not those necessary to settle a succession, such as selling and paying the debts. 23 A. 24, *Succession Thos. Supple*. See VIII. (e), 2). A. No. 9.

2. The office of *provisional administrator* is not now known to our law; in the discretion of the judge some such appointment for the preservation of the estate might be made, pending a contest before him, with the right of revocation at his discretion. 30 A. 806, *Succession Clark*.

(d) *Oath and inventory.*

1. An administrator cannot be dismissed from office and another appointed in his place, for not having begun an inventory or given bond, until the ten days allowed have elapsed. 23 A. 396, *Succession Harlor*.

(e) *Bond and sureties.*

1) In general.

1. Service of an order on an executor to furnish security may be made on the attorney at law, when the executor is absent. 27 A. 347, *Succession Bobb*.
3. May give a surety residing in another parish. 1876, p. 109.

2) Obligation to furnish security ; and its renewal.

1. An executor who fails to furnish the bond required of him, thirty days after service of the order on him, becomes, *ipso facto, functus officio*. 27 A. 347, *Succession Bobb*.

3) Execution, amount, and validity of the bond.

1. The revised C. C. 3042, which gives to the judge alone the right to pass on the sufficiency of the surety residing out of the parish, does not decree the nullity of such a bond given without his sanction. The judge's subsequent acceptance will be sufficient. 25 A. 474, *Succession Guilbeau*; 1876, p. 109.

4) Extent and extinction of the surety's obligation.

1. A judicial bond must be construed by reference to the law in pursuance of which it was given; and where no particular amount is expressed in an administrator's bond, the surety will be liable in the amount for which the law directs such a bond to be taken, to wit: one-fourth beyond the estimated value of the movables, immovables, and of the credits comprised in the inventory, and the fact of the inventory not having been filed when the bond was signed, will not alter its effect. 15 A. 551, *Soldini v. Hyams*. See BONDS.
2. The surety is not discharged by consent of the heirs given for a settlement of the succession, by the curator outside of court. 15 A. 60, *Perkins v. Cenas*.

3. The sureties on an administrator's bond, cannot be held liable for a sale made by the administrator in an action in partition, because this is not a part of the duties prescribed by law to administrators. 22 A. 310, *Hebert v. Hebert*.

4. A surety on an administrator's bond may obtain his discharge on proof of mal-administration. 29 A. 697, *Sanders v. Edwards*.

5. The bond of an administrator inures to the heirs as well as creditors, and when the administrator, who was also tutor without bond to some of the heirs, had not as yet filed his final account of administration when the heirs were emancipated, the sureties on his bond, as administrator, will be held liable for the amount accruing to the heirs. 30 A. 743, *Goux v. Moucla*.

5) Proceedings against the surety.

1. The surety on an administrator's bond, cannot object to the return of *nulla bona*, on a writ of *fi. fa.*, on the grounds that the sheriff made his return after the return day of the writ had passed. 15 A. 551, *Soldini v. Hyams*. See SURETYSHIP, II. (a), 4), A. No. 13.

2. A suit in damages for the amount of the creditor's claim against a succession, may be brought against the surety of the administrator, without suit for an account from the administrator, on the allegation that the conditions of the bond have not been complied with: *i. e.*, the faithful performance of the duties of the administrator, dismissed for said reasons. 28 A. 113, *Ann Ford v. Ann Kittridge*; 16 L. 72; 5 L. 322; 8 L. 211; 10 L. 26. 5 M. 330.

3. WYLY, J., *dissenting*: The administrator is not personally liable on such a debt, and hence his surety cannot be sued. *Ib.*

4. The court which accepted the bond, has jurisdiction to enforce its payment, 1876, p. 109.

(f) *Their removal; forfeiture and vacation of their trust.*

1. A testamentary executor, who was compelled to leave New Orleans, having declared himself an enemy to the United States, in obedience to the orders of the general of the United States army, became *functus officio*. 20 A. 83, *Succession Vogel*; 19 A. 22, *Succession Poindexter*.

2. The act of 1837, p. 95, section 3, was repealed by act of 1855, p. —, section 2; and the removal must be sought as directed by (1818, 1019) C. P., and (1551) C. C., i.e., by direct action. 22 A. 96, *Succession Peter Williams*. See Nos. 4, 7. ACTIONS.

3. An executor who files no account during five years of his administration, nor one year after he is ordered to do so, and whose sureties are insolvent, should be dismissed from office. 24 A. 187, *Brown v. Ventress*.

4. The administrator who has *prima facie* qualified can only be removed in a direct action, and not by an *ex parte* motion. C. P. 1017, 1018; 25 A. 474, *Succession Guilbeau*.

5. An administrator who has been removed by an *ex parte* motion, on the ground that he has not furnished his security within the ten days, may oppose the application for the administration by the heir who caused his removal, and show that he did furnish a bond, but that he was unable to furnish a surety residing in the parish, and that the bondsman furnished by him was and is good and solvent. 25 A. 474, *Succession Guilbeau*.

6. An executrix who sells succession property at private sale, and leaves the State to reside elsewhere, without leaving her power of attorney, should be destituted from her office. 27 A. 688, *Succession Winn*.

7. A rule is not the proper proceeding to dismiss an administrator. 28 A. 323, *Succession Calhoun*. See Nos. 2, 4.

8. An administrator may be dismissed for failure to file an account within twelve months. 26 A. 194, *Ford v. Kittridge*.

9. If the administrator does not file an account within twelve months he may be ordered to do so, and if he disobey the order of the court, then the creditor may demand his removal. 28 A. 800, *Succession Head*; 9 A. 478; 5 A. 563; R. S. section 3717.

10. An allegation that plaintiff is a creditor of the executrix, is not sufficient to remove her. See PLEADING, V: (a), 3), B. No. 3.

11. An executor who advertises for sale, a property *per aversionem*, well knowing that the tract contains more land than advertised, should be dismissed from his trust. See SALE III. (b), 2), c. No. 4.

12. A testamentary executor who fails to give bond when ordered, becomes *ipso facto functus officio*. See SUCCESSION, VIII. (e), 3).

VIII. OF THE POWERS, RIGHTS AND OBLIGATIONS OF ADMINISTRATORS, CURATORS AND EXECUTORS, AND THEIR ADMINISTRATION.

(a) *In general.*

1. The administrator of the estate of one of the partners of a commercial firm, who had acted as liquidator of the partnership affairs, has only to account for and pay over to the new liquidator, the funds which had come into the hands of the former liquidator. 16 A. 34, *Succession of Twibill*.

2. An executor who, while acting as agent, had raised a crop, and with the knowledge of the creditors and legatees, continued its working, is entitled to be reimbursed the expenses necessarily paid in carrying on the plantation. 19 A. 494, *Succession Wederstrandt*.

3. The estate is not liable for supplies to carry on the plantation, when it appears the debt was incurred six years after the death of the testator, and no evidence shows by what authority the executor worked the plantation. 23 A. 189, *Miltenberger v. Taylor*.

4. An executor who carries on a plantation, cannot charge to the estate supplies which are not necessary. 27 A. 331, *Succession Brown*.

5. An administrator is the trustee of the creditors. 2 A. 923; 4 A. 169; 10 A. 723; 21 A. 149, *Succession Jacob Weigel*.

6. An administrator cannot bind the estate as indorser; he will render himself individually liable, however. 21 A. 286, *Livingston v. Gaussens*.

7. Executors, administrators, etc., have no power to create liabilities against the estate, or increase its responsibilities. 21 A. 287; 22 A. 372; 24 A. 83, *Dickson v Succession Compton*.

8. An administrator who contracts a debt for the succession without proper authority, renders himself personally liable to the creditor. 23 A. 428, *Carroll, Hoy & Co. v. Davidson*.

9. The representative of an estate cannot bind the estate by drawing drafts, but binds himself. 25 A. 562, *Louisiana Mutual Insurance Company v. Walters & Elder*.

10. As an administrator cannot bind the estate he represents, *ex contractu*, without authority of the judge, the estate cannot be bound by a breach of duty. 26 A. 660, *Hoss & Elder, administrators v. Jones*.

11. An administrator, who entrusts the whole settlement of the succession to his attorney, and allows more than a year to elapse before suing on allegations of fraud, for the nullity of the judgment rendered on his petition, cannot escape liability for his neglect. 26 A. 214, *Cushing v. Harmonson*.

12. An administrator or executor is without power to waive prescription already acquired. 26 A. 380, *Villere v. Villere*; 21 A. 373, 748; 23 A. 193; 24 A. 83; 25 A. 492. See PRESCRIPTION, VI.

13. An administrator cannot extend the terms of the debtor's payment beyond that fixed in the original contract. 26 A. 660, *Hoss & Elder v. Jones*.

14. Although the sureties agreed to sign the bond of an administrator, on condition that designated attorneys should settle the succession, the agreement is not binding, and after revocation of their mandate, all acts done by the attorneys are null. 27 A. 114, *Succession Babin*.

15. The creditor of a succession cannot better his position, by accepting a mortgage from the administrator; if he seeks to enforce the mortgage, it will properly be enjoined. 27 A. 190, *Ledoux, adm'r v. Breaux, sheriff*.

16. An administrator cannot exceed his authority; if he does, his acts are null. 29 A. N. R., *Walmsley v. Walker*.

17. Where an executor has qualified and given bond for the faithful discharge of his trust, and taken possession of the property of the estate by virtue of the provisions of the will, a strong case must be made against him to induce the court to appoint a receiver to take the possession of the property from him. 1 Woods, 262, *Haines v. Carpenter, ex'r*.

18. The application for a receiver must be supported by evidence, showing that the appointment is necessary. *Ib.*

19. The verification by complainant, of a bill, stating upon information and belief, grounds for the appointment of a receiver, is not of itself such evidence as would justify the appointment by the court. *Ib.*

20. In an application to discharge a trustee, and the appointment of a receiver for the trust estate, it must be made to appear that the property is in danger, and that the trustee is irresponsible. *Ib.*

21. The court which appointed a testamentary executor, being without jurisdiction, the executor may make his application before the proper court, and oppose the appointment of the public administrator. 28 A. 611, *Succession Maria Bowman*.

22. An administrator, who is unfaithful in the discharge of his duties, should be dismissed from office. 28 A. 784, *Travis v. Insley*.

23. A creditor, whose claim is not acknowledged, or liquidated by the judgment, cannot interfere in the administration. 30 A. 704, *Succession Winn*.

(b) *Duration and resignation of their trust.*

1. The administration should not be prolonged for the purpose of collecting claims, when all the debts have been paid. 27 A. 591, *Succession Halsey*.

2. At the expiration of the term of office of the public administrator, his successor in office should be appointed to settle the successions yet under his administration. 28 A. 602, *Succession Cabrol*.

(c) *Their diligence; claims due the succession; and property subject to administration.*

1. A notice published by the administrator, requesting creditors to present their accounts to the attorney named, is a delegation of power which it was competent for the administrator to make. 16 A. 261, *Succession Yarrowburgh*.

2. Executors, administrators, etc., cannot transfer negotiable assets without an order of court. 17 A. 17, *Burbank v. Payne & Co.*; 1 A. 22. See (e), 2), B. No. 4.

3. An administrator can only collect the notes given to the estate in lawful currency. 18 A. 567, *Trichel, ad'r v. Myers*.

4. Payment to the administrator in Confederate notes does not discharge the debt. 21 A. 175, *Draughton v. White*.

5. An administrator who received Confederate money in payment of succession property sold by him, when that money was the currency in general circulation, can only be held for the value of said money in gold at that time. 29 A. 577, *Succession Womack*; 8 Wall. 1, *Thorington v. Smith*. See (f), 2), B. Nos. 3, 5.

6. The executor will not be held liable for more than he was able to collect. 24 A. 435, *Succession Henderson*.

7. An administrator is without power to grant an extension to the principal, and if he does, this does not release the surety on the note. 25 A. 182, *Landry v. Delas & Co.*

8. The administratrix, who occupies a house, the separate property of her deceased husband, is liable for the rent. 27 A. 550, *Succession Gayle*.

9. LUDELING, C. J., *dissenting*: An administrator is not bound to rent succession property. *Ib.*

10. Under act No. 16, of 1870, the revenues of the ferry kept at Donaldson, and carried on after the death of the grantor, are liable for the debts of the deceased. 28 A. 137, *Succession Schonberg*.

11. Where notes due the succession are renewed to the best interest of all concerned, by capitalising the interest and forcing a part payment before renewing, no cause of complaint exists. 27 A. 588, *Succession Halsey*.

12. An administrator cannot sue, in disregard of his formal settlement with and discharge of the debtor, without alleging error or fraud in the settlement. 29 A. 350, *Haile, adm'r v. McGhee, Snowden & Violet*.

13. An administrator who does not collect a debt is bound by his tableau. See ESTOPPEL, No. 62.

(d) *Deposit of succession funds; account thereof; and the official bank book.*

1. An administrator who deposits funds of the estate with a commercial house, under his own name, becomes responsible therefor. 20 A. 148, *Succession Lagarde*.

2. When the administrator has taken care of the property entrusted to him, as a prudent person, depositing the money in the hands of commission merchants of standing, in the absence of banks paying interest on deposit, and the commission merchants fail, he cannot be made liable for the loss. 23 A. 584, *Dickson v. Dickson*.

3. The public administrator who fails to deposit the succession funds in bank, is liable to twenty per cent. per annum interest. 28 A. 367, *Succession Milton Taylor*.

(e) *Sale of succession property.*

1) In general.

1. Where the decree of the court recognizes the necessity of a sale of the property of an intestate, to pay debts due by his succession, and the purchaser is in good faith, his title cannot be questioned, although the debts might have been paid by the future revenues of the crops. 15 A. 250, *Savage v. Williams*.

2. A testamentary executor must proceed to the sale of the succession property to pay debts, in the same manner as is prescribed for curators of vacant successions. 18 A. 59, *Succession Egana*.

3. The statute of 1838 (R. S. 1870, sec. 3691; C. C. 1190), in relation to successions under five hundred dollars, does not dispense with the appraisal and thirty days advertisement, previous to the sale of real estate. 18 A. 728, *Succession Curley*.

4. In as summary a manner as possible, means speedily and diligently, as allowed by law, but not against law. *Ib.*

5. A succession sale by the sheriff, while the property is advertised in another suit, does not, of itself, render the sale null. 19 A. 107, *Bossier v. Kennedy*.

6. A purchaser at probate sale is not bound to look beyond the decree, and the jurisdiction of the court. 20 A. 124, *Sizemore v. Wedge, administrator*. See No. 10; 2), A. No. 2; 7), D. No. 4. SALE, X. Nos. 4, 5.

7. One who objects to the sale, should present all his grounds of objection at once. 23 A. 309, *Succession Brown*.

8. A private agreement entered into between the administrator and purchaser, whereby the parties bind themselves to sell and buy at a certain price, which is the full value of the property, has nothing improper, and if the price be paid accordingly, after legal proceedings have been had, the sale cannot be disturbed. 24 A. 531, *Brown v. Jacob*.

9. Property sold by order of court, under a will which has become null by the birth of a posthumous child, cannot be recovered without tendering to the purchaser the price which went to pay the debts of the insolvent succession. 27 A. 563, *Green v. Baptist Church of Shreveport*. See SALE, X. No. 18.

10. A sale under order of the probate court, of property belonging to a person not dead, but absent, is utterly null and void. The title is not cured by the prescription of ten or twenty years. 29 A. 560, *Burns v. Van Loan, et als*; 4 R. 26, 201; 14 A. 598. See No. 6.

11. Evidence to show that terms of sale other than those recommended by the majority of the meeting of creditors of a succession would be more advantageous, is inadmissible. See EVIDENCE, XV. (j), No. 1.

12. Executory process may issue against a succession. See EXECUTORY PROCESS, II. (a), No. 4.

13. But not a writ of *fi. fa.* based on a mortgage merged into judgment. See EXECUTORY PROCESS, IV. Nos. 5, 6.

14. For alienation of minor's property, see MINORS, III. (g). PARTITION, III. (b), Nos. 6, 13.

15. For partition sales, see PARTITION, III. (b).

16. T. mortgaged his property to C. and afterwards sold it to A., who assumed the mortgage as part of the price; C. renewed his note without novation; T. died, and A. then signed a counter letter recognizing the simulation of the sale; thereupon the administratrix proceeded to administer and sell the property. C. took a rule before the probate court to rescind the order of sale on the ground that the succession is not the owner of the property; *Held*: That the counter letter of A. was admissible in evidence and that the mortgage creditor had no right to have the order of sale revoked. 30 A. 187, *Succession of Tabarry*.

2) Power, obligation and application to sell; and order of sale.

A. In general.

1. Orders of sale in succession matters, are not final judgments, and may be modified by the judge from a cash sale to one partly on credit. 18 A. 496, *Succession Hebrard*. See PARTITION, III. (a), No. 8. JUDGMENT, VI.

2. A purchaser at probate sale, is not required to look beyond the decree recognizing the necessity of the sale. 19 A. 353, *Wright v. Cummings*; 18 Howard, 497. See 1), No. 6. SALE, X. Nos. 4, 5. *Infra*, No. 10.

3. An administrator cannot sell more property than is necessary to pay debts and defray the expenses of the administration. 20 A. 355, *Succession Phelan*.

4. An administrator cannot resist the application of a judgment creditor to sell property, by setting up unliquidated claims in reconvention against the judgment creditor. 21 A. 508, *Brown v. Roberts, ad'r*.

5. The creditor cannot ask the executor to sell property, after the heirs have been put in possession. 23 A. 212, *Sevier v. Succession Gordon*.

6. The testamentary executor has the right to apply for the sale of property to pay particular legacies and debts, and the heirs can only arrest the sale by advancing the money to make the payments, or by showing that the payments should not be made. 23 A. 309, *Succession of Brown*.

7. A probate sale, made under an order of court which had been suspended until a certain event, which did not take place, is null. 20 A. 233, *Succession Michel*.

8. An order of sale obtained by the public administrator appointed, pending a contest for the administration, is not an absolute nullity; the purchaser need not look beyond the order. 27 A. 600, *Duckworth v. Vaughn, public adm'r*. See VII. (c); *supra*, No. 2.

9. The order of sale obtained by an administrator to pay debts, is necessarily *ex parte*, and this affords no ground upon which a creditor may enjoin the sale. 28 A. 633, *Tertrou v. Comeau, sheriff*.

10. It is not regular to issue an *ex parte* order in favor of one or more creditors, for the sheriff to sell property under administration, to pay their debts. 28 A. 804, *Succession Spears*.

11. In default of proof to the contrary, the recitals in an act of sale, that the vendee is a widow, will be taken as true, and a sale by her executor to pay her debts, will pass a valid title to the purchaser. 30 A. 332, *Smith v. Kinney*.

B. Power to sell and necessity of the order.

1. The order of sale was obtained by one who signed himself attorney in fact of the executrix; the publications were regularly made, and the price was paid in Confederate money. The proceedings, therefore, being regular, on their face, the sale cannot be disturbed, even if the pretended attorney in fact had no authority. 23 A. 616, *Allen v. Cuttlef*.

2. The widow in community need not join in the sale where it is made to pay the debts of the husband's estate. 24 A. 229, *Davidson v. Executors Siliman*. See MARRIAGE, XIII. (d), No. 2; (e), 4), c.

3. A sale to pay debts, made on the prayer of the administrator, divests the title of the succession, and the minors cannot complain. 24 A. 342, *Willard v. Payton*.

4. An administrator has no authority to transfer a judgment in favor of the succession by simple motion; such transfer is null. 28 A. 335, *Succession Amy Anderson*. See (c), No. 2.

5. A sale provoked by the tutor, *ex-officio* administrator, should be authorized by a family meeting; none is necessary, if the sale be provoked by creditors against an administrator, under articles 990, 991 and 992, C. P. C. C. (1155), (1156); 14 A. 91; 2 A. 463; 9 A. 107; 16 A. 420, *Succession Weber*; 21 A. 712, *Succession Schuttler*. See No. 10. MINORS, III. (g).

6. An administrator has no right, as such, to provoke a sale of the effects of the succession by an action in partition. 22 A. 309, *Hebert v. Hebert*. See (f), No. 1.

7. The creditor has a right under articles 990, 991 and 992, Code of Practice, to demand the sale of the succession property to pay his claim. 23 A. 582, *Payne v. Ferguson*.

8. A mortgage creditor has no right to enjoin the sale for want of notice of the application, when the sale is ordered to pay creditors having a higher rank than the mortgage creditor. 25 A. 194, *Jefferson Wells, curator v. J. M. Wells, ex'r*.

9. The judgment, which forms the basis of a demand, by the creditor, for the sale of sufficient property of the succession to satisfy the same, cannot be collaterally questioned nor revised. 26 A. 150, *Succession Vaughn*.

10. No family meeting need be convoked to sell property to pay debts on the application of the administrator. 28 A. 269, *P. A. Davidson v. M. A. Davidson*. See No. 5; c. Nos. 3, 4.

11. A creditor, even if his claim be acknowledged by the administrator, can not, *ex parte*, obtain an order for the sale of succession property. The order must be obtained contradictorily with the administrator. 29 A. N. R., *Powell, administrator v. Garner*.

12. An administrator who sells movable property of the succession, at private sale, and does not prove that its real value was less than the appraisement, will be forced to account for the appraised value. 27 A. 744, *Succession Harris*.

13. No order is necessary for the sale of shares owned by absentees in any corporation here. Acts 1877, p. 60.

c. Notice and mode of application; the parties; requisites and effect of the order.

1. The rules which regulate the sale of the property of minors, do not apply to sales of succession property, made at the instance of administrators, for the payment of debts, and consequently, the sale of succession property for the payment of debts may be made for less than the appraised value in the inventory, and such sales must be held valid and binding upon the minor heirs, as well as upon heirs of full age; where a succession is accepted with the benefit of inventory, no law requires that the property shall produce its appraised value, nor that a re-appraisal shall be made in case the first estimation shall not be reached. In such cases, sales made in the manner provided by law, for sales under execution, will be valid, if thus ordered by a decree of the court. 15 A. 641, *Carter v. McManus*.

2. The sole object of the law in making the attorney for absent heirs, a party to an application for the sale, is to ascertain contradictorily with him, if such a sale be necessary. 18 A. 496, *Succession Hebrard*.

3. The citation of the heir, and advice of a family meeting, are not necessary when application by an administrator is made, for a sale to pay debts. 19 A. 528, *Vincent v. Daubigné*; 15 A. 676, *Carter v. McManus*. See B. Nos. 5, 10.

4. A family meeting is not necessary for a sale obtained by the tutor, (?) to pay debts. 20 A. 125, *Sizemore v. Wedge*; 9 A. 107; 11 R. 508; 10 R. 457; C. C. (1042), (1048), (1051).

5. For validity of order of sale rendered by State courts under the authority of the Confederate States, see CONSTITUTION, II. (b), No. 4.

6. An order of sale, when there is no administrator, is null. See COURTS, II. (d), 6), No. 7.

7. District courts are without jurisdiction to render the order. See COURTS, II. (d), 6), No. 8.

8. The parish court is without jurisdiction to order the sale to pay an unliquidated claim of more than five hundred dollars. See COURTS, II. (f), No. 6.

3) Advertisement and description of the property.

1. The sale should be advertised during thirty days. 15 A. 697, *Gernon v. Bestic*.

2. When the adjudicatee at a probate sale is in good faith, the sale cannot be annulled, if made from boundary to boundary, where the quantity is more than it was advertised to contain. 23 A. 630, *Mitchell v. Levi*.

3. An advertisement signed by the clerk, and an error in the time of making the sale, and a sale by an administrator when the court ordered the sheriff to make it, will vitiate the sale. 29 A. 504, *Hermann & Vignes v. Fontelieu*.

4. An executor who advertises a sale *per aversionem*, knowing that the tract contained more land than mentioned, should be destituted. See SALE, III. (b), 2), c. No. 4.

5. An error in the French advertisement will not vitiate the sale, when the English one is correct. See SALE, VII. (b), No. 1.

6. The real estate, of successions amounting to less than five hundred dollars, must be advertised during thirty days. See SUCCESSION, VIII. (e), 1), Nos. 3, 4.

7. The sales *must* be advertised in the German Gazette for Orleans and Jefferson, 1870, p. 130; only in English, 1874, p. 113; in Orleans, once a week in thirty days, and three times in ten days, 1878, p. 157; except Orleans, 1876, p. 146.

4) Appraisalment; terms of sale; and amount the property must bring.

1. The administrator has the right to apply in good faith for the sale of property to pay debts, but he has no right to incumber such sale by requiring the purchaser to buy other property than that of the deceased, nor to demand a larger portion of cash than the wants of the succession may require, and if he himself become the purchaser at such a sale it cannot be maintained. 15 A. 250, *Savage v. Williams*.

2. Where the court has ordered the sale of property on terms of credit, and sold it for cash, the sale will be void for want of an order of sale. 15 A. 254, *Smelser v. Blanchard*.

3. Property sold without appraisement, in a small succession, which the law directs to be settled in as summary a manner as possible, is null and void. 18 A. 728, *Succession Curley*.

4. The succession property is not bound to be sold for cash, but may be sold on terms of credit, if the creditors do not complain. 19 A. 355, *Wright v. Cummings*.

5. Succession property against which a seizure and sale has been issued, may be sold at two-thirds of the appraisement. 19 A. 528, *Vincent, administrator v. D'Aubigné*.

6. The property may be adjudicated for less than its appraised value, when sold by the administrator to pay debts. 15 A. 641, *Carter v. McManus*; 19 A. 528, *Vincent v. D'Aubigné*; 28 A. 269, *Davidson v. Davidson*.

7. Succession property may be sold for less than its appraised value, to pay debts, although it be mortgaged, and the price of adjudication be not sufficient to pay the mortgage; the decision in the 12th A. 368, is not contrary to this doctrine. 28 A. 175, *Succession B. Stolz*; 354, *Norton v. Citizens' Bank*; 13 L. 86; 10 R. 398; 11 R. 510; 2 A. 967; 4 A. 579.

8. TALIAFERRO, J., *dissenting*: There is no law to authorize a sale for less than the appraisement. *Ib.* See MINORS, III. (g), 3).

9. The law fixes the value of appraiser's services. 25 A. 648, *Succession Caballero*. See APPRAISEMENT; *infra*, No. 16.

10. When succession property is offered for sale, for cash, and does not bring the amount required by law, an immediate offer at twelve months credit is null; it should be re-offered after a publication of fifteen days. 27 A. 241, *Ambrose v. Marsh*.

11. Where the inventory is destroyed, and two years elapse before the sale of the succession property, a new inventory and appraisement are valid. 27 A. 560, *Walker & Vaught v. Kimbrough, administrator*.

12. A sale of succession property to pay debts, may be made for less than two-thirds of the appraisement. 28 A. 639, *Succession Fontelieu*; 10 R. 398; 9 R. 508; 13 L. 431; 5 A. 437. (See also the able decision of Hon. A. L. Tissot, Judge of the Second District Court for the parish of Orleans, in the succession of L. H. Tabary, rendered after the two cases referred to in No. 13.)

13. A succession sale to pay debts cannot be made for less than the appraised value, unless the price bid be the actual value of the property. 29 A. 505, *Hermann & Vignes v. Fontelieu*; 536, *Fraser v. Zyltéz*.

14. Minors' property not sold to pay debts, must bring the appraisement. See MINORS, III. (g), 3).

15. Succession property sold under executory process, need not bring the appraisement. 19 A. 528, *Vincent v. D'Aubigné*.

16. Appraisers' fees, 1870, No. 33.

5) Place of sale and by whom it may be made.

1. Property in another parish may be sold at succession sale, by the sheriff of the parish, where the succession is opened under the orders of the probate court. 28 A. 354, *Norton v. Citizens' Bank*; 7 R. 144; 9 M. 461.

6) Capacity to purchase.

1. Where the surviving partner, in an ordinary partnership, is an administrator of the deceased partner's succession, he has the capacity, by the express provision of the act of 1854, to purchase at a succession sale of his effects. 15 A. 250, *Savage v. Williams*.

2. Under our law, the widow in community may purchase from the succession of her husband, of which she is administratrix, and in the absence of proof to the contrary, it will be presumed that the law of any other State is the same upon this subject as our own. 15 A. 451, *Payett v. Curtis*.

3. Curators, administrators, etc., are expressly prohibited from purchasing directly or indirectly, property administered by them; the only exception to

this prohibition is the one in favor of the surviving partner in community or ordinary partnership, or an heir or legatee of the deceased. 15 A. 581, *Dugas v. Guilbeau*; 641, *Carter v. McManus*.

4. The purchase by an administrator of an heir's interest in the succession, if nullity it be, is only a relative one, which can avail no one except the vendor. 16 A. 135, *Peyton v. Enos*.

5. An administrator who, without right, purchases succession property, cannot avail himself of the nullity of the sale, as a bar to the payment of the price. 29 A. 38, *Succession Mrs. O'Brien*.

6. Executors and others acting in a fiduciary capacity cannot purchase the property which they hold in trust. 4 H. 503, *Michoud v. Girod*.

7. An administrator, who is not an heir, cannot purchase at the sale of the succession, take possession, and pay the price in the name of his son. 23 A. 519, *Casanave v. Spear*; 2 A. 785.

8. An administrator cannot buy, take possession of and pay the price of the succession property, as agent of the buyer. 23 A. 520, *Casanave v. Spear*.

9. The widow in community, who is administratrix, may purchase at the sale of the succession property. R. §. section 12; 21 A. 38; 24 A. 482, *Wooley v. Russ*. See No. 2.

10. An administrator cannot either directly or indirectly purchase property of the succession. 27 A. 241, *Ambrose v. Marsh*; 491, *Formento v. Robert*.

11. The tutor who is the survivor in community, may purchase. See MINORS, III. (g), 5), No. 3.

12. The minors duly represented may sue to set aside the sale made by the administrator to himself, who is not an heir. See PLEADING, I. (c), 1), B. No. 2.

13. An executor cannot purchase. See SALE, I. No. 2.

7) Adjudication and evidence of the sale; its ratification and avoidance; rights and obligations of the parties.

A. In general.

1. The heirs of age, who should have been made parties to the sale prayed for by the tutor under the authorization of a family meeting, ratify the sale by claiming the proceeds. 21 A. 282, *Misner v. Fulshire*.

2. A creditor of a succession cannot take a rule on the auctioneer, who has sold succession property, to compel him to deposit the proceeds of sale in the hands of the sheriff, subject to the further orders of the court. The administrator alone could have claimed a settlement from the auctioneer. 29 A. 438, *Succession Dowler*.

3. See sales at auction and *à la folle enchère*, SALES, VII.

B. *Proces-verbal and act of sale; what passes to the purchaser; effect of adjudication and failure to comply therewith.*

1. An heir who purchases during his marriage, is invested with a new title for the benefit of the community, unless a declaration to the contrary be made in the act of sale. 15 A. 588, *Breaux v. Carmouche*.

2. A probate sale of property not belonging to the succession, does not divest the title of the owner. 23 A. 447, *Beckham v. Henderson*. See SALE, V. (a), No. 10.

3. Creditors of a succession cannot bring a suit against the purchasers of the succession property, to annul their title or compel payment of the price, when the administrator acknowledges to have received the payment. 29 A. 574, *Swan v. Gayle*.

4. The adjudicatee must show the defect of title. See EVIDENCE, VIII. No. 17.

5. The Second District Court for the parish of Orleans may compel a compliance. See COURTS, II. (d), 6), No. 5.

6. The court ordering the sale, may enforce the adjudication. *Ib.* No. 6.

7. A sale to execute a will or pay debts, transfers the mortgages to the proceeds. See MORTGAGE, VIII. (c), No. 2 *et seq.*

8. A probate sale does not affect the property banks. See MORTGAGE, VIII. (c), Nos. 6, 7.

c. *Right to retain the price or plead in compensation*

1. The wife's administratrix cannot plead in compensation to the return of the husband's share of the proceeds of sale of the community property, the half of a community debt paid by the wife, since the death of her husband: she must pay and then claim. 18 A. 268, *Succession McGinnis*.

2. The widow in community, who purchases at sales of the effects of the community, must pay the price. Her case is not covered by articles (1265) and (2603), Civil Code, she is not an heir. 12 L. 466, *Gorton v. Gorton*; 2 A. 412, *Dees v. Tildon*; 22 A. 250, *Prescott v. Gordon*.

3. The universal legatee for an unascertained portion of the estate, cannot retain in her hands the price of adjudication, when the will orders the transmission of funds to a foreign country, there to be distributed. 24 A. 321, *Succession Cordeviollé*.

4. An administrator cannot bind himself to wait for the payment of the purchase price of property bought by the husband, until distribution takes place between the heirs, of whom the wife is one. He must enforce the collection. 27 A. 39, *Fluker v. Kent*.

5. The purchaser of succession property, cannot offset the price with a debt due to him by the succession. 29 A. N. R., *Walmsley v. Walker*; 3 A. 150; 7 N. S. 238; 14 L. 556; 2 A. 412; 18 A. 268; C. C. 1056.

6. A purchaser at a succession sale made to pay debts, may retain in his hands, out of his bid, the amount of special mortgages existing on the property when it was acquired by the deceased. 29 A. 385, *Succession Triche*.

7. At a sale of property of an insolvent succession, the mortgage creditor first in rank, who purchases property subject to his mortgage, may, on giving security to the administrator, retain the price in his hands. 29 A. 386, *Succession Triche*.

8. A special mortgage creditor, purchasing property subject to his mortgage, at probate sale, may retain the price until settlement of the estate, upon giving security to refund such part as may be found due on final settlement. 29 A. 507, *Tertrou v. Durand*.

9. Where a widow in community, under the advice of a friend, purchased the community property sold to pay its debts, part cash and part credit, the cash being advanced by the friend, and proving sufficient to pay the debts, she should not sign notes for her half of the credit portions; having done so, however, and the notes being held by her friend, for want of sufficient proof, that he held them as security for his advances, a judgment obtained by him against her, partly based on said notes, is properly enjoined for said portion. 30 A. 120, *Reardon v. Moriarty*.

10. See also COMPENSATION, IV.

D *Warranty; relief granted purchasers under defective sales; ratification and avoidance thereof.*

1. The property was sold as belonging to the succession of A., when, in fact, it belonged to that of B.; A. and B. were brothers; the heirs of the one were the heirs of the other. Suit was brought by the administrator of B. to recover the property, and the purchaser called the heirs in warranty; *Held*: That in default of proof that they had accepted the succession of A., or done any act of heirship, they were not liable. 15 A. 273, *Winn v. Dickson*.

2. Where the sale has been rescinded, the property cannot be taken from the administrator; it must be administered according to law. 15 A. 250, *Savage v. Williams*.

3. The executrix being invested by law with powers of administration only, could not ratify a sale which was void, for want of a proper order to sell. 15 A. 254, *Smelser v. Blanchard*.

4. A purchaser is not bound to look beyond the decree of the probate court ordering the sale; he must look to the jurisdiction of the court. The truth of the record concerning matters within its jurisdiction cannot be disputed. 14 L. 146; 15 L. 182; 7 R. 66; 10 R. 396; 11 R. 67; 2 A. 468; 14 A. 154; 3

N. S. 32; 8 L. 321; 18 A. 485, *Succession Hebrard*; 21 A. 505, *Woods v. Lee*. See 1), Nos. 6, 10.

5. The widow in community who purchases property at a succession sale, not only ratifies, but authorizes and participates in the sale, which she cannot, afterwards, repudiate. 24 A. 227, *Davidson v. Executrix Silliman*.

6. A succession sale cannot be annulled, unless the heirs return the purchase price paid to the creditors. 28 A. 269, *Davidson v. Davidson*. See TENDER.

7. The sale made in accordance with a judgment of the probate court, cannot be treated as an absolute nullity, and a new order of sale obtained from another court. 29 A., N. R., *Dunn v. Bird, sheriff*.

8. Where one of the three lots sold, is necessary for the enjoyment of the property, and the succession has no title thereto, the sale of the whole will be cancelled. 27 A. 150, *Succession Trainor*.

9. In case the will be annulled, the title is, nevertheless, good. See SALE, V. (a), No. 9.

10. The sale of another's property is null. See SALE V. (a), No. 10. SUCCESSION, VIII. (e), 7), No. 2.

11. For warranty in sales, see SALE, III. (c).

8) Seizure and sale of succession property by creditors.

1. The Second District Court of New Orleans having ordered the sale to pay debts, the mortgage creditor could not afterwards sue out executory process from the Sixth District Court. 15 A. 636, *Poutz v. Bistes*.

2. Succession property sold under executory process, need not bring the appraisalment. 19 A. 528, *Vincent v. D'Aubigné*.

3. A mortgage creditor may either obtain a seizure and sale, or may take a rule on the administrator to sell. 19 A. 529, *Vincent, ad'r v. D'Aubigné*; 12 A. 68.

4. A sale made by virtue of a *fi. fa.*, issued in execution of a judgment obtained by a creditor of the estate, and ordering the succession property to be sold to pay debts, seems to be regular, and will vest title in the adjudicatee. 21 A. 40, *Kellar v. Blanchard*.

5. A mortgage creditor who obtains a judgment on his note, cannot issue a *fi. fa.* against the succession. 25 A. 154, *Succession Patrick*. See COURTS, (g), 2), No. 3.

6. The judgment debtor having died after issuance of the *fi. fa.* and seizure of his property, the proceedings are stayed, and the probate court must administer the property. 29 A. 118, *Hall & Lesle v. Belden*.

7. Executory process may issue against a succession. See EXECUTORY PROCESS, II. (a), No. 4.

8. The appointment of an administrator is not necessary if a partition has not been made and the heirs are absent. See EXECUTORY PROCESS, II. (a), No. 7.

9. Where the succession is administered by a tutor, a seizure and sale of the succession property contradictorily with him, is valid. See PLEADING, I. (c), 6), No. 9.

10. The representative of the succession against which executory process has been issued, is not entitled to administer the proceeds of sale, or any part thereof, when it is not shown that the claim of the seizing creditor will not absorb the proceeds, nor that there are debts of a higher privilege. 30 A. 323, *Gally v. Dowling, curator*.

(f) Rendition of accounts; debts and charges and their payment.

1) In general.

1. Where the heirs, by an act under private signature, regulate between themselves the mode of partition of the estate, and authorize the curator to pay certain claims, and further verbally authorize him, in order to save expense, to settle the affairs of the estate out of court; *Held*: That the surety of the curator is not discharged from liability by such acts of the heirs, but

will be held responsible on the failure of the curator to account or pay over money which he may have received. 15 A. 60, *Perkins v. Cenas*. See (e), 2), B. No. 7.

2. The public administrator, whose office is expired, cannot, for that reason, plead that he is exonerated from the faults of his administration. 28 A. 820, *Succession Overby*.

3. The difference between an account and a tableau of distribution is, that the former shows what has been done by the administrator, the money received and paid, a statement of which should be rendered yearly, whilst a tableau of distribution shows the assets and proposes a distribution among the creditors in accordance with their rank and privilege. 29 A. 712, *Succession Bofenschen*.

4. A rule on a person acting as administrator, to show cause why execution should not be issued against him for a fixed amount, must be considered as a demand for an account, which must be by petition and citation. 18 A. 155, *Succession Feltmeyer*.

5. The curator must sustain his account by proper proof. 18 A. 272, *Interdiction Rochon*. See 2), A. No. 4; 3), Nos. 10, 11.

6. The judge can only order the executor to pay funds in his hands. 21 A. 297, *Succession Johnson*.

7. It is derogatory of legal proceedings for an executor's account to be incumbered with a useless mass of matter consisting of a prolix narrative of the life and times of the deceased. 25 A. 331, *Succession of Hogan*.

8. When the heirs of the mother, to whom certain paraphernal claims were due by the husband, have not renounced the community, they cannot compete with the creditors of the husband's succession. 28 A. 562, *Succession Anaïs Plantevignes, wife of L. Ledoux*. See MARRIAGE, XIII. (e), 3).

9. A special account of administration to pay but one creditor, cannot be allowed. 29 A. 366, *Succession Lacroix*.

2) Obligation to render, right to claim, and necessity of an account; its requisites and distribution of funds; interest due by administrators, etc., and their personal liability.

A. In general.

1. The filing of a tableau of distribution implies control over the funds to be distributed. 18 A. 391, *Rochereau v. Harvey*.

2. Where the account makes a *prima facie* showing that the executor has no fund on hand, the court will not order him to file a tableau of distribution. 19 A. 104, *Succession Watterston*.

3. An action against an executor or his estate, for a sum of money not accounted for, should be brought before the parish court in the form of a demand for an account. 26 A. 602, *Tessier v. Littell*.

4. An administrator is required to prove every item of his account under a general opposition. 29 A. 711, *Succession Bofenschen*. See 1), No. 5.

5. An administrator is chargeable with property stolen from the succession, during the absence of his keeper. 29 A. 744, *Succession Harris*.

B. Right to claim and necessity of an account; and personal liability of administrators, etc.

1. The regular mode of ascertaining the extent of the personal liability of an executor for acts of mal-administration, is by opposition to the account of administration when rendered; a personal action by the creditor against the executor, cannot be carried on so long as an opposition to the account on the same grounds, remains undisposed of. 15 A. 214, *Cooper v. Cotton*.

2. Execution may be issued against the individual property of the curator who fails to pay an amount set down on his tableau, duly homologated. 18 A. 220, *Succession Philbrick*; C. P. 993, 1057; 13 A. 416, *Stevens v. Stevens*.

3. An administrator cannot receive Confederate notes in payment of debts due to the estate. 20 A. 148, *Succession Lagarde*. See (c), No. 5.

4. A creditor whose judgment is suspended by an appeal, may call upon the executor; for an account. 20 A. 581, *State ex rel. Chaplain v. Judge Second District Court*.

5. An executor who received Confederate notes, which are lost in his hands,

is liable for the amount in good money. 21 A. 545, *Succession Sprowl*. See No. 3.

6. An administrator who fails to file an account of his administration within twelve months, should be dismissed from office. R. S., section 9; 26 A. 194, *Ford v. Kittridge*; but see VII. (f), No. 9.

7. A delinquent executor who abandons his trust and appropriates the succession property to his own use, should be condemned to pay twenty per cent. damages per annum. He stands without equity before the court. 26 A. 567, *Succession Hogan*.

8. An executor who filed his accounts, showing no indebtedness to the estate, and afterwards raised a crop of cotton, which was destroyed during the war, without fault on his part, is not liable to the estate. 28 A. N. R., *Succession Elgee*.

9. No action will lie against an executor or administrator to make him personally responsible for the debts of the succession until he neglects or refuses, on the demand of an interested party, to file a tableau and to pay the debts accordingly under an order of the probate court. 11 H. 142, *McGill v. Armour*.

10. An executor, who is partner of a firm holding the money of the estate, must be considered in possession of the fund in his fiduciary capacity. 30 A. 76, *Succession Bailey*.

c. *Obligation to account; and interest due by administrators, etc.*

1. An administrator is bound to render an account of the interest received by him, as also of the revenues of the estate confided to him, when kept in kind beyond a reasonable time. 15 A. 555, *Soldine v. Hyams*.

2. An executor is entitled to a credit for interest paid to procure extensions of mortgage notes, where he had not moneys in hand sufficient to pay the notes. 26 A. 195, *Succession Hale*.

3. An administrator who does not account for the undivided share of the deceased in a planting partnership, should be allowed to prove that the planting was a failure. 29 A. N. R., *Succession Dichary*.

3) *Proceedings on filing the account; the citation, notice and parties.*

1. The law makes no distinction between the beneficiary heir, who is a creditor (although he be the administrator), and the other creditors; and the judgment homologating an administrator's account, when the administrator is both heir and creditor, is binding on the other heirs, without personal citation to them. 15 A. 676, *Carter v. McManus*.

2. As between the heirs and creditors, the homologation of the account is binding without a citation personal to the heir. *Ib.*

3. An account of administration cannot be homologated in the country parishes, until after thirty days notice required by acts 1855, p. 50, section 9, otherwise the judgment of homologation will be reversed, and the case remanded to be proceeded with according to law. 16 A. 304, *Succession Foster*.

4. Notice of a tableau to creditors, published in the newspapers, is not sufficient to bind heirs. 16 A. 258, *Succession Yarborough*; 11 A. 412, *Truxillo v. Truxillo*.

5. Notification of the filing of an account operates as a citation to all persons concerned, creditors as well as legatees, and the homologation, bars all further enquiries as to all matters included therein. 18 A. 264, *Succession Egana*. See *infra*, No. 9.

6. Defendant may show that the judgment homologating her account was in reality no judgment, never having signed the account nor authorized any one to sign or present it for her. 26 A. 206, *Succession Pipes*.

7. The homologation of a tableau of administration, not notified to the attorney for absent heirs, nor to the heirs themselves, does not estop the latter from proceeding against the curator for an account. 20 A. 579, *Miller v. Rougieux*; 10 A. 674; 14 A. 706.

8. The joinder of the heirs, in the prayer for the homologation of a tableau,

is not a waiver of their rights against the administrator for his mal-administration in not proceeding to collect a debt, which was prescribed at the time it was placed on the tableau. 15 A. 186, *Serret v. Labaure*.

9. Publication of the account is notice to the legatees. 29 A. 378, *Succession Bougère*; 10 R. 118; 18 A. 263.

10. To homologate an account where no opposition has been filed, the proof of the correctness of the account must be made *ex parte*, as in ordinary cases of conformation of judgments by default. 29 A. 521, *Succession Planchet*. See JUDGMENT, XV. (c), 1). Nos. 8, 9, 10: *infra*, (f), 4). No. 12; *supra*, (f), 1), No. 5; 2), A. No. 4.

11. For same subject, see JUDGMENT, XV. (a), 2). MINORS, III. (f), 1).

4) Opposition to the account.

1. A rule is not the proper mode to dispose of an opposition to a tableau. 17 A. 133, *Succession Barbour*.

2. Heirs may appear and oppose the tableau, although they would not have been concluded by the homologation. 17 A. 133, *Succession Barbour*.

3. The opponents to a tableau of distribution, are all plaintiffs and defendants. 18 A. 583, *Succession Kerley*; 27 A. 552, *Succession Gayle*. See No. 16.

4. No opposition to a tableau can be entertained, if made after its homologation. 23 A. 528, *Succession Mouton*.

5. The administrator may, on trial of the oppositions to his account, amend as to an error of fact to his prejudice. 25 A. 211, *Succession Waterer*.

6. Although the capacity of the administrator be denied in an opposition to his account, the whole opposition should not, for that reason, be dismissed, but the objections to the account should be tried on their merits. 26 A. 595, *Succession of Epperson*.

7. If the tableau filed be not satisfactory, an opposition should be filed thereto; a rule to dismiss the administrator for this reason, will not lie. 28 A. 323, *Succession Calhoun*.

8. A judgment homologating an account, so far as not opposed, which is not signed, and to obtain which, no proof has been offered of the items, will not bar a supplemental opposition to the account allowed by the judge, and to which ruling no bill of exception is taken. 27 A. 667, *Succession Haggerty*.

9. The executrix having filed an amendment to her account, the opponent should be allowed to file supplemental oppositions thereto. 27 A. 587, *Succession Hasley*.

10. An opposition to an account is not the form of action to be pursued, to annul a purchase, by one who is said to be an interposed person, whose purchase is for the benefit of an administrator who cannot purchase. Judgment reversed, opposition sustained, and right reserved to heirs to institute an action of nullity of the sale made by an administrator. 29 A. N. R., *Succession of C. B. Thompson, opposition of heirs to final account*.

11. An account must be homologated by the parish judge, in open court, during term time; a judgment rendered in chambers does not preclude a subsequent opposition. 29 A. 378, *Succession Bougère*. See TERM.

12. The administrator is bound to prove each separate item of his account, whether opposed or not, but if opponent only opposed specific items, without any general opposition to the other items, proof of which has not been made, he will be confined to his opposition. 29 A. 712, *Succession Bofenschen*; 30 A. 270, *Succession Dougart*. See *supra*, (f), 3), No. 10. JUDGMENT, XV. (c), 1), Nos. 8, 9, 10.

13. An heir is interested in defeating any debts placed on the tableau of administration, not due or prescribed. 28 A. 607, *Succession Romero*; 25 A. 534.

14. An answer by a creditor, to an opposition to an account filed by another creditor, is not admissible. Replications are not permitted in our practice. 28 A. 820, *Succession Overby*.

15. An opposition to a tableau of distribution, is an answer. 28 A. 607, *Succession Romero*.

16. On the trial of oppositions to an account, the administrator is considered as plaintiff, and the burden of proof is on him to establish his account. 29 A. 521, *Succession Planchet*; 30 A. 270, *Succession Dougart*. See No. 3.

17. An administrator has no interest to contest the claims on oppositions, as between creditors. See COURTS, II. (f), No. 13.

18. The judicial mortgagee of an heir may claim by opposition to the account that his debt be paid out of the heir's share. See EXECUTION, I. No. 9.

19. The administrator may, without answer to the widow's opposition, claiming her homestead, prove that she or the children have concealed property. See HOMESTEAD, I. No. 1.

20. Effect of the judgment homologating an account, so far as not opposed. See JUDGMENT, XV. (c), 2), Nos. 6, 7, 8, 9, 10.

21. Where the executor's account, opposed by the minor, is remanded for further proof on the part of the executor, which he fails to furnish, judgment will be rendered in favor of the minor. See MINORS, III. (f), 4), No. 2.

22. The filing of an opposition, is not an abandonment of another suit pending. See ABANDONMENT, No. 1.

5) Presentation and liquidation of debts and charges; payment without order of court; and admissions and vouchers of administrators, etc.

A. In general.

1. A mortgagee made party to a rule to cancel mortgages, and to whose notice and special attention the tableau, moreover duly advertised, was brought after being homologated, is precluded from calling for repetition on subsequent mortgagees, who have been placed before him on the tableau. 17 A. 72. *Tibben v. Gratia*.

2. When the heirs have been put in possession "upon payment of the debts, if any there are," and they filed an account which was homologated, the creditors can only have recourse against the heirs personally. 24 A. 114, *Succession Dunford*.

3. A third opposition, asking that the auctioneer who sells succession property, be ordered to retain a sufficient amount out of the proceeds to pay opponent's claim, is not a proper proceeding. The money is to be distributed by the administrator. 26 A. 160, *Minor v. Barker*.

4. An executor cannot renounce prescription. See PRESCRIPTION, VI.

B. Presentation of claims; their admission or rejection by administrators, etc., and effect thereof.

1. The estate is not bound, because the claims have been allowed by the attorney at law, and placed on a tableau of distribution, which was homologated, the whole without the consent of the administrator. 27 A. 296, *Succession Poussin*.

2. An administrator may acknowledge a debt, but he cannot create one. The estate is not bound simply by reason of his acknowledgment, or that of his attorney. 29 A. 16, *Rheil v. Martin*.

3. An extra judicial statement by an executor, that he believes a debt to be due by the estate, does not bind the heir, nor is the heir bound by an approval of a court as to such claims, if it be made *ex parte*. 24 H. 553, *Gaines v. Hennen*.

4. A creditor of the deceased can intervene in a suit for partition between the heirs to claim his debt. See PARTITION, III. (a), No. 10. But see EXECUTION, I. No. 9.

C. Payments in error, or without order of court; evidence and vouchers of administrators, etc.

1. If an administrator makes an unauthorized payment, which does not benefit the creditors or heirs, he will be responsible for the amount. 19 A. 96, *Bogan v. Finlay*.

2. Advances by the executor, of a portion of the amount accruing to the heirs, cannot be properly charged in his accounts as executor; they should be collated in a partition. 27 A. 329, *Succession Brown*. See V. (c), 2).

7) Opening of dividends.

1. Opposing creditors, who succeed in having certain items rejected from

the syndic's tableau, have no privilege therein, and are not entitled to receive the same solely. The amount must be distributed between all the creditors. 16 A. 12, *McIntosh v. Planters' Insurance Company*.

2. When the tableau homologated, shows that the funds of the succession are not sufficient to pay ordinary creditors, they cannot compel payment by proceedings based on the judgment of homologation. 20 A. 418, *Money et al. v. Cosse, administratrix*.

3. For jurisdiction of the parish court to issue execution, see COURTS, II. (d), 1), No. 8.

8) Expenses of administration

A. In general.

1. The order of sale being obtained without authority, and improperly on the part of the curator, the succession should not be held liable for the costs of sale. 24 A. 105, *Succession Navarro*.

2. The curator is individually liable therefor. 23 A. 630, *Mitchel v. Levi*.

3. An administrator may, in proper cases, employ a book-keeper and collector, but must prove such necessity, the value of their services, and the work actually performed. 26 A. 256, *Succession Schmidt*.

4. The auctioneer may retain out of the proceeds of sale of property sold by him, under the orders of the probate court, his commissions and the expenses of the sale. 29 A. 437, *Succession Dowler*.

5. Two dollars is the charge fixed by law for affixing seals, and one dollar for raising them. 29 A. 747, *Succession Harris*. See NOTARY, No. 6.

6. The general privileges must be paid by the mortgage which is least ancient. See PRIVILEGE, IV. (b).

7. An estate is liable for the costs incurred by the executor to maintain the will. See COSTS, III. (d), No. 1.

8. For charges of insolvents and mortuary proceedings, see PRIVILEGE, IV. (b).

9. An executor cannot charge the estate for superintending a plantation. 21 A. 545, *Succession Sprowl*.

10. Where landed property belonging to a succession is employed as pasture and for raising fruit, and is subject to a mortgage which the mortgagee constantly threatens to foreclose, and cannot be rented, and the attention of some one is constantly required to preserve the fences, fruit trees, and attend to the collection of its revenues, the executor is authorized to employ a keeper or agent, and pay him, with privilege, a reasonable salary. 30 A. 133, *Succession Dorville*.

B. Fees of counsel.

1. An executor, who is an attorney at law, and a member of the law firm whose services were employed to settle the estate, can allow his firm, nor himself, no compensation. 24 A. 492, *Succession of Liles, Sr.*; 15 L. 397; 5 A. 567.

2. The vendor's privilege is superior to the attorney's fees. See PRIVILEGE, IV. (b), No. 3.

3. The succession cannot be made liable for the fees of the attorney employed by one of the heirs, to sue for the destitution of the curator or other representative. 27 A. 412, *Wailes & Mathews v. Succession Brown*.

4. When the succession is provided with a competent lawyer, neither he nor the administratrix can impose an onerous charge to the estate by employing additional counsel. 27 A. 551, *Succession Gayle*. LUDLING. C. J., *dis-senting*: No law compels the administratrix to employ only one lawyer. *Ib.*

5. The widow, domiciled in Mississippi, and who is entitled to one-half of the personal property after paying the debts, independently of any will, cannot be made to contribute to the expenses of attorney's fees, incurred by the testamentary executrix to settle the contestations arising under the will. 28 A. 183, *Succession Hampton Elliott*.

6. No attorneys' fees should be charged to the succession for defending a suit by the forced heirs to reduce the will which bequeathed the whole property to the executrix. 27 A. 589, *Succession Hasley*.

7. Five per cent. is a reasonable compensation for an attorney on an estate of five thousand dollars. 29 A. 745, *Succession Harris*.

8. When the public administrator is not entitled to attorneys' fees, see c. § 1, No. 7.

9. Further, for attorneys' fees, see ATTORNEY, II. (c).

c. *Commissions of administrator, etc.*

§ 1 In general.

1. An executor is never entitled to receive more than his commissions, which the law fixes as his exclusive remuneration for services rendered in the mortuary proceedings. 15 A. 625, *New Orleans v. Baltimore*.

2. The public administrator cannot interfere nor claim a commission where the widow was administering in her capacity of tutrix, and a creditor sought to be appointed administrator, but the matter was compromised and the widow appointed. 24 A. 354, *Succession Durand*.

3. An executor, with seizin, having qualified, demanded an inventory, but turning over the estate to the heirs, who offer to pay the debts and legacies, before the taking of the inventory, has a right to his commissions. 25 A. 323, *Hale v. Salter*.

4. One of two executors, who qualifies, is entitled to the whole commission. *Id.*

5. The public administrator who closes an estate, when little is to be done, is entitled only to two and a half per cent. commission for collections. 26 A. 662, *Succession E. Hart*.

6. An executor who is dismissed is not deprived of his commission. 27 A. 331, *Succession Brown*.

7. The public administrator has no right to appear in a succession where the widow is present. If he does, and obtains the provisional administration notwithstanding her opposition, he will be entitled to no commission nor attorney's fees. 27 A. 575, *Succession Miller*.

8. The public administrator, who is an heir, and who has no right to the dative executorship in his former capacity, will be entitled to charge only two and one-half per cent. commission. 30 A. 422, *Succession Bougère*.

§ 2 Property or amount on which commissions are allowed; and right thereto as affected by the seizin.

1. A curator who refused to take the oath of allegiance, and went into the Confederate lines, became *functus officio*, and lost all claims to commissions, except on sums received by him prior to the abandonment of his trust. 19 A. 23, *Succession Poindexter*; 3 A. 624.

2. Executors who have not, under the will, seizin of the whole estate, are entitled to charge commissions only on the amount which came into their hands. C. C. 1677; 22 A. 367, *Succession Day*.

3. A clause in the will, giving the executor a per cent. on the individual property of the deceased, is to be calculated on the mass of the assets; this cannot be considered as a universal legacy, and the executors are compelled to pay a *pro rata* of the debts. 24 A. 243, *Succession Kock*.

4. An executor is not entitled to charge commissions on money in bank collected by his predecessor, nor on a note due by him and on which a commission has already been charged. 30 A. 423, *Succession Bougère*.

§ 3 Forfeiture of commissions, and of executors who are legatees.

1. A dative testamentary executor, who is also a legatee, is entitled to commissions. 24 A. 321, *Succession Cordeviolla*.

2. Where an administration, instead of being beneficial, has been injurious to a succession, the administrator will not be allowed commissions. 4 A. 578; 24 A. 490, *Succession of John Liles, Sr.*

3. A dative executor cannot retain in his hands the amount of the legacy due to him; article 1628, C. C., applies to testamentary executors. 25 A. 648, *Succession Caballero*.

4. A dative testamentary executor, actually administering sixteen thousand

dollars, and presenting thereagainst charges amounting to some nine thousand dollars, consisting of funeral charges, attorney's fees, his commissions, clerk's fees, notary and appraiser's fees and auctioneer's charges, reduced by the court to six hundred dollars, is unfaithful in the discharge of his duties, and deserves no commission. 25 A. 648, *Succession Caballero*.

5. An executor, who is a legatee, is entitled to no commission. 27 A. 589, *Succession Hasley*.

(g) *Joint administrators, etc.*

1. One of two executors who qualifies, is entitled to the whole commission. 25 A. 323, *Hale v. Salter*.

(h) *Property of third persons found in the succession.*

1. One who claims property inventoried in the succession, cannot assert his claim by opposition to the administrator's account. 15 A. 228, *Cathey v. Kerr*.

2. The validity of a title claimed adversely to a succession, administered by a curator, cannot be enquired into in the form of a rule taken by the curator against such adverse claimant, to show cause why a sale of the property provoked by the curator should not be confirmed; a direct action is necessary. 15 A. 661, *Succession Renneberg*.

IX. OF FOREIGN SUCCESSIONS; LAWS BY WHICH SUCCESSION PROPERTY IS DISTRIBUTED; AND THEIR CONFLICT.

(a) *In general.*

1. The appointment of a judicial factor or administrator by a foreign court of justice, confers no power upon such judicial factor to act in Louisiana, upon the simple registry of the decree of the foreign tribunal for his appointment. 15 A. 405, *Henderson v. Rost*.

2. The powers of administrators, appointed in different States, extend only to the limits of the sovereigns creating them, and that neither allows the other to intermeddle with any assets within their respective jurisdictions. 17 A. 16, *Burbank v. Payne & Co.*; 19 A. 42; 8 L. 508; 2 N. S. 20.

(b) *Administration of the same succession under different jurisdictions; and powers, rights and obligations of administrators, etc., creditors and legatees.*

1. When a person dies, leaving property in two or more States, his property in each is considered a separate succession, for the purpose of administration, the payment of debts and the decision of claims of parties asserting title thereto, and the power of administrators appointed in different States, extends only to the limits of the sovereigns creating them. 17 A. 15; 23 A. 23, *Succession Milton Taylor*; R. S. 1870, sec. 3677.

2. Judicial proceedings, in France, cannot affect the real property of the deceased, in Louisiana, which is a separate succession from that in France, and must be administered according to the laws of Louisiana. 21 A. 365, *Succession Widow Grehan*; 1 R. 263; 14 A. 633; 9 R. 438.

3. An executor residing in a foreign country or in another State, cannot receive letters of executorship from the courts of Louisiana without giving bond. 21 A. 394, *Succession Young*.

X. OF INSOLVENT SUCCESSIONS.

1. A mortgagee who assists at a meeting of the creditors of an insolvent succession, and does not require a sale for cash for so much as is necessary to pay him, is bound by the terms fixed by the meeting. 23 A. 542, *Frère v. Robson*.

2. No more than two hundred dollars can be charged for funeral expenses in an insolvent succession. 28 A. 149, *Succession Hearing*.

3. A jury is not permissible in the probate court. See JURY, I. Nos. 3, 4.

SUMMARY PROCESS.

I. IN GENERAL.

II. OF THE RIGHT TO SUMMARY PROCESS; WHEN REQUISITE AND THE EXCEPTION THERETO.

I. IN GENERAL.

1. A rule by the administrator is not the proper remedy to recover property in possession of third persons. 18 A. 512, *Succession Moore*; 8 A. 11.

2. A judgment creditor cannot proceed by rule to make the sureties of the sheriff liable for money collected by the latter on a writ of *fi. fa.* 22 A. 78, *Soulé v. Worsham*.

3. The right to proceed by rule is confined to incidental matters which may arise in the course of a suit; it cannot be resorted to, except in cases expressly allowed by law. 22 A. 245, *Hernandez v. Hugh*.

4. In summary proceedings, jury trials are not had unless expressly allowed. 22 A. 293, *Pesant v. Heartt*.

5. The ejectment of a tenant is to be tried summarily. *Ib.*

6. Where the record does not show what are the rights of a plaintiff in rule, seeking to make an ex-sheriff account for property sequestered whilst acting in his official capacity, nor the nature of the proceedings in which the property has been sequestered, the rule will be dismissed. 16 A. 256, *Grayson v. Paris*.

II. OF THE RIGHT TO SUMMARY PROCESS; WHEN REQUISITE; AND THE EXCEPTION THERETO.

1. A judgment was rendered against two defendants for a certain sum of money; the wife of one appeared and ruled the judgment creditor to show cause why she should not be discharged on depositing in the hands of the sheriff one-half of the amount of said judgment; *Held*: That the proceeding is novel and unauthorized by law. 22 A. 251, *Dalton v. Viosca*.

2. The seizing creditor may, *by rule*, call upon those claiming prior mortgages or privileges, to show cause why they should not be erased. The defendants are bound to show the validity of their prior incumbrances before excepting to this mode of proceeding. 24 A. 256, *Merrick v. Courtland*. See Nos. 9, 15.

3. A proceeding by rule, to render the estate and the administrator personally liable, *in solido*, for the debt of plaintiffs, who are ordinary creditors, when the estate is shown to be insolvent, is irregular, and should be set aside. 24 A. 517, *King v. Succession Trigg*.

4. Where a rule has been continued indefinitely, notice must be given to the adverse party of its subsequent fixing. 20 A. 544, *Hennen v. N. O. & C. R. R. Co.*

5. A rule against the surety of a tax collector being fixed in chambers, and no action taken thereon, without further notice to the defendant in rule, it could be set for trial and submitted. It is only in the parish of Orleans where notice of trial must be served, when the rule has been continued indefinitely. 28 A. 553, *State v. Floyd & Golding*.

6. The plaintiff, who was the adjudicatee, having refused to comply with the demand of the sheriff to deposit the amount of the adjudication, until a decision on the third opposition, properly ruled the sheriff and third opponent to show cause why the sheriff should not make title on the ground that the third opponent had no valid mortgage. 25 A. 145, *Blair & Co. v. Taylor & Irving*.

7. Third parties holding shares of stock belonging to or standing in the name of a stockholder, in pledge, cannot be made parties or proceeded against by rule in a proceeding by a purchaser of the stock at sheriffs sale, to compel a transfer of the stock on the books of the company. The third persons should be made parties by petition and citation. 22 A. 156, *Weiser v. Smith*.

8. A proceeding by rule against the surety on a forthcoming bond given by intervenor, cannot be extended to the principal. 17 A. 315, *Ledda v. Maumus*.

9. The judgment creditor, may by rule, call upon those claiming prior privileges and mortgages, to show cause why they should not be erased. 27 A. 293, *N. O., Canal & Banking Co. v. Recorder Parish Point Coupée*; 2 A. 649; 15 A. 334; 24 A. 256; C. C. 3379, 3166; 29 A. 355, *New Orleans National Bank v. Raymond*. See Nos. 2, 15.

10. A rule is not the proper remedy to cause the transfer of mortuary proceedings from one parish to another where the succession is also opened, because the judgments already rendered would be annulled by this proceeding. 28 A. 19, *Succession Lee*.

11. Under the act of 1873, in a contest for a judicial office, the plaintiff may proceed by rule, and the defendant is not entitled to a jury. 25 A. 238, *State ex rel. Morgan v. Kennard*; 658, *Woodruff v. Lobdell*.

12. The act entitled "an act to regulate proceedings in contestation between persons claiming a judicial office," No. 11, of 1873, which provides for proceeding by rule in such cases, and fixes the delay of appeal, does not violate that clause of the fourteenth amendment to the constitution of the United States, which declares "nor shall any State deprive any person of life, liberty or property, without due process of law." 92 U. S. (Otto's), 480, *Kennard v. Louisiana ex rel. Morgan*; 1873, pp. 51, 78.

13. A rule is the proper proceeding to compel the purchaser at probate sale to comply. See COURTS, II. (d), 6, No. 5.

14. Not to annul tax judgments, see JUDGMENT, XI. (a), No. 3.

15. The writ of seizure and sale having been recorded previous to the wife's mortgage, the latter may be cancelled on rule. See MORTGAGE, VIII. (b), No. 7.

16. A proceeding by rule to erase mortgages is properly taken before the court issuing execution. See MORTGAGES, IX. No. 2.

17. The inscription of a judgment rendered for the price of slaves, may be erased by a rule. See REGISTRY, II. (e), 2, A. No. 2.

18. Summary process against tax collectors, in chambers, 1873, p. 181; in contestation for judicial office, 1873, pp. 51, 78; 1877, E. S., p. 197.

SUNDAY.

1. Closing of stores. See CORPORATIONS, II. (b), No. 5. Sunday counts in the delay of citation, but is excluded in delays of appeal. C. P. 318, 575.

SURETYSHIP.

I. OF ITS CONSTITUTION, NATURE AND VALIDITY.

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|-------------------------------|--|
| (a) <i>In general.</i> | (c) <i>Surety's consent and evidence thereof; validity of the principal, and inequality of the accessory obligation.</i> |
| (b) <i>Surety's capacity.</i> | |

II. OF ITS EXTENT; INTERPRETATION, AND EFFECTS.

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|--|---|
| (a) <i>As between the creditor and surety; and of counter-sureties.</i> | 4) Proceedings against the surety; exceptions he may plead; and of co-sureties. |
| 1) <i>In general.</i> | A. <i>In general.</i> |
| 2) <i>Letters of credit.</i> | B. <i>Co-sureties and plea of division.</i> |
| 3) <i>Counter-sureties; and collateral security to indemnify the surety.</i> | C. <i>Plea of discussion.</i> |
| | (b) <i>As between the debtor and surety.</i> |
| | (c) <i>As between co-sureties.</i> |

III. OF ITS EXTINCTION.

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|---|---|
| (a) <i>In general.</i> | 1) <i>In general.</i> |
| (b) <i>Creditor's acts affecting the surety's right of subrogation.</i> | 2) <i>Acts affecting the terms of the principal contract.</i> |

IV. OF LEGAL AND JUDICIAL SURETIES.

I. OF ITS CONSTITUTION, NATURE AND VALIDITY.

(a) *In general.*

1. Where a party acting as agent, loans the money of his principal, he is not liable as surety to his principal, even if between the agent and borrower a charge is made for indorsing, when in fact there is no indorsement. 20 A. 269, *Shiff v. Shiff*.

2. The sureties on a bond given by an intervenor to release an attachment, cannot be held liable as judicial sureties; no law allowing such bonds to be given, they must be considered as conventional, and the liability of the sureties must be determined by the conditions mentioned therein. 22 A. 535, *Dawson v. Morton & Williamson*. See PLEADING, VIII. (d), 1), No. 11. ATTACHMENT, IX. (b). SEQUESTRATION, II. (d), 1), Nos. 2, 3.

3. Change of fees will not release a surety on the official bond of officers, 1877, No. 12.

(b) *Surety's capacity.*

1. The law does not authorize the tutrix to bind her ward, nor the administratrix to bind the succession, as surety, even with the authorization of a family meeting, approved by the court. 20 A. 269, *Shiff v. Shiff*.

2. A respite is based on the supposed solvency of the debtor; the applicant for a respite may become a judicial surety. 20 A. 143, *Gailard v. His Creditors*.

3. There is no law which prohibits a lawyer from being security; any rule of court to the contrary is of no validity. 26 A. 468, *Daly v. Duffy & Schonshausen*.

4. A surety may be good although he is not the owner of tangible property to the amount of the bond, within the jurisdiction of the court. 27 A. 685, *State ex rel. Fosdick v. Judge Sixth District Court*; 662 *State ex rel. Liquidators v. Judge Sixth District Court*.

5. A surety who owns personal property is good. 27 A. 698, *State ex rel. Pontchartrain Railroad Company v. Judge of the Superior Court*. See IV. Nos. 3, 6, 7.

6. Qualifications, 1876, p. 109.

(c) *Surety's consent and evidence thereof; validity of the principal, and inequality of the accessory obligation.*

1. The rule, that the surety cannot plead matters personal to the principal obligor, cannot be applied to a case where the principal is alleged to be a slave, and consequently incapacitated from contracting from motives of public policy. 15 A. 38, *Levy v. Wise*.

2. The plea of coverture is personal to the wife, and does not relieve the surety, who, in this respect, may be bound beyond his principal. 16 A. 448, *Kennedy v. Bossiere*; C. C. (3005), (2982), (3029). See OBLIGATIONS, III. (a), No. 14.

3. Parol is inadmissible to prove that one of the contracting parties to a written instrument, acted as agent and surety for another. 19 A. 472, *Bogan, administrator v. Calhoun*. See EVIDENCE, XV. (f).

II. OF ITS EXTENT, INTERPRETATION AND EFFECT.

(a) *As between the creditor and surety; and of counter-sureties.*1) *In general.*

1. There is no distinction between the surety who has bound himself *in solido* with the debtor, and the surety who has not so expressly bound himself. 15 A. 522, *Jones v. Fleming*. See OBLIGATIONS, VIII. (e).

2. When there is no consideration as to the principal, the surety is not bound. 15 A. 485, *Adams v. Cury*.

3. It is necessary to obtain the consent of the surety of the lessees, who deliver possession to the lessor, before he can enter into a new lease; otherwise

the surety is released. C. C. 2675, 2676, 2677, 2679 and 3030; 5 R. 213: 23 A. 438, *Denouvion, tutrix v. Hodgson & Lytle*.

4. The stockholders who bind themselves to see that the note given by the corporation shall be paid, are sureties, and bound solidarily. 26 A. 624, *Kilgore v. Tippit*.

5. A conventional bond for an indefinite amount, to secure the faithful performance of the duties of an officer in a private corporation, is valid and can be enforced. 27 A. 433, *Canal & Claiborne Street Railroad Co. v. Succession Armstrong*.

ON RE-HEARING: The amount being left blank in the bond, the suretyship is not complete. *Ib.*

6. The sureties on the bond of the parish treasurer, are liable for his failure to pay money which came into his possession as such, whether his term of office had expired or not. 26 A. 243, *Clements v. Biossat*. See MORTGAGE, I. No. 4:

7. As against a surety, the courts will not lend their aid to affect him beyond the plain and necessary import of his undertaking, nor assist against him in completing an imperfect or defective instrument. 6 H. 292, *McMicken v. Welep*.

8. The sureties of a notary, are not liable for money deposited with the notary to erase mortgages. See NOTARY, No. 2.

9. Nor for money received from one person to pay another. *Ib.* No. 9.

10. They are liable for a forgery committed by the notary. *Ib.* No. 10.

11. An agreement wherein the obligor binds himself as surety, that the note of a third person shall be paid at maturity, but that his guarantee shall not be used, unless in case of his death, must be construed as securing the note, and judgment may be recovered thereon if the note be not paid at maturity. 28 A. 768, *Washburn v. Van Norden et als*.

12. A surety is bound by the accounts which his principal rendered to the creditor. 19 Wall. 198, *United States v. Housen*.

13. Binding force of a judgment against the principal, as to the surety, see JUDGMENT, XV. (a), 3).

14. The registry of a parish treasurer's bond, does not operate a mortgage as to the surety. See MORTGAGE, I. No. 4.

15. A mortgage given to secure a person who signs as surety, is valid. See MORTGAGE, III. (c), No. 4.

16. When the nominal lessee will be considered as surety, see PROVISIONAL SEIZURE, No. 20.

17. "I am his security for twenty-five hundred dollars," only covers the first equal amount of debit allowed, and when that amount is covered by credits, the suretyship is at an end, although by closing up the account afterwards, the amount due by the principal is less than the amount of suretyship. 30 A. 737, *Gerson v. Hamilton*.

2) Letters of credit.

See BILLS AND NOTES, V. (c).

3) Counter-sureties; and collateral security to indemnify the surety.

1. A mortgage granted by the maker, to the indorser, as security against liability, is not an accessory to the principal obligation. 15 A. 646, *Bowman v. McElroy*.

2. A third person, who pledges certain articles for the debt of another, does not thereby become surety for the debt. 23 A. 477, *James v. Pike, Lapeyre & Bro.*

3. Where a bond is given to a surety, to hold him harmless from any and all liability on the bond signed by him, to refund what he may be compelled to pay on said bond, and to have it cancelled within a specified time, in default thereof, to pay in his hands a sum necessary to cover the amount in litigation; after the expiration of the delay, the obligee can sue on said bond, and is not bound to exhaust all recourse against his principals. 26 A. 124, *Connery v. Cannon et al.*

4. A surety, into whose hands a certain sum was deposited, as guaranty of indemnity, and who afterwards purchases the obligation whereon he went security, is bound to refund to his principal the difference between the amount deposited and the cost of his purchase. 28 A. 834, *Davis v. Levy*.

4) Proceedings against the surety; exceptions he may plead; and of co-sureties.

A. In general.

1. No motion is necessary to compel the administrator to file a brief statement of his condition, to ascertain the amount of succession funds in his hands, if execution has been returned *nulla bona*, before suing the security. 23 A. 576, *Christian v. Lassiter*.

2. The surety has no right to plead a prescription which does not inure to the benefit of his principal. *Ib.*

3. Plaintiff may proceed against the surety, where further process against the principal is unavailing. 26 A. 543, *Deblanc v. Levasseur*.

4. A surety who desires to interpose the plea of discussion, must do so *in limine*; he must point out unincumbered property, and must furnish the costs to carry the discussion into effect. 29 A. 843, *Hill & Co. v. Bourcier*; 11 L. 136; 13 L. 276.

5. The surety is not estopped by the recitals of the lessee's condition, in a lease. See ESTOPPEL, No. 39.

6. When the principal is dead, the creditor may sue the surety immediately. See PROVISIONAL SEIZURE, No. 10.

7. The surety cannot object to a tardy return of the writ. See SUCCESSION, VII. (e), 5), No. 1.

8. For surety on a sequestration bond, and proceedings against him, see SEQUESTRATION, II. (d), 3).

9. The same on an attachment bond, see ATTACHMENT, IV. (a); IX. (a).

10. The same on an injunction bond, see INJUNCTION, V. VIII.

11. The surety of a tax collector cannot urge that the taxes collected were illegal. See TAXES, III. (c), 3).

12. For proceedings against a tax collector's surety, see TAXES, III. (c), 4).

13. *A. fi. fa.* against the principal, on a forthcoming bond, returned *nulla bona*, previous to the seventy days, will authorize proceedings against the surety. 30 A. 159, *Stewart v. Lacoume*; 384, *Pinard v. George*.

14. For surety on appeal bonds, see APPEAL, III. (d); (e).

B. Co-sureties; and plea of division.

1. A fund deposited by the principal debtor with one of two co-sureties, as collateral security, should inure to the benefit, proportionally, of the other co-surety. 15 A. 579, *Smith v. Conrad*.

2. Defendants who deny their obligation of suretyship, cannot claim a division. 26 A. 625, *Kilgore v. Tippit*.

3. Sureties, who do not plead a division, are bound *in solido*. See OBLIGATIONS, VIII. (e), No. 4.

C. Plea of discussion.

1. The surety on a bond given by a constable, to avail himself of the plea of discussion, must point out the property of his principal and furnish the means to carry on the discussion. 22 A. 169, *Heath v. Shrempp*.

2. The plea of discussion may be filed in *limine litis*, by way of exception; it neither admits nor denies plaintiff's claim; nor is the depositing of the money to carry into effect the plea, such an execution of the judgment as would deprive defendant from appealing. C. P. 715; C. C. 3403; 9 R. 71; 10 R. 73; 12 A. 363; 23 A. 773; 24 A. 515, *Alter v. Pickett*.

3. When money is not tendered to carry on the discussion, and the principal has gone into bankruptcy, the plea of discussion must fail. 25 A. 559, *Pipes v. Nersworthy*.

4. The surety on the note, condemned *in solido* with his principal, has a right to discuss the principal's property. 27 A. 203, *Matthews v. Kemp*.

5. The surety cannot plead discussion before judgment is rendered against

the principal who is sued with him in the same action. 28 A. 236, *Andrews v. Biossat*.

(b) *As between the debtor and surety.*

1. A surety on an attachment bond cannot recover indemnity against the principal before making any payment, unless he brings himself within article (3026), C. C. 22 A. 335, *Edwards v. Prather*.

2. A surety who has paid a debt when it was still in force, has the right to recover from the principal what he has paid, although the original obligation may be prescribed at the date of the surety's claim. 24 A. 564, *Long v. Templeman*.

(c) *As between co-sureties.*

1. One of two solidary obligors, who pays the whole debt, can recover the one-half against his co-obligor. See PAYMENT, II. (b), 1), No. 8.

III. OF ITS EXTINCTION.

(a) *In general.*

1. The act of 1869, p. 45, which provides that within twenty days after its passage, all auctioneers' bonds in force shall expire, and that the sureties thereon shall not be liable, etc., applies to acts of the principals, occurring after the twenty days mentioned. 26 A. 538, *State v. Blohm et als*.

(b) *Creditor's acts affecting the surety's right of subrogation.*

1) *In general.*

1. The form of the contract by which a surety binds himself for the payment of the debt, in case the debtor should not himself satisfy it, does not affect the surety's right to plead, in bar of the action against him, his discharge in consequence of a prolongation of the term of payment, without his consent. 15 A. 522, *Jones v. Fleming*.

2. A surety on a tutor's bond may demand the cancellation of his bond, when, without his consent, any of his co-sureties are released. 16 A. 358, *Succession Pratt*; 15 A. 206. See MINORS, I. (d), No. 3.

3. Where no act is shown, which would prevent the surety from being subrogated to plaintiff's right, the latter's forbearance or delay in enforcing his rights, does not discharge the surety, who has his remedy under C. C. (3026). 18 A. 652, *Elmore v. Robinson*; C. C. (3030); 2 A. 188.

4. The failure of the merchants to exact payment for their advances, when they had funds sufficient in hands from the proceeds of the crop, discharged the mortgage given by a third person to secure the advances. 21 A. 636, *Darby and Tremoulet v. Fuselier*.

5. An extension granted to the principal by the administrator of a succession, who has no power to do so, does not discharge the surety. 25 A. 182, *Landry v. Delas & Co*.

6. A delay without consideration granted to a parish treasurer to settle up his indebtedness, does not release his sureties. 26 A. 243, *Clements v. Biossat*.

7. Forbearance to sue does not release the surety, who might have paid the debt at maturity, and enforced the obligation against his principal. 28 A. n. r., *Case, receiver v. Sarpy*.

8. The fact that collateral security has been taken from a principal, does not release the surety, unless there was an agreement with the principal to extend the payment of the bond. 6 H. 279, *United States v. Dodge*.

9. A surety is not released by the failure of the creditor to sue the principal or to enforce his privilege. If any of the securities, by which the debt is secured, are lost by the fault of the creditor, the surety is discharged to the extent of their value. 29 A. 844, *Hill & Co. v. Bourcier et al*.

10. A landlord who enters into a new contract of lease with his lessee, does not thereby release the surety given on a former lease, for any balance remaining due. *Ib*.

11. Where the property, subject to the usufruct, has been sold with the

consent of the owners, the surety of the usufructuary may sue for his discharge. See SERVITUDES, I. No. 5.

2) Acts affecting the terms of the principal contract.

1. Where each of two parties purchased one undivided half of certain lands, and furnished for the price, their joint and several promissory notes, secured by mortgage, on the land purchased; *Held*: That these parties must be considered as purchasers and principal obligors, each for one-half only of the property purchased; and, that, consequently, the re-purchase of one-half by the original vendor, from one of these purchasers, releases the remaining purchaser from his obligation as surety, as it renders impossible that subrogation to which he would be entitled under articles (2157) and (3030), of the Civil Code. 15 A. 594, *Succession of Daigle*.

2. Where the lessee avails himself of his privilege to renew, the surety will not be bound on the renewal, unless he consented to the extension. 21 A. 727, *Fasnacht v. Hener*.

4. Evidence offered by the surety to prove that there was a consideration for the extension of time granted to the principal by the creditor, should be received. 29 A. 732, *Allison v. Thomas*.

IV. OF LEGAL AND JUDICIAL SURETIES.

1. Judicial bonds must be construed with reference to the law under which they are given. Any clause which is superadded must be rejected, and any that is omitted, supplied. 19 A. 81, *Guion, administrator v. Succession Guion*; 12 A. 69; 11 L. 174, 196. See BONDS.

2. A judgment ordering the husband to deliver to his wife, separated from bed and board by a previous judgment in the same suit, her undivided half interest in certain property, or pay *in solido* with the surety on the bond furnished for the dissolution of the injunction restraining him from disposing of the property during the pendency of the suit for separation, the amount of the judgment is null as to the surety, he being no party to the last judgment. 22 A. 576, *Riley v. Her Husband*.

3. A surety is not required to own immovable property, but to have property sufficient at the time of signing the bond, to answer for its amount. 23 A. 279, *State v. Judge Seventh District Court*. See I. (b).

4. In becoming obligors on judicial bonds, the parties contract in reference to the law. 23 A. 705, *Green v. Huey, sheriff*.

5. In a suit against the surety of an auctioneer, the court will presume that the auctioneer was regularly qualified, although the defense is that the auctioneer had taken neither the license, nor the oath required by law. 26 A. 538, *State v. Blohm et al.* See AUCTIONEER.

6. A surety having property in another State, is good, provided his residence be within the State. 27 A. 662, *State ex rel. Salamander Insurance Co. v. Judge Fourth District Court*; 685, *State ex rel. Fosdick v. Sixth District Court*. See I. (b).

7. Although the surety may possess only personal property, not tangible, he is good. 27 A. 697, *State ex rel. Pontchartrain Railroad Co. v. Judge of the Superior District Court*; 27 A. 685, *State ex rel. Fosdick v. Judge Sixth District Court*. See I. (b).

8. A surety on a tutor's bond, has the right to ask his release, when one of his co-sureties has been previously released. See MINORS, I. (d).

9. Sureties on judicial bonds are liable *in solido*. See OBLIGATIONS, VIII. (e), No. 17.

10. Change of fees, not to release surety on official bond of officers. Acts 1877, No. 12.

SURPLUSAGE.

See LAWS, II. (d). SURETYSHIP, IV.

SURRENDER.

See ARREST, IV. (b). BANKRUPTCY. CRIMINAL LAW, V. (d). INSOLVENCY.

SURVEY AND SURVEYOR.

1. See BOUNDARY. EVIDENCE, XIV. (b); XXIII. (g). NEW ORLEANS, II. (g), 3). PUBLIC LANDS, II. (a); III. (b), 2), D.; (c), 3), B. § 1; (d); IV. (a).

2. Parish surveyors may employ deputies, 1874, p. 262; survey of Tangipahoa river, 1877, E. S., p. 23.

TANGIPAHOA.

Archives from the recorder, 1870, p. 121; return day of appeals, 1877, p. 20; survey of Tangipahoa river, 1877, E. S., p. 23; memorial to congress, 1878, p. 96.

TAX COLLECTOR.

1. See TAXES, III. (c); (d).

2. They may sue to recover taxes. See PLEADING, I. (c), 8), No. 2.

3. Qualification, 1870, p. 45; cannot hold office under police jury, 1877, E. S., p. 7.

TAXES.

I. IN GENERAL.

II. OF THEIR CONSTITUTIONALITY AND LEGALITY; AND THE LIABILITY TO TAXATION.

(a) *Constitution, treaties and laws of the United States.*

(b) *Constitution and laws of the State.*

1) In general.

2) Equality and uniformity of taxes; and legislative delegation of the power of taxation to subordinate corporations.

A. In general.

B. *Local contributions in the nature of taxes; and delegation of the power of taxation to subordinate corporations.*

3) Objects of taxation and exemption therefrom; repeal of laws levying taxes; and retrospective taxation.

(c) *Subjection of the power of taxation to judicial control.*

III. OF THEIR ASSESSMENT AND COLLECTION.

(a) *In general.*

(b) *Assessment and its correction; appointment, powers, rights, and obligations of assessors.*

(c) *Appointment, powers, rights and obligations of the collector; and of his bond and sureties.*

1) In general.

2) Execution, formalities, and validity of the bond.

3) Extent of obligation under the bond; its penalty; and extinction of the surety's liability.

4) Proceedings against defaulting collectors and their sureties.

(d) *Proceedings against delinquent tax payers; tax sales; and right of redemption.*

1) In general.

2) Formalities of sale; description of property and its owner; and evidence of title.

3) Effect of sale; its avoidance; and right of redemption.

I. IN GENERAL.

1. The ordinance of the city of New Orleans, levying a special railroad tax, was legal at the time it was passed, and as it conferred equitable if not vested rights upon the land holders, it could not be repealed, if susceptible of repeal, except by some positive provision of law, or the clearest and most patent implication. 15 A. 89, *New Orleans v. Southern Bank*.

2. The subscription notes of a mutual insurance company constitute part of the capital stock of the company subject to taxation. 18 A. 675, *City v. State Mutual Insurance Company*.

3. The capital of a bank, deducting therefrom the bonds which are not taxable, may be taxed. 23 A. 307, *State v. Mechanics' and Traders' Bank*.

4. A tax illegally assessed, but paid to the city, cannot be recovered, because there is a natural obligation to support the city government. 25 A. 454, *Factors' and Traders' Insurance Company v. City*; but see No. 11.

5. Where the police jury levied a tax in the prevision that they might be liable for a conditional obligation; *Held*: That the injunction against the enforcement of the same, not only for the surplus, but also for the obligation itself, was properly made perpetual, at least until the condition would happen. 26 A. 155, *Lorie v. Hitchcock, collector*.

6. The auditor has no authority to levy a tax, but he has a right to calculate the amount necessary to pay out the interest on the debt of the State, and notify the tax collectors thereof. 24 A. 205, *Flower v. Legras*; 26 A. 558, *State v. McGinnis*. See MANDAMUS, I. (b), No. 26.

7. Taxes are not debts, but forced contributions. 26 A. 697, *Geren v. Gruber*.

8. Taxes are not debts, and cannot be seized nor compensated; they are payable in money. 28 A. 836, *Shreveport v. Gregg & Ford*; 7 A. 194; 26 A. 694, *Cooley on Taxation*, 13. See No. 14.

9. When the evidence on which a tax judgment was obtained, is not offered in evidence, the presumption will be in favor of its correctness. See EVIDENCE, III. (d), No. 5.

10. The taxes having been levied to pay interest on certain municipal bonds, the holders thereof are entitled to an injunction to prevent a diversion of the funds. See INJUNCTION, II. (a), Nos. 9, 10, 11.

11. There is a natural obligation to pay taxes. See QUASI CONTRACTS, II. No. 4; but see *supra*, No. 4.

12. Necessity of recording taxes. See REGISTRY, II. (a), Nos. 9, *et seq.* PRIVILEGE, V. VI.

13. A sale of real estate should not be executed, unless all the taxes be paid. 28 A. N. R., *City of New Orleans v. Campbell*; O. B. 45, fo. 481. See SHERIFF, II. (b), 1). SALE, I. (a), No. 8.

14. Taxes cannot be compensated with the over payments made on another year's taxes. 30 A. 541, *City of New Orleans v. Davidson*; 554, *Same v. Same*. See No. 8.

15. Penalties remitted, when, acts 1870, E. S., p. 96; collection postponed, 1871, p. 15; penalties remitted, 1871, pp. 19, 196; 1873, p. 98; 1875, p. 106; also granting extension; 1877, p. 26; refunded, 1871, p. 210; sinking fund bond taxes of New Orleans postponed, 1874 p. 92; certain state taxes not collectible, 1874, p. 94; park tax, 1875, p. 104.

16. For acts levying taxes, see REVENUE.

17. Voluntary contribution of, 1877, how receipted for, vouchers receivable for taxes, 1877, p. 6; warrants issued to constitutional officers receivable for the general fund, 1877, p. 71; only for the year for which they are issued, 1877, E. S., p. 80; assessing and collecting taxes, 1877, E. S., p. 136; amended, 1878, pp. 234, 229.

18. For special tax authorized by the parishes, see the name of each parish.

II) OF THEIR CONSTITUTIONALITY AND LEGALITY, AND THE LIABILITY TO TAXATION.

(a) *Constitution, treaties and laws of the United States.*

1. Under the treaty of 1853, French subjects are exempt from the tax of ten per cent. on property inherited by them in this State. 18 A. 403, *Succession Amat*. This tax is repealed, 1877, E. S., p. 125.

2. Subjects of Bavaria are exempt by the consular convention entered into between the United States and that kingdom, on the 21st of January, 1842, from the tax of ten per cent. on successions in this State, going in whole or in part to persons not domiciliated in the United States. 19 A. 369, *Succession Crusius*; 10 A. 391; 18 A. 403; 1877, E. S., p. 125.

3. Article 17 of the revenue law of 1869, which imposes a license tax upon banking corporations, is in violation of section 10 of article 1, of United States constitution. 23 A. 271, *State v. Southern Bank*.

4. A tax laid by the State on the business of one dealing in foreign bills of exchange, is not an interference with the constitutional power of congress to regulate commerce. 8 H. 73, *Nathan v. Louisiana*.

5. The tax of ten per cent. imposed by the statute of Louisiana upon estates inherited by foreigners, does not violate any provision of the constitution of the United States. 23 H. 445, *Frederickson v. Louisiana*.

6. For repeal of the ten per cent. tax on absent heirs, see acts of 1877, No. 86, p. 125, E. S.

(b) *Constitution and laws of the state.*

1) In general.

1. The penalty imposed by act No. 178, of 1867, as amended by act No. 90, of 1865, on merchants for selling hay without first having it inspected, is not a tax or impost upon produce. States can pass inspection laws. 21 A. 256, *State v. Fosdick*. See CONSTITUTION, II. (c), 1), No. 2.

2. The legislature has the right to impose a commutation tax. 24 A. 87, *Louisiana Lottery Co. v. City*; 11 A. 733; 9 Wall, 50. See (b), 3), No. 18.

3. A tax for school purposes, on property, is not unconstitutional. Article 118 of the constitution, provides for a poll tax, but does not prohibit any other tax. 24 A. 205, *Flower v. Legras*.

4. Parish taxes can be collected from owners of property situated in incorporated towns, when such property is not expressly exempted by law from such tax. 25 A. 445, *Maurin v. Chs. Smith*.

5. The building of levees is a public enterprise, which concerns incidentally the whole State, and the tax levied for their construction is legal and constitutional. 26 A. 559, *State v. Maginnis*. See (b), 2), A. No. 6; B. No. 2.

6. A notary's income may be assessed. 27 A. N. R., *City v. R. J. Kerr*.

7. The payment of ten per cent. of the proceeds of unredeemed pledges, to the metropolitan police district, is not a commutation of taxes. 27 A. 648, *City v. Metropolitan, etc., Bank*.

2) Equality and uniformity of taxes; and legislative delegation of power of taxation to subordinate corporations.

A. In general. •

1. The 117th section of the act of 1856, which was intended to amend an act entitled, "an act to consolidate the city of New Orleans, and to provide for the government of the city of New Orleans, and the administration of the affairs thereof, contemplated that the special railroad tax should be levied after the assessment roll was completed. 15 A. 123, *New Orleans v. Union Bank*.

2. Police juries have no right to discriminate between a resident and non-resident tax payer; an ordinance imposing a tax on the latter, is null and void. 16 A. 204, *Halloway v. Police Jury*.

3. The tax of one-quarter per cent., levied by act April 4th, 1865, upon the gross amount of sales of commission merchants selling upon consignment, goods consigned from other States, is unconstitutional. 19 A. 424, *State v. Kennedy & Co*. See LICENSE, Nos. 11, 31.

4. A tax levied upon the amount of business done by a merchant, is not unconstitutional. 25 A. 627, *State ex rel. Blackmore v. Graham, auditor*; 8 Wall. 124.

5. The State has power to authorize a municipal corporation to levy taxes, and to provide the means of collecting it. Penalties for non-payment may be imposed by the corporation under this authority. 26 A. 674, *Slack v. Ray*.

6. Act 82, of 1859, authorizing the police jury of Pointe Coupée to levy a tax to construct a levee, is constitutional. 20 A. 196, *Police Jury Pointe Coupée v. P. Colomb*. See 1), No. 5; 2), B. No. 2.

7. The constitution does not require that every tax shall be assessed throughout the State, but that taxation by the State shall be uniform throughout the State. Local taxes may be assessed under special statutes. 26 A. 493, 497, 491, *re-affirmed*; 27 A. N. R., *City of New Orleans v. Roudanez*.

8. The town of Plaquemines has no authority to levy a license on the occupation of keeping a warehouse and running a dray. 29 A. 261, *Plaquemines v. Roth*.

9. An incorporated company whose business is to compress cotton, is not

required to pay a tax on its dividends. 1 Woods, 296, *Cotton Press Company v. Collector*; 13 Statutes, 283.

10. The act of February 23, 1852, establishing the charter of the city of New Orleans, which declares that the rate per cent. of the tax to pay interest on the consolidated debt in each municipality, shall be in proportion to the indebtedness of each, is not in conflict with article 127, of the constitution of 1845, which declares that taxation shall be equal and uniform throughout the State. 2 Woods, 108, *Maenhaut v. New Orleans*.

11. Under the revenue act of 1871, the city of New Orleans could not levy more than two per cent. taxation. See NEW ORLEANS, II. (e), 1), No. 2.

12. The administrator of finance need not sign the tax bills. *Ib.*, No. 3.

13. Formalities required for the collection of city taxes. See NEW ORLEANS, II. (e), 1), No. 15.

14. For delegation of power to subordinate corporations, see CONSTITUTION, II. (c), 4). NEW ORLEANS, II. (e), 1).

15. A tax on every four hundred pounds of cotton raised, is unconstitutional. See POLICE JURY, No. 7.

16. See LICENSE.

17. Police juries may impose a license on grog shops. See POLICE JURY, No. 16.

18. Taxes imposed by police juries and municipal corporations, limited. 1877, p. 47.

b. Local contributions in the nature of taxes; and delegation of the power of taxation to subordinate corporations.

1. It is not the State tax roll which creates the indebtedness for the local tax, it is the ordinance which levies the tax. Hence, a person who has removed with his property out of the State, after the assessment of the State tax, but before any local tax is assessed, is not indebted for such local tax. 16 A. 118, *Templeton v. Board of Levee Commissioners*.

2. A tax for levee purposes, levied in local parts of the State, is constitutional. 16 A. 429, *Richardson v. Morgan*. See (b), 1), No. 5; 2), A. No. 6.

3. Local assessment for local improvements, is not taxation. 20 A. 497, *City praying, etc.*; 26 A. 1, *Daniel v. City*. See NEW ORLEANS, II. (e), 4).

4. The seventh section of the revenue law of 1871 prohibits municipal corporations from levying a tax, for any purpose, in any year, in excess of two per cent. on the assessed value of all property therein listed for taxation, and they must be governed accordingly. 23 A. 358, *State ex rel. v. Mayor and Administrators*.

5. Act No. 7, of 1870, and act No. 68, of 1870, are not inconsistent, the former limits the municipal tax to one and three quarters per cent. "provided it be sufficient to pay the interest on the consolidated debt and railroad bonds," the latter limits the tax to two per cent. 26 A. 498, *City v. Burthe*.

6. The constitution does not require that every tax should be assessed throughout the State, but that taxation by the State shall be uniform throughout the State. Local taxes by the city may be levied. 26 A. 493, *City v. Klein*. See (b), 2), A. No. 7.

7. Property annexed by the city of New Orleans, may be assessed to pay the debt existing previous to the annexation. 26 A. 498, *City v. Burthe*; 12 A. 515; 14 A. 505.

8. The metropolitan police tax assessed in the parish of St. Bernard, being equal and uniform in that parish, is constitutional, although not equal and uniform throughout the metropolitan district. 27 A. 396, *Galley v. Guichard, tax collector*.

9. By act 1872, p. 56, police juries are prohibited from levying and collecting any tax exceeding the hundred per cent. of the State tax, which amounts to four mills on the dollar, without authority from a majority of the voters. The levee tax, the school tax, the interest tax, are not State taxes within the meaning of the act. 29 A. 1, *Lafitte v. Morgans*.

10. The general assembly may delegate to municipal corporations, the power to levy licenses. 29 A. 283, *City v. Kaufman*; *Ib.*, *City v. Marx*; *Ib.*, *City v. Adler*. See LICENSE, 22.

11. No power has been given by the legislature to the town of Vermillionville, to impose any license taxes, such power exists only when specially granted to corporations. 28 A. 586, *Corporation of Vermillionville v. Mouton* See LICENSE, 22.

12. The city of New Orleans may set aside the writs of *fieri facias* issued by her, but the clerk is nevertheless entitled to his fees. See NEW ORLEANS, II. (c), No. 11.

13. For delegation of power to subordinate corporations, see CONSTITUTION, II. (c), 4).

14. For delegation of power as expressed in the title of an act, see CORPORATION, I. No. 7. SHREVEPORT, No. 3.

3) Objects of taxation and exemption therefrom; repeal of laws levying taxes; and retrospective taxation.

1. The act of congress of February 20, 1811, exempting land sold by congress from taxation for five years from the date of sale, has no application to lands donated by the general government to this State, and sold by the State. 15 A. 147, *Bishop v. Marks*.

2. By the act of 1856, a distinction is made between property belonging to a charitable institution, which is in use for the purpose of exercising the charitable objects of the institution, as for instance, the asylum, and other property belonging to the association and yielding revenues to its coffers. The former is exempt from taxation, while the latter has not the benefit of its exemption. 15 A. 389, *New Orleans v. Congregation Dispersed of Judah*. See NEW ORLEANS, II. (e), 2), No. 9.

3. The charter of the New Orleans Mechanic's Society, (acts 1821), does not exempt their property from taxation; and said property not being actually used for charitable purposes, but a revenue being derived therefrom, the same is liable to taxation. 27 A. 436, *New Orleans v. Mechanic's Society*.

4. A railroad in passing through a parish, is liable to assessment of a parish tax on the property of the road located within the parish, unless exempted by special law. 20 A. 334, *Hayes v. Hayman*.

5. The revenue acts of 1865, 1868 and 1869, do not impose any specific tax on cotton. 23 A. 511, *Abbott v. Britton & Kountz*.

6. Act No. 57, of 1874, can have no effect to prevent the collection of taxes, levied in 1872 for 1873. 26 A. 499, *City v. Louisiana Mutual Insurance Company*.

7. The act of 1866, No. 122, exempting certain property, occupied by the United States, from taxation during the war, was annulled by article 149 of the constitution of 1868. 21 A. 325, *Police Jury of Jefferson v. Burthe*.

8. If the law exempts other property than that specially authorized by the constitution, the taxes imposed on other property are not unconstitutional, but the property so exempted may be, nevertheless, taxed. 26 A. 702, *Morrison v. Larkin*; 27 A. 722, *State v. Maxwell*; 520, *City v. Peoples' Insurance Company*.

9. The transferee of the rights and franchises of the New Orleans, Opelousas and Great Western Railroad, (Charles Morgan), under foreclosure of the mortgage bonds issued by said railroad company, is liable to taxation upon the real estate, rolling stock, etc.; the ten years exemption from taxes after completion of the road, has lapsed by abandonment of the work. 28 A. 482, *State v. Charles Morgan*. See CORPORATIONS, I. No. 10.

10. LUDELING, C. J., *dissenting*. The road not being completed is exempt from taxation. *Ib.*

11. Upon the sale of the property and franchises of a railroad corporation, under a decree founded upon a mortgage, which in terms covers the franchises, or under a process upon a money judgment against the company, immunity from taxation upon the property of the company, provided in the act of incorporation, does not accompany the property in its transfer to the purchaser. The immunity from taxation in such cases is a personal privilege of the company and not transferrable. 93 U. S. (Otto's), 217, *Morgan v. Louisiana*.

12. The franchises of a railroad corporation are rights or privileges which are essential to the operation of a corporation, and without which its roads and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. Immunity from taxation is not itself a franchise of a railroad corporation, which passes as such without other description of the purchaser of its property. 93 U. S. (Otto's), 217, *Morgan v. Louisiana*.

13. ON RE-HEARING: The buildings and improvements erected on the property of the Female Orphan Asylum by the lessees, cannot be taxed as against said lessees. The improvements revert to the asylum on payment of a certain price; the lessees have only the use of said buildings, and this is not taxable. 29 A. N. R., *City of New Orleans v. Geo. W. Campbell*; 18 A. 513.

14. A statute authorizing the imposition of a tax according to a previous assessment, is not retrospective. 4 Wall. 172, *Locke v. New Orleans*. See III. (a), No. 2. LAWS, II. (c), No. 3.

15. The capital of the Sugar Shed Company, invested in the sheds, may be taxed. 26 A. 378, *Sugar Sheds v. Harris*.

16. Under a contract granting the right of way to Nicholson & Co., the transferrers of the St. Charles Street Railroad Co., the city agreed to exempt the depots of the company from taxation; the company was to pay a bonus to the city, on each passenger carried; the exemption is not binding on the city, because under its charter of 1856, under which the contract was effected, the legislature directed the city to assess and levy a tax on all real estate, whether owned by individuals or corporations. 28 A. 497, *City of New Orleans v. St. Charles Street Railroad Co.*

17. The laws of 1871, 1872 and 1874, providing that on payment of a license of one thousand dollars, the insurance companies shall be exempt from all other taxation, is unconstitutional. The legislature has no power to exempt from taxation. 28 A. 756, *City of New Orleans v. Lafayette Insurance Co.*

18. The decision in 24 A. 86, *Louisiana State Lottery v. City*, so far as it conflicts with the above, is overruled. *Id.* See (b), 1), No. 2.

19. When the tax roll is so amended as to show the value of the improvements, and proof thereof is made, although the lots are exempt from taxation, being the property of the Female Orphan Asylum, the lessee thereof to whom belongs the buildings, and against whom the assessment is made, should be condemned to pay the tax on the relative value of said improvements. 28 A. 426, *Thomas B. Lee v. City of New Orleans*. See No. 13.

20. A bank organized since the constitution of 1868, cannot be exempt from taxation on its capital. 27 A. 684, *City v. Metropolitan, etc., Savings Bank*; 646, *City v. People's Bank*.

21. It is the actual and real capital of a corporation, represented by the property in which it has been invested, which is subject to taxation, and not its nominal capital. If the capital be invested in non taxable securities, it is not taxable. 29 A. 855. *City v. New Orleans Canal and Banking Company*.

22. For exemption from city taxation, see NEW ORLEANS, II. (e), 2).

23. The residence of the officiating clergyman, or parson, is not exempt from taxation under sections 2 and 4, and section 3243, Revised Statutes. 30 A. 259, *First Presbyterian Church v. City of New Orleans*.

24. An exemption which applies equally to all tax payers, is not unconstitutional. 30 A. 554, *City of New Orleans v. Davidson*.

25. The property pretended to have been purchased by the commission to be created under act No. 31, of 1871, as a site for the State House, never was transferred to the State, it was properly taxed in the name of the owners. 30 A. —, *State v. Bloomer & Girardey*.

26. For the same subject, see NEW ORLEANS, II. (e), 2).

27. The notes representing money loaned at interest by a corporation, may be taxed. 30 A. 876, *New Orleans v. Mechanics' and Traders' Insurance Company*.

28. Consolidated bonds of New Orleans exempt from taxation, 1860, No. 3; also charitable institutions for the relief of orphans, 1870, p. 33; New

Orleans Turner's Association, 1870, p. 72; Southwestern Bible Society, 1870, E. S., p. 118; St. Patrick's Hall Association, 1874, p. 64; certain water crafts, 1874, p. 261, but see NEW ORLEANS, II. (d), 2), No. 13; cotton and woolen goods manufactured here, 1875, p. 107; church, school, cemetery and property of charitable institutions yielding a revenue, to be assessed, 1877, E. S., p. 121.

(c) *Subjection of the power of taxation to judicial control.*

1. To complain of the assessment rolls, allegations must be made of injury, and surprise by the complainant. Objections of informality are too late after homologation. 20 A. 336, *Hayes v. Heyman*. See III. (b), No. 6.

2. Section 63, of the revenue act of 1869, prohibiting courts from interfering with tax collectors, applies simply to captious and frivolous objections, and to persons in whose name the property has been assessed. 22 A. 246, *Buckner v. Masters, tax collector*.

3. The revenue acts prohibiting courts from interfering with State tax collectors, in the discharge of their duties in collecting licenses or taxes, does not apply to parish taxes. 22 A. 465, *Gilmer v. Hill*.

4. Under section 58, of the revenue act of 1871, upon the dissolution of an injunction to arrest the collection of taxes, plaintiff and his surety should be condemned to pay twenty per cent. damages on the amount of the taxes. 24 A. 205, *Flower v. Legras*.

5. Where property has been previously forfeited to the State, and the tax payer enjoins the sale by the tax collector, under act 47, of 1873, the one hundred per cent. damages do not apply. 26 A. 702, *Morrison v. Larkin*.

6. The one hundred per cent. damages on taxes enjoined, applies to cases where the assessed tax payer enjoins, and not a third person, although he may be the owner. 26 A. 698, *Geren v. Gruber*.

7. The presentation to the board of assessors of an unsworn statement of the value of the property, the assessment of which is sought to be reduced, will not be sufficient to form the basis of an application for relief to the courts. 28 A. 417, *Frost, guardian v. City of New Orleans*; 19 A. 474; 21 A. 439; 28 A. 414, *City v. Buckner*.

8. Power of courts to mandamus State officers, see CONSTITUTION, II. (e), 2), No. 2.

9. Power of courts to levy taxes, see COURTS, I. Nos. 12, 13, 14, 15.

10. Act No. 69, of 1869, is constitutional. See EXECUTION, I. No. 8.

11. Difference between a *fi. fa.* and an imposition of taxes by courts, see COURTS, I. No. 15.

12. Taxes shall not be ordered levied by the judge to pay judgments rendered against a parish, 1877, E. S., p. 87.

III. OF THEIR ASSESSMENT AND COLLECTION.

(a) *In general.*

1. The first and second sections, approved January 29, 1858, amendatory of sections 103 and 104 of the charter of New Orleans, approved March 12, 1857, do not make the payment of the taxes therein mentioned, from January first to March first, annually, dependent as to time on the will of the contributors, but simply suspends, until after the first of March, the action of the city to enforce its lien on the personal property of the delinquents, or to sue out an injunction, as provided by law. 15 A. 614, *New Orleans v. Clark*.

2. The levying of a tax on a previous assessment, is constitutional. 21 A. 105; *Frellsen v. Mahan*. See II. (b), 3), No. 14; 10 A. 677.

3. By act of 28th March, 1867, the collection of taxes, from 1860 to 1864, were extended to 1870. 21 A. 325, *Police Jury of Jefferson v. Burthe*; 328, *Same v. Metairie Race Course Association*; 329, *Same v. Foucher*.

4. Where the defendant does not personally owe the taxes, the sheriff has no right to pay them, and decrease plaintiff's credit on the *fi. fa.* by their amount. 23 A. 482, *St. Romes v. Macarty*.

5. The State taxes of 1872, were due only in 1873, and the penalties accrued only from December, 1873. 26 A. 726, *State v. Edgar*.

6. An assessment levied by virtue of a judgment to pay the same, if including warrants not forming the basis of the judgment, is null. 28 A. N. R., *O'Connor et als. v. Favrot et als.*

7. An assessment which exceeds the amount necessary to pay the judgments forming its basis, is null. 29 A. 105, *Stevenson v. Weber, collector, etc.*

8. The police warrants issued previous to 1874, are receivable in payment of any licenses, taxes and debts due or to become due to the parishes of Orleans, Jefferson and St. Bernard, without regard to the apportionment of the metropolitan tax, levied in each parish, composing the metropolitan district. 28 A. 423, *City of New Orleans v. City Hotel et al.*; 27 A. 494, *State ex rel. Lubie v. Administrator of Finance*; 24 A. 37, *City v. Mount, treasurer*. Act Nos. 33 of 1874; 41 of 1870; 1877, p. 27.

9. It is the duty of courts to order the levy and collection of a tax whenever a judgment is rendered against a parish, whether or not the limit of taxation be already reached. 28 A. 613, *Duperier v. Police Jury of Iberia*.

10. The presumption is that the taxes due have been included in the charges paid by the plaintiff who purchased. See EVIDENCE, No. 1.

11. The tax payer when sued is not entitled to a jury. See JURY, I. No. 9.

12. A judgment for taxes need not describe the property assessed. See NEW ORLEANS, II. (e), 1), No. 5.

13. How new rolls must be made in case of loss of originals, 1877, E. S., p. 81; of the assessment, act No. 96, E. S. of 1877; back taxes due to New Orleans payable in warrants, etc., 1877, E. S., p. 208; what property shall be assessed, 1878, p. 229.

14. Act No. 7 of 1875, postponed the collection of all taxes until the 1st of November, 1875; a sale made after the passage of the act and previous to the 1st of November, is null and void. 30 A. 871, *Workingmen's Bank v. Lannes*.

(b) *Assessment and its correction; appointment, powers, rights and obligations of assessors.*

1. Where property has been omitted in the general State assessment, a supplemental assessment may be afterwards made; in this case it is not necessary that the formalities of time, manner and place, required by law, should be observed. 15 A. 89, *New Orleans v. Southern Bank*.

2. When, in an assessment of a lot of ground, neither the number of the square, nor the number of the lot, nor the name of the street on which the lot fronts, is given, such assessment is wanting in particulars, essential to the identification and description required by the 26th section of the revenue act of 1847, which requires the tract or lot of land to be designated at least by its boundaries. 15 A. 15, *Woolfolk v. Fonbene*.

3. Want of proper description of the property will vitiate the assessment roll of a corporation. 20 A. 560, *Brusle v. Sauvé*. See (d), 2), No. 17.

4. An illegal or insufficient assessment, is a radical defect. 29 A. 510, *Thibodeaux v. Keller*; 15 A. 15; 14 A. 709; 30 A. —, *New Orleans v. V. Reaud*. See III. (d), 2).

5. An assessment giving the number of the square, the name of the four streets, the name of the owner, the number of the lot and the measurement, (22x119), the two streets of which it forms the corner, is sufficient and valid. 29 A. 416, *City v. Day*. See No. 19, and III. (d), 2).

6. The tax payer is bound by the assessment, unless he specially alleges and proves that he had good reasons for not having the assessment rolls corrected, and that he tried in vain, in the manner prescribed by law, to have the correction made. 21 A. 439; 23 A. 782, *City v. Walker*; 27 A. 521, *Serrill v. City*. See II. (c), No. 1.

7. The assessor, in default of a return from the company, is authorized to take as a basis of assessment, the published sworn statement of the company, showing its assets, and if the assessment rolls be not opposed, as required by law, they are binding. 19 A. 474, *State v. Louisiana Mutual Insurance Co.*

8. Courts have no jurisdiction to reduce excessive assessments after the delay given to the tax payers to correct their assessment, has expired. 26 A. 697, *Geren v. Gruber*.

9. Authority to correct errors of assessment, is solely confided to the State board of assessors, 1871, No. 42. 26 A. 753, *State v. Widow De St. Romes*.

10. Under act No. 55, of 1865, the assessors were entitled to three per cent. on the amount of taxes, gross receipts; they were removed in July, 1868, several months afterwards the general assembly, levied a tax of one per cent. on the basis of the assessment; the assessors were not entitled to any percentage on this tax. 23 A. 780, *State v. Graham, auditor*.

11. The State having paid the assessors for the preparation of the rolls, had a right to levy another tax from them without paying anything to the assessors. 25 A. 309, *State ex rel. Assessors v. Graham*.

12. The object of section 40 of the revenue law of 1871, ordering publication in the official journal, during thirty days, of the opening of the assessment rolls, is to give the tax payer notice that he may have an opportunity to have errors corrected; a publication in any other than the official journal is good if the tax payer has notice thereof. 25 A. 197, *Gay v. Hebert*.

13. MORGAN, J., *dissenting*: Where a man's property is seized under execution, he has a right to see that all the formalities required by law have been complied with. *Id.*

14. The assessment consists of the descriptive lists and the valuation of the property by the clerk, recorder and sheriff. 26 A. 696, *Geren v. Gruber*.

15. The discrepancy between the original assessment roll and the copies, is controlled by the former. 26 A. 696, *Geren v. Gruber*.

16. After final judgment has been rendered, defendant cannot take a rule on the city to reduce the assessment. 27 A. 668, *City of New Orleans v. Mechanics' and Traders' Bank*; 666, *Lefranc v. City*.

17. A rule is not the proper proceeding to amend or correct an assessment. 28 A. 429, *Charles Schmidt v. City*.

18. An assessment against a railroad company, which does not indicate on what particular property it is made, such as: two hundred and fifteen acres of woodland, twenty-eight mules, one passenger car, seven flat cars, in block, twenty-five thousand dollars, is null. 30 A. 626, *Clinton & Port Hudson Railroad Company v. Tax Collector*. See (d), 2), No. 17.

19. Under the following: "assessment district 7, square 373, between St. Ann, Main, White, Dupré,—2 corners, 9 lots, 28.2 × 100, 132 × 141, 4, 126 × 141, 6, 188 × 100," no title under execution of a tax judgment can be divested; no purchaser placed in possession. 30 A. 295, *Marin v. Sheriff and City*. See (d), 2), No. 17.

20. Arbitrators appointed under act No. 96, of 1877, have no power to decide what property is exempt from taxation, as, for instance, the franchise of a railroad company. 30 A. 262, *State ex rel. City Railroad v. Board of Assessors*.

21. An assessment against another than the real owner, is null, even if the owner's title be not recorded in the conveyance office. The assessor must, by diligent inquiry, ascertain the real owner. 30 A. 295, *Marin v. City and Sheriff*; 871, *Workingmen's Bank v. Lannes*.

22. For costs of city tax suits, see CLERKS OF COURT, No. 8.

23. A law authorizing the future imposition of a tax, according to a past assessment, is not retroactive. See LAWS, II. (c), No. 3.

24. The assessors under the acts of 1875, became *functus officio*, on the 20th of April, 1877, when the act creating the board of State and city assessors went into operation. The appropriation made by the acts of 1877, pp. 77, 79, was for the benefit of the new board, because, the amount corresponds with their salaries, and is wholly inadequate for that of the others, and because the new board did the work. 30 A. 235, *State ex rel. Paris, etc. v. Jumel, auditor*.

25. Assessments in New Orleans, 1875, p. 32.

(c) *Appointment, powers, rights and obligations of the collector; and of his bond and sureties.*

1) In general.

1. Tax collectors must be careful to receive only such warrants as are issued

under specific appropriations, and are specially made receivable for taxes, and under section 3337, R. S., they must indorse on each warrant the date of its reception, the name of the tax payer, and the amount of his taxes so paid with such warrant; and must make oath that the warrants turned over are the identical ones received. 25 A. 413, *State v. Lemarié*.

2. The tax collector has no right to receive parish warrants in payment of taxes, unless specially authorized under the law; he will be compelled to pay currency for the warrants so illegally received. 27 A. 459, *West Baton Rouge v. Morris*.

3. The senate having rejected the nomination of a tax collector, in January, 1871, made under the provisions of act of 1870, p. 131, which did not create a new office, his appointment by the governor during the recess of the senate, was in violation of article 60 of the constitution, and therefore null. 24 A. 177, *Edwards v. Evans*. See Nos. 9, 10.

4. The two dollars and twenty-five cents allowed the collector should not be included in the amount of taxes; no penalty can be calculated thereon. 26 A. 716, *State v. Eclipse Towboat Company*.

5. The tax collector is entitled to two dollars for each deed of sale, but where the one person buys a whole tract which had been subdivided into many lots, and gets one deed, only two dollars can be charged. 27 A. 363, *State ex rel Wiltz v. Clinton, auditor*.

6. A tax collector is entitled to commissions only on the amounts collected by him. 28 A. N. R., *State v. R. O. Hebert*.

7. Act 42, of 1871, made it the duty of the tax collectors outside of New Orleans to take a description of taxable property, and to deliver the same to the board of parish assessors, fixed the compensation for such services, with a proviso that the fees of the tax collector should not be more than two thousand dollars; therefore no cause of action can arise in favor of the tax collector against the parish, based on an ordinance providing for extra compensation for the furnishing of such descriptive taxation list. 28 A. 306, *Beauregard v. Parish of East Baton Rouge*.

8. A parish treasurer properly refuses to accept warrants from the tax collector, where the tender is not accompanied with the oath that the collector had not speculated in warrants. 26 A. 279, *Simmons v. Boullet*.

9. The governor, and in his absence, the lieutenant governor, may remove a tax collector and appoint a successor. 29 A. 243, N. R., *State ex rel. Attorney General and Carey v. John Barrow*; 25 A. 119, 396; 26 A. 537; constitution 1868, article 53. See Nos. 3, 10.

10. The governor has the authority to remove a tax collector and appoint a successor. 26 A. 537, *State ex rel. Weber v. Fisher*. See CONSTITUTION, II. (d), Nos. 2, 3. OFFICE AND OFFICERS, No. 26.

11. Although the law may require a collector to receive taxes in coin or current money only, yet, if he receive drafts for such taxes, he may enforce their collection against the acceptor. 18 Wall. 421, *Miltenberger v. Cooke*.

12. The act of 1864, creating the office of tax collector, was repealed by the revenue act of 1868. The officers elected under the former act cannot continue in office after the appointment of their successors under the latter act. See INTRUSION IN OFFICE, No. 9.

13. The town of Natchitoches can exact a bond from the tax collector. See NATCHITOCHES, No. 1.

14. Blank licenses, 1877, p. 31; fees of tax collectors, except in Orleans, 1877, E. S., p. 6; penalties for refusing to turn over tax rolls, 1874, p. 80; tax collector ineligible to a parish office, 1877, E. S., p. 7.

2) Execution, formalities, and validity of the bond.

See OFFICE AND OFFICER. MORTGAGE, I. No. 4; must be approved by the auditor, 1877, p. 68.

3) Extent of obligation under the bond; its penalty; and extinction of the surety's liability.

1. The sureties, on a tax collector's bond, when sued for moneys collected

by their principal, and not accounted for by him, cannot urge that the taxes and licenses collected were illegally assessed, and that their principal was not legally elected collector. 27 A. 568, *Mayor of Homer v. Merrit et als.* See SURETYSHIP, II. (a), 4), A; B.

4) Proceedings against defaulting collectors, and their sureties.

1. The auditor is authorized by law to give certificates of the account kept with tax collectors, and such are receivable in evidence, to prove the amount due by the defaulting tax collector. 26 A. 268, *State v. Succession Masters.*

2. Settlements made by the tax collector with an authorized police jury, cannot be disturbed by the latter's successors. 26 A. 277, *Simmons v. Boullt.*

3. Where nothing shows that the tax collector was prevented from returning blank licenses to the auditor in his settlement, they are not admissible in evidence to show that the amount claimed by the State should be reduced *pro tanto*. 26 A. 125, *State v. Ranson.*

4. Although the amount received by the tax collector has not been paid into the treasury, yet if the sums received their proper destination, and the parish was thereby benefitted, no judgment should be rendered against the collector to pay over a second time. 26 A. 278, *Simmons v. Boullt.*

5. A tax collector need not be published as a defaulter before being sued. 28 A. 553, *State v. Wm. D. Floyd & Golding.*

6. See also SURETYSHIP, II. (a), 4). A.

7. Extension to tax collectors, 1873, p. 44.

(d) *Proceedings against delinquent tax payers; tax sales; and right of redemption.*

1) In general.

1. The State tax collector having made his return of delinquent tax payers, and having sworn that he found no other property liable to seizure and sale, for said taxes, in accordance with the revenue act of 1869, No. 114, the title to the property of the delinquent tax payers became vested in the State, and the authority of the tax collector ceased, although he was commissioned to collect back taxes. A judgment against him, in favor of the tax payer, would not bind the State. 23 A. 136, *Hall v. Hall.*

2. Where the tax levied is in excess of a legal assessment, the city has the right to remit the surplus, and sue for the balance. 26 A. 497, *City of New Orleans v. Burthe.*

3. A tax payer, whose lands have been forfeited to the State, under the revenue acts of 1871, has no right to complain of their sale, under act No. 47, of 1873. 26 A. 701, *Morrison v. Larkin.*

4. The assessment and proceedings to enforce the city tax, being in the name of the lady, as she acquired the property, her husband need not be made party to the proceedings for judgment. 28 A. 677, *Mrs. Lavergne v. City of New Orleans.*

5. A judgment by default is unnecessary in tax suits, which the law assimilates to executory proceedings, which should issue upon the simple filing of the tax bills and proof of publication. 26 A. 471, *City v. Rawlins.*

6. A draft not honored by the drawee, and, by agreement, not to be considered as a payment of the tax unless paid, will not authorize an injunction against a sale by the tax collector. 27 A. 338, *Garner v. Anderson, tax collector.*

7. A judgment for city taxes against a succession, need not decree the claim to be paid in due course of administration. 28 A. 180, *City v. Stewart.*

8. The assessment in the name of —, long since dead, and publication of said name, will authorize judgment for taxes in favor of the city. An injunction taken out by the testamentary heir against the execution of said judgment, will be dissolved. 28 A. 670, *Irwin, tutor v. City.*

9. WYLY, J., *dissenting*: An assessment, publication and judgment, in the name of a dead man, is not sufficient to bring his legatee, the delinquent, before the court. *Ib.*

10. Due publication of the notice to the tax payers, as required by law, is a valid citation. The legislature regulates the mode of citing parties. 26 A. 708, *City of Shreveport v. Jones*. But see act No. 96, of 1877.

11. The advertisement of the tax payer's name, has the effect of a citation duly served, and should be subject to the same rule. Notice published to the "Heirs de St. Romes," is not a valid citation, and the judgment for taxes must be reversed. 28 A. 17, *City v. Heirs de St. Romes*.

12. An assessment and publication, in lieu of citation, by the city of New Orleans, in the name of the deceased owner, without prefix of estate or succession, is good. 28 A. 240, *City v. Ferguson*.

13. A notice in the name of "estate of —," for city taxes, is sufficient. 28 A. 180, *City v. Estate Samuel Stewart*.

14. A tender made by a mortgagee at the residence of the purchaser, who has no agent here, and who is part of the time absent from the State, to redeem the property sold for taxes, if made within the legal delay, is sufficient. 27 A. 209, *Alter v. Shepherd et als*.

15. The tax collector may seize other property than that assessed, of the tax payer, without waiting for a decision on the question of priority between the State and certain seizing creditors of the movable property. 28 A. 352, *Manheim Berwin v. M. Legras*.

16. The effect of such a sale is to extinguish the mortgages resting thereon. See MORTGAGE, VIII. (a), No. 14.

17. An allegation that defendant holds under a tax sale which is an absolute nullity, cannot be construed into an admission of defendant's title. See EVIDENCE, XII. (j), 2), No. 1.

18. Collection of taxes, 1877, E. S., p. 136; privilege limited to three years, 1877, p. 142, sec. 36.

2) Formalities of sale; description of the property and owner; and evidence of title.

1. An illegality in the assessment of property sold for taxes is a radical defect, and not a mere informality which may be cured by the lapse of five years from the date of the sale. 15 A. 15, *Woolfolk v. Fonbene*. See III. (b).

2. When the assessment is not made in the manner required by law, a sale of the property assessed for taxes by the collector, will be null. 15 A. 15, *Woolfolk v. Fonbene*.

3. When the assessment roll, the ordinance of the police jury levying the tax, and the adjudication of the property, are not shown, a monition will not be homologated. See MONITION, No. 1.

4. The law does not require the registry of a collector's sales in the office of conveyances out of the city of New Orleans, nor are we advised that a recording is necessary in the parish of Orleans. 16 A. 228, *Alderson v. Sparrow*; 11 L. 438.

5. Those who claim under tax sales, must show that all the requirements of the law have been fulfilled, under pain of nullity. They must show the assessment and its legality. 19 A. 185, *Brady v. Offutt*. But see article 118 of the constitution of 1868, making tax collector's deeds *prima facie* evidence of valid sales.

6. In a proceeding for a tax sale, if the owner's succession be duly represented, the appointment of a *curator ad hoc*, to represent the *absent* or *unknown* owner, under the act 1858, is null, and renders the sale invalid. 19 A. 25, *Gernon v. Handlin*.

7. A sale for taxes made under an assessment, in the name of an absentee, to whom the property never belonged, when the real owner is a resident of the parish, and his title is of record, is null. 19 A. 185, *Brady v. Offutt*; 6 N. S. 348; 7 L. 50; 10 L. 283; 13 L. 205; 4 A. 248; 6 A. 542; 8 A. 19; 10 A. 329; 14 A. 210. See Nos. 15, 16.

8. When the owner is unknown, and a *curator* is appointed by the justice, and proceedings are conducted contradictorily with him in a tax sale, this will be sufficient. 20 A. 323, *Pursell v. Porter*.

9. When the names of the four streets bounding, and the number of the square of ground sold at tax sale, are given, as changed by the council, the description is sufficient. 20 A. 323, *Pursell v. Porter*. See No. 17.

10. A mere notarial act of sale, by the United States revenue tax collector, without an offering and an adjudication, made twenty-five miles from the place of distraint, is an absolute nullity, and the price paid need not be tendered back by plaintiff, who claims the property sold. 26 A. 189, *Johnson v. Dunbar, administrator*.

11. A judgment for a municipal tax, obtained against one not the owner of the property sold, is utterly null and void, and the purchaser acquires no title. 26 A. 730, *Desormeaux v. Moylan*; 735, *Jacobshagen v. Moylan*.

12. A tax collector has authority to sell lands which have been forfeited to the State. 27 A. 338, *Garner v. Anderson*.

13. Act No. 47, of 1873, is not unconstitutional in providing for seizure and sale, by the tax collector, of property liable to taxation. 27 A. 19, *McMillen v. Anderson*. See REVENUE, No. 1.

14. Act No. 47, of 1873, giving the right to the tax collector, to seize and sell without judicial formality, is not in conflict with the fourteenth amendment of the constitution of the United States. 95 U. S. (Otto's), 41, *McMillen v. Anderson*.

15. When the tax collector's sale was made as against a person assessed, who had no title to the land, the sale is null. 28 A. 537, *Delaroderie v. Mrs. A. Hillen, tutrix et als.* See No. 7.

16. The assessment stands in lieu of a judgment, and if there be no assessment or judgment against the true owner, the tax collector can make no valid sale. 29 A. 509, *Thibodeaux v. Keller*; 30 A. 176, *Fix v. Succession Dierker*.

17. If the advertisement be vague, the tax sale is null. 29 A. 510, *Thibodeaux v. Keller*; 30 A. —, *Gusman v. Susan Berryman et als.* See No. 9; (b), Nos. 3, 4, 5, 18, 19.

18. See act No. 47 of 1873, p. 98; private sales authorized by tax collectors, 1874, No. 105, p. 154.

3) Effect of sale; its avoidance; and right of redemption.

1. The purchaser at a tax sale declared to be invalid, is entitled to the value of improvements made by him. 19 A. 25, *Gernon v. Handlin*.

2. The judgment ordering the redemption should condemn the owner to pay the amount of the bid, interest, etc. 24 A. 525, *Coleman v. Baker*.

3. The right of redemption is accorded *ex gratia*. 26 A. 697, *Geren v. Gruber*.

4. A mortgagee has the right to redeem property sold for taxes. 27 A. 208, *Alter v. Sheperd*. (N. B.—*All legal or judicial mortgage creditors now have that right. Acts 1875, p. 34.*)

5. A property sold in 1873, for taxes of 1871, may be seized again by the tax collector, and sold for the taxes of 1872. 27 A. 425, *McAlister v. Anderson, tax collector*.

6. WYLY, J., *dissenting*: The State has no right to treat her sale as null, keep the money and resell the property. *Ib.* See No. 17.

7. A legal notice must be given to the party to be ousted, as in all summary proceedings, before the purchaser at tax sale, under act No. 47 of 1873, can be put in possession. 27 A. 705, *State ex rel. Norcross v. Judge Fourth District Court, parish of Orleans*.

8. The formal tender by article 407, C. P., is not required, in action to redeem land sold for taxes; a simple offer of the amount of the bid, interest, etc., is sufficient. 5 A. 675; 24 A. 524, *Coleman v. Baker*.

9. When the tax collector's sale is an absolute nullity, plaintiff need not tender back the purchase price to recover the property. 26 A. 189, *Johnson v. Dunbar, adm'r.*

10. Plaintiff should have tendered the amount of taxes paid by the vendee holding under simulated sale, to be entitled to damages for the unlawful withholding of the property. 26 A. 445, *George v. Campbell*.

11. One who sues to annul a tax title, need only offer the proportion of the tax due by him where he is only part owner. The auditor's title is not a complete bar to the suit. 28 A. 650, *Winter v. Atkinson*.

12. Under article 118, of the constitution of 1868, and act No. 42, of 1872,

section 59, the tax collector's title cannot be treated as a mere nullity. 25 A. 237, *Coco v. Thieneman*.

13. A tax sale cannot be attacked collaterally by the mortgage creditor, who issued executory proceedings enjoined by one, who purchased the property at a tax sale since the mortgage. 29 A. 112, *Lannes v. Workingmens' Bank*. See No. 16; III. (a), No. 14.

14. The doctrine in the case of *Dupré v. Thompson*, 25 A. 504, is too broadly stated, giving the right to contest collaterally a tax sale. The dissenting opinion of judge Wyly is correct. 29 A. 112, *Lannes v. Workingmens' Bank*. See No. 16; *per contra*, OBLIGATIONS, VII. (b), 2), B. § 1, No. 17.

15. Under a sale made by the State tax collector, the purchaser is not entitled to be put in possession as long as the title has not become final. 29 A. 510, *Thibodeaux v. Keller*.

16. The mortgagee may intervene in a suit by injunction between the purchaser at a tax sale, and the sheriff, to prevent enforcement of his mortgage, and claim the nullity of the tax sale. See PLEADING, VIII. (d), 2), No. 4.

17. All taxes due to the State are extinguished by confusion, when she purchases the property at a tax sale; when, therefore, under the provisions of act 105, of 1874, the tax collector sells the same property, the State cannot seize it again for the taxes which accrued thereon during the period of its ownership. 30 A. 432, *Bradford v. Lafargue*. See Nos. 5, 6.

18. For right of redemption, see acts 1875, p. 34; 1877, E. S., No. 96.

19. Improvements how appraised, 1873, p. 178; two years possession will quiet the purchaser's title, 1873, p. 180.

TELEGRAPHIC DISPATCHES.

See EVIDENCE, XXV. (c), No. 2. OBLIGATIONS, VII. (a), 5), B. § 2, Nos. 8, 9.

TENDER.

1. EXECUTION, V. (d), 13), Nos. 3 *et seq.* OBLIGATIONS, VII. (d), 2); 3). PAYMENT, IV. TAXES, III. (d), 3). SALE, III. (d), 5), A. B.; VI. (c), Nos. 3, 4; VIII. (d), No. 5. APPEAL, I. (a), No. 1.

2. Money deposited with a clerk of court is not a payment. See CLERKS OF COURT, No. 11.

3. Tender of Confederate money. See CONFEDERATE MONEY, No. 9.

4. Costs against defendant, who admits the claim, but makes no tender. See COSTS, III. (a), No. 3.

5. The debtor cannot enjoin the execution before tendering the price paid for the litigious right. See INJUNCTION, II. (b), 1), No. 1.

6. Property sold to pay community debts cannot be recovered without a tender of the debt paid. See MARRIAGE, XIII. (e), 4), c. No. 3.

7. A real tender is unnecessary when the offer to pay is peremptorily refused. See OBLIGATIONS, VII. (a), 5), B. § 1.

8. The price used in paying the incumbrances existing at the time of the sale, under execution, must be tendered to the purchaser. See PETITORY AND POSSESSORY ACTIONS, I. No. 8.

9. Plaintiff may bring his action to annul a contract without refunding the amount received by him, where it would require a liquidation with other parties to ascertain his rights. See PLEADING, I. (c), 7), No. 2.

10. Pleading want of amicable demand is of no avail to defendant, who does not make a tender. See PLEADING, VI. (a), 1), No. 3.

11. A succession sale cannot be annulled unless the heirs return the purchase price. See SUCCESSION, VIII. (e), 7), D. No. 6.

12. Tender to redeem property sold for taxes, where, when, and by whom made. See TAXES, III. (d), 1), No. 14.

13. When a tender is not necessary, see TAXES, III. (d), 2), No. 10.

14. A formal tender is unnecessary to exercise the right of redemption in tax sales. See TAXES, III. (d), 3), No. 8.

15. Without a tender, the minor cannot proceed by hypothecary action to

enforce his mortgage on property over which a priority of mortgage was given for a loan used for the benefit of the minor. See *MINORS*, III. (i), No. 5.

16. A want of tender, set up *in limine litis*, against a suit for the nullity of a tax sale, should not be maintained, if the amount is not apparent or made to appear. 30 A. 310, *Barrow v. Lapène*.

19. The debtor who has made a tender, but no deposit, will be relieved from costs of court, but not from interest. 30 A. 383, *Aurich v. Wolf & Levy*.

18. When the money paid for the property bought at probate sale, has been used to pay the debts of the deceased owner, his heirs cannot reclaim the property without first paying back or tendering the sum thus used. 30 A. 891, *Sharkey, tutor v. Bankston*.

TENSAS.

Parish of, authorized to levy a road tax, 1870, E. S., p. 102; portion of, annexed to Franklin, 1870, E. S., p. 189; school board authorized to sell land, 1876, p. 130.

TERM.

1. Proceedings for the expropriation of property for public use C. C., (2608), are summary in their nature; but the statute does not require the district judge to sit in vacation. 16 A. 182, *Police Jury v. Manning*.

2. The term of the district courts for the parish of Orleans commences on the first Monday in November, and ends on the third day of July. 19 A. 292, *Bethancourt v. Stephens*; 21 A. 329, *Fisk v. Moss*; O. B. 38, fo. 264, *Fisk v. Gibbs, Bright & Co.*; 24 A. 289, *Blessey et als. v. Kearney et als.*; 29 A. N. R., *Marsoudet v. Clancey*. See *COURTS*, II. (e), No. 23.

3. A claim of ownership set up by a third person to certain property sought to be attached in a suit, cannot be adjudicated on a rule tried in vacation. 29 A. 241, *City of New Orleans v. Jno. A. Morris*.

4. For judgments rendered and signed out of term time, see *JUDGMENT*, IV. Nos. 1, 3, 4, 5.

5. An account must be homologated in term time. See *SUCCESSION*, VIII. (f), 4), No. 11.

6. See *NEW ORLEANS*, III. (g). *NEW TRIAL*, III. (c). *OBLIGATIONS*, VIII. (c). *SHERIFF*, I. (b). *INJUNCTION*, I.

7. For term of district courts, see *JUDICIAL DISTRICTS*.

8. Term of parish courts, 1874, p. 267; 1877, E. S., p. 63.

9. Term of Superior Criminal Court, 1878, p. 149.

TERREBONNE.

See *POLICE JURY*, No. 41; commissioners of indebtedness, 1874, p. 124; repealed, 1876, p. 93; suspension of clerk, 1875, p. 31.

THINGS.

I. OF PUBLIC THINGS.

(a) *Distinction of public things; title thereto; its acquisition and divestiture; and dedication to public use.*

1) In general.

2) Evidence, requisites, and effect of dedication to public use.

(b) *Administration and use of public things; their obstruction; and abatement of public nuisances.*

II. OF PRIVATE THINGS.

(a) *Distinction of private things.*

(b) *Ownership of private things and its modifications; acquisition and divestiture of title thereto.*

1) In general.

2) Expropriation of private property for public use.

I. OF PUBLIC THINGS.

(a) *Distinction of public things; title thereto; its acquisition and divestiture; and dedication to public use.*

1) In general.

1. Where property has been dedicated to public use, it is *hors de commerce*, and the donors can no longer claim ownership. 21 A. 244, *Baton Rouge v. Bird, sheriff*.

2. The tract known as the "open space," in the city of Shreveport, is common property, to the use of which all the inhabitants of the city are entitled in common, cannot be alienated by the city, nor acquired by private individuals. 22 A. 527, *Shreveport v. Walpole*.

3. The land being taken and occupied by the municipal corporation, without any forms of law, the claim of the owner for compensation should be allowed. 28 A. 171, *Bailey et als. v. City of Carrollton*.

4. Property donated to the inhabitants of a parish, on the express condition that a court house shall be built thereon, cannot be seized by the creditors of the parish, although only a small portion is actually used for the court house. 30 A. 65, *Police Jury of Plaquemines v. Foulhouse et. als.*

2) Evidence, requisites, and effect of a dedication to public use.

1. The sale of property bounded by an avenue, on a plan of a town which is referred to in the act of sale, as designating the position of the property sold, is a dedication of the avenue to public use, and the vendee, together with the public generally, have the right to use the whole width of the avenue. 15 A. 9, *Burthe v. Fortier*.

2. It would be unsafe to infer an intention to dedicate property to public use, from the fact that a line of dots is depicted on a plan made at the time; something more definite and precise is required, such as words indicative of the intention. 16 A. 404, *David v. City of New Orleans*.

3. MERRICK, C. J. *dissenting*: The prospectus issued refers to the dedication; the term *les cours des Dryades*, is sufficiently explicit. *Ib.*

4. There is no particular form necessary for a dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the purposes intended. 18 A. 563, *Pickett v. Brown et al.*; 3 A. 282; 7 A. 223, 498; 21 A. 244, *Baton Rouge v. Bird, sheriff*; 22 A. 526, *Shreveport v. Walpole*.

5. The adoption of the plan of the city for the boundaries and measurement of lots sold by one owning a large tract, and an acquiescence therein for a period of more than thirty years, bars all claims against the city for land taken up by the streets. 24 A. 194, *Arrowsmith v. City*.

6. Whoever buys real estate within corporate limits with reference to a plan which sets forth the public streets, cannot close the streets by fencing the same. The municipal authorities are authorized to cause the removal of the obstruction. 29 A. 630, *Sheen v. Stothart*; 4 A. 73; 20 A. 226; 3 A. 230; 22 A. 526.

7. The fact that the public was permitted to pass over a certain road during thirty or forty years, will not of itself constitute the place a *locus publicus*; there must be an intention on the part of the owners to dedicate it to public use. 26 A. 462, *Morgan v. Lombard*.

(b) *Administration and use of public things; their obstruction; and abatement of public nuisances.*

1. Public places within the limits of a corporation cannot be appropriated to private use, and individual corporators, as well as the officers of the corporation, have the right to prevent such appropriation and to sue for the demolition and removal of buildings on them by individuals. 15 A. 577, *Stevens v. Walker*.

2. Where steamboats navigated a river for a considerable length of time, it will be considered as a public highway, and prescription will not avail those seeking to obstruct the navigation by building bridges across the river. 20 A. 226, *Ingram v. Police Jury of St. Tammany*.

II. OF PRIVATE THINGS.

(a) *Distinction of private things.*

1. Promissory notes secured by mortgage, are movables. 21 A. 56, *Mille v. Dupuy*; C. C. 466, 3250, 3256.

2. A promissory note is an incorporeal thing. 22 A. 97, *Succession DePouilly*.

3. The right to the use of a pew in a church, is an incorporeal immovable. 23 A. 9, *Succession Gamble*.

4. Notes given for rent, are movables. C. C. 474, (465), 475, (467); 23 A. 11 *Succession Gamble*.

5. An engine and machinery, when attached to the sugar house, are immovable, but as soon as removed, become movables. 22 A. 117, *Citizens' Bank v. Knapp*. See No. 16; (b), 1), No. 2.

6. Materials collected for the purpose of raising a new building, are not immovable. 23 A. 284, *Beard v. Duralde*.

7. The machinery attached to the premises forms part of the immovable, and cannot be removed during the suit to foreclose the mortgage. 23 A. 749, *Theurer v. Nautré*.

8. Movables belonging to third parties, are not transferred with the plantation. 24 A. 129, *East v. Ealer*.

9. The mules owned by a lessee, and used on the plantation leased, are not immovables, and do not pass to the purchaser at the sale under foreclosure of the mortgage. 23 A. 141, *Citizens' Bank v. Grand*.

10. An iron safe cemented in a double brick vault, to the walls of the house, and attached in the same way to the soil by a brick foundation running down through the floor, put there by the owner of the house, is an immovable, and is acquired by the purchaser of a house at a public sale. 24 A. 43, *Folger v. Kenner*.

11. Horses used exclusively under the saddle, and in harness, and not in cultivation of the plantation, do not form part of the realty. 28 A. 749, *Lapène & Jacks v. D. C. McCan & Son*.

12. For buildings erected on lands, see ACCESSION, II. (a), No. 5.

13. For crops of lessees, seized by the roots under execution against the landlord, see EXECUTION, V. (d), 12).

14. All contracts relative to movables, may be proved by parol, see EVIDENCE, XIII. (b), No. 9.

15. Movables are governed by the laws regulating the person of the owner. See LAWS, IV. Nos. 5, 6.

16. The engine, when detached from the sugar house, and removed from the plantation, becomes movable. See MORTGAGE, II. No. 1; *supra*, No. 5.

(b) *Ownership of private things and its modifications; acquisition and divestiture of title thereto.*

1) In general.

1. The owner of the soil cannot keep the improvements under article 508, C. C., when they rest partly on the land of the builder, who should be allowed the equitable right of removing the part on his neighbor's land. 26 A. 367, *Gordon v. Fahrenberg & Penn*.

2. One who removes, under the instructions of the owner, improvements from the mortgaged property, incurs no liability, even though he may have subsequently purchased the improvements which were when purchased, movables. 26 A. 538, *Meyer v. Frederick*.

3. Plaintiff had no right to build a privy upon the space of ground belonging in common, to plaintiff and defendant, without the consent of defendant. 27 A. 174, *Renopsky v. Davis et als*.

4. Difference between legal and equitable title. 23 A. 419, *McKee v. Griffin*.

5. The owner of a tract of land has a right to excavate within his own boundaries, a canal for the purpose of navigation, and to require payment of

tolls for its use, from those who choose to navigate therein. 19 A. 264, *Harvey v. Potter*

6. Movable effects on the land seized under executory process, and which are used in carrying out the industry to which the real estate was subjected, being seized, advertised, appraised and sold, as subject to the mortgage, must be considered as immovable, and the title thereto is vested in the purchaser. The injunction issued to prevent their sale, by the succession of the mortgagor should be made perpetual. 27 A. 657, *Rochereau v. Bobb*.

7. For improvements erected by one of two co-proprietors, see QUASI CONTRACTS, Nos. 6, 7 and 8.

2) Expropriation of private property for public use.

1. In a suit brought by a railroad company to expropriate land; *Held*: That the defendant has no right, in addition to the price of the land expropriated, to claim payment for damage which may be done, to the rest of his property, when it is shown that such damage is more than compensated by advantages derived from the project for which the expropriation takes place. 15 A. 481, *Vicksburg Railroad v. Calderwood*.

2. In proceedings for the expropriation of private property for public use, all the formalities prescribed by law must be strictly observed. 22 A. 26, *City of Jefferson v. Delachaise*.

3. When the discrepancy between two sets of commissioners, appointed to value property expropriated, will lead the court to believe there was error, the case will be remanded for a new hearing. 23 A. 521, *N. O., M. & C. R. R. Co. v. C. Zeringue*.

4. Private property can only be expropriated for purposes of public utility; this necessity is to be judicially determined, when resisted. 20 A. 308, *Lecoul v. Police Jury St. James*.

THIRD.

1. For third opposition, see PLEADING, VIII. (e).

2. For third possessors, see EVIDENCE, XIII. (d). EXECUTORY PROCESS, II. (b), 3); III. (b). MORTGAGE, VI. (c), 4); 5); 6).

3. For third persons, see APPEAL, I. (e). DONATIONS, II. (d). EVIDENCE, XII. (h); (j), 4); XV. (a); XXII. XXIV. XXV. (c). JUDGMENT, XIV. XV. (a). OBLIGATIONS, VII. (b). PARTNERSHIP, I. (c); III. PAYMENT, III. REGISTRY, II. (a), 3); III. (a), 1), D. SHIPPING, III. (b). SUCCESSION, VIII. (h).

TIME.

See BILLS AND NOTES, VI. (b); VII. (b). DATE. DAY. EVIDENCE, XIII. (c). PRESCRIPTION, VIII.

TITLE.

See THINGS, II. (b), 1). PETITORY AND POSSESSORY ACTIONS. PUBLIC LANDS.

TOLLS AND IMPOSTS.

1. Where a grant for a limited time is made by a State legislature to an individual, who is permitted to collect tolls, and in consideration thereof is to expend capital and labor in opening a canal where the water is not navigable, the grantee, even after the expiration of the term, has a right to collect tolls, and the grant cannot be revoked without remuneration to the grantee. 20 A. 239, *Grant v. Leach*.

2. The owner who excavates a canal through his land, for navigation, may exact toll from those who choose to navigate it. 19 A. 264, *Harvey v. Potter*.

3. Bayou St. John was unnavigable, and the State had the right to grant a charter to a corporation to convert the bayou into a navigable stream, and under the assent of congress, applicable to one corporation, to authorize its successor, to levy a contribution on all vessels which navigate the bayou. Such

toll is a compensation for the labors expended in cleaning and deepening the stream. 29 A. 430, *Carondelet Canal Navigation Company v. Parker*.

4. Toll bridge on Bodceau lake, 1870, p. 91; toll shell road and Marigny canal to the lake, 1872, p. 22; toll bridge on Notalbany river, toll road in the parish of Plaquemines, 1876, p. 95.

TOW BOATS.

See SHIPPING, VIII. CARRIERS.

TRADE MARK.

1. The honest, skillful and industrious manufacturer, or enterprising merchant, who has produced or brought into the market an article of use or consumption that has found favor with the public, and who, by affixing to it some name, mark, device or symbol, which serves to distinguish it *as his*, and from all others, shall in no manner and to no extent be deprived of the same by another, who applies to his production the *same* or *colorable* imitation of the same name, mark, device or symbol, so that the public may be deceived into the purchase of the *one*, supposing them to be that of the other. 24 A. 97, *Wolfe v. Barnett & Lion*.

TRADITION.

See DELIVERY.

TRANSACTION.

1. A transaction, whereby for a certain sum, litigants agree to settle all matters in dispute does not give rise to any warranty. The compromise has the force of the thing adjudged. 20 A. 249, *Davis v. Lee*.

2. A compromise, once completed, has the force of the thing adjudged between the parties. 23 A. 697, *Rabun v. Pierson*.

3. The compromise fell the moment the obligor refused to perform the conditions. 23 A. 712, *Barret v. Hard*.

4. The defendant cannot be permitted to enjoy the fruits of the compromise and at the same time repudiate the corresponding obligation imposed on him by it. 23 A. 784, *Stewart v. Haas*.

5. The indorser, who knew that notice could not have been served on him, and who compromised with the creditor by paying a less amount, cannot subsequently recover on the ground that he was unaware, at the time of payment, that his liability was not fixed. 26 A. 64, *Jamison v. Pothaus*.

6. The agreement of an heir to pay the applicant for administration, an annuity, if she should discontinue her application, and transfer to him her share in the succession, is binding, although the succession turns out to be insolvent. 26 A. 292, *Archinard v. Boyce*. See ALEATORY CONTRACTS, No. 5; SALE, I. (d), No. 6.

7. The compromise of a law suit may be annulled for error of facts bearing upon the principal cause of the compromise, and coupled with fraud. 26 A. 424, *Packard v. Ober, etc.*

8. LUDELING, C. J. and WYLY, J., *dissenting*: Not where the error is, as to what evidence might have been adduced. *Id.*

9. A settlement largely beneficial to minors, but made in two different acts on the same day, cannot be divided so as to set aside one act and leave the other; the transaction must be considered as a whole. 27 A. 349, *Ames v. Hale*.

TRANSCRIPT OF APPEAL.

1. See CLERK OF COURT, Nos. 2, 3.

2. The transcript must be paid for, before delivery, 1872, p. 71.

TRANSFER.

See ASSIGNMENT. APPEAL, I. (b), 2), H. COURTS, IV. (b). CRIMINAL LAW, XIII. (b). EVIDENCE, X. (d).

TREASURER.

1. For State and parish treasurer, see CONSTITUTION, II. (d), No. 11. MANDAMUS, I. (b), Nos. 15, 16, 20. MORTGAGE, I. No. 4. PLEADING, I. (c), 8), No. 1. SURETYSHIP, II. (a), 1). TAXES, III. (c), 1), No. 8. NEW ORLEANS, II. (g), 5). PUBLIC EDUCATION.

2. Warrants to be registered in the State treasurer's office, 1872, p. 134; repealed 1873, p. 97; regulating his office, 1877, p. 29; to deposit money within twenty-four hours with fiscal agent, 1877, pp. 51, 77; assistant State treasurer, 1877, E. S., p. 7.

TREATY.

1. For treaty exempting foreign subjects from the ten per. cent tax in successions, see TAXES, II. (a).

2. The stipulations for the protection of the inhabitants and their property, in the treaty for the cession of Louisiana, ceased to operate when that State was admitted into the Union. 9 P. 224, *City of New Orleans v. Armas*.

TRESPASS.

See OFFENSES AND QUASI OFFENSES. PETITORY AND POSSESSORY ACTIONS, II. (c), 2); III. PRESCRIPTION, III. (c), 3). EVIDENCE, XIV. (c), No. 4.

TRIAL.

1. Nothing is irregular, if the trial takes place in the clerk's office instead of the regular court room, when the judge, clerk and sheriff were present, and the trial was had in open court. 23 A. 43, *Smith v. Jones*.

2. The legislature can, at any time, make any change or modification in the manner of conducting and trying suits; the law of March 10, 1866, authorizing suits for ejectment of tenants to be tried by preference, applies to all cases not tried, although the same were filed before the act went into operation. 6 R. 309; 18 A. 397, *Hoa v. Lefranc*.

3. Where a case has been dropped from the docket and afterwards restored and put at issue by the filing of an answer, defendant is not entitled to a notice of restoration of the cause. 19 A. 128, *McKinbrough v. Castle*.

4. The judge did not err in refusing to re-instate a case fixed for ten o'clock and submitted in its regular order, in the absence of defendant's counsel, who gave no good reason why he was not present. 27 A. 237, *Anderson v. Arnette, et al.*

5. Where the rules of the district court require causes to be fixed on the first day of the term, it is error to fix a cause on the second day of the term. 18 A. 703, *Walker v. Ducros*.

6. The trial of the suit for a dissolution of partnership should proceed, although an appeal was taken from a previous order appointing a liquidator. 27 A. 702, *State ex rel. Wood v. Judge Fifth District Court*.

7. Cases may be fixed by motion in the parish of Orleans. No rule of court being shown to the contrary. 29 A. N. R., *Semple, Reno & Casselly v. Albert Thomas et al.*; R. S. 1987.

8. Cases cannot be tried out of the parish where the defendant has his domicile. See COURTS, II. (g), 1), No. 17.

9. Discretion of the judge in the trial of summary cases. See PROHIBITION, No. 1.

10. For recusation of the judge, see RECUSATION.

11. For short-hand reporter, see 1876, p. 149.

TRUST.

I. OF TRUSTS CREATED IN THIS STATE.

II. OF TRUSTS CREATED IN OTHER STATES.

I. TRUSTS CREATED IN THIS STATE.

1. For liability of a trustee, see DEPOSIT, III. No. 32.

2. Trust, prohibited. See DONATIONS, III. (b), No. 2.
3. See *Trusts and Perpetuities*, under DONATIONS, III. (c).

II. OF TRUSTS CREATED IN OTHER STATES.

1. The right of the *cestui que trust*, under the common law, cannot be assimilated to the usufruct of our law. 15 A. 154, *Perin v. McMickens*.
2. A deed of trust is no title in Louisiana. 28 A. 326, *Marsh v. Levin*.
3. It does not prevent the legal owner from mortgaging. See MORTGAGE, III. (d), No. 1.
4. A deed made and executed in the State of New York, by a citizen of Louisiana, is valid. See OBLIGATIONS, VI. (b), 2).

TUTORSHIP.

See MINORS.

UMPIRE.

See EXECUTION, V. (b). EXPERTS AND AUDITORS. PARTITION, III. (a).

UNDERTAKER.

See LEASE, II. (a). PRESCRIPTION, III. (c), 4).

UNDER-TUTOR.

See MINORS, III.

UNION PARISH.

Shiloh incorporated, 1870, p. 77; Farmerville, incorporation act amended, 1870, E. S., p. 109; repealed, 1872, p. 117; two additional justices, 1877, E. S., p. 84.

UNITED STATES.

For courts of the United States, see BANKRUPTCY. CONSTITUTION, I. COURTS, IV. EVIDENCE, XXIII. (f); (g). JUDGMENT, XIII. XIV. MANDATE, VI. PUBLIC LANDS.

URBAN.

See NEW ORLEANS, II. (e), 1), No. 13.

USAGE.

1. For general custom, see LAWS, II. (j).
2. For evidence of custom, see EVIDENCE.
3. Duration of lease, when not stipulated, see EVIDENCE, VII. No. 23.

USUCAPTION.

See PRESCRIPTION, II.

USUFRUCT.

1. A donation of usufruct under private signature, is not valid. 27 A. 534, *Lee v. Cummings*.
2. A surviving widow, whose donation by her husband under a universal title is reduced to the disposable portion, has no usufruct on the legitime. 28 A. N. R., *Forstal v. Durel*.
3. Parol is not admissible to prove the usufruct on an immovable. See EVIDENCE, XIV. (a), 1), No. 3.
4. When separate appraisement is necessary in foreclosures against a usufructuary, see EXECUTION, V. (a), 4), No. 7.
5. When the widow must give bond for her homestead, see HOMESTEAD, I. No. 24.
6. The railroad company, in the exercise of their right of way, are not liable in damages, if the houses along their route cease to be useful. See OFFENSES AND QUASI OFFENSES, II. (d), Nos. 2, 3.

7. The usufructuary is bound for the tax, and for the paving. See *QUASI CONTRACTS*, I. No. 6.

8. The testator may dispense the usufructuary from taking an inventory and giving bond. See *SERVITUDES*, I. No. 1.

9. Rights and powers of usufructuaries. *Id.*, No. 2; see further Nos. 3, *et seq.*

10. See *SERVITUDES*, I. *MARRIAGE*, XIII. (e), 4), D.

USURY.

1. See *LOAN*, III. (b). *PRESCRIPTION*, III. (c), 1). *OBLIGATIONS*, III. (b), 2).

2. Usury not presumed. See *EVIDENCE*, III. (a), No. 2.

VACANT ESTATE.

See *COURTS*, II. (d), 2), 5). *PRESCRIPTION*, V. (d). *SUCCESSION*, V. (a); VII. (a), 1).

VAGRANTS.

Acts 1871, p. 1.

VARIANCE.

See *JUDGMENT*, V. (a). *PLEADING*, V. (a), 2); (e).

VENTE A REMERE.

See *SALE*, VI. (a).

VENUE.

See *CRIMINAL LAW*, VI. (c). XIII. (b).

VERMILLIONVILLE.

For delegation of power to levy licenses, see *TAXES*, II. (b), 2), B. No. 11; *Vermillion Academy*, acts 1872, p. 131.

VERNON.

Parish of, created, acts 1871, p. 175, roads, 1878, p. 93.

VESTED RIGHTS.

1. See *CONSTITUTION*, II. (c), 3). *DONATIONS*, VI. (f). *INJUNCTION*, II. (a), Nos. 9, 10, 11. *MARRIAGE*, XV. (a). *PRESCRIPTION*, I. *WATER WORKS*, No. 3.

2. The United States Supreme Court will decide without regard to decisions of State courts, etc. See *COURTS*, I. No. 9.

3. An ordinance conferring equitable, if not vested rights on land holders, cannot be repealed. See *TAXES*, I. No. 1.

VETERANS.

See *PENSION*; 1876, p. 90.

VIS MAJOR.

See *EVIDENCE*, IX. (e). *INSURANCE*, III. (f); (i). *SALE*, II. (d), 5), B. *SHIPPING*, X. (c), 3).

VOTE.

See *ELECTION BY THE PEOPLE*.

WAGER.

See *ALEATORY CONTRACTS*. *CRIMINAL LAW*, IX. (f). *INSURANCE*, I. (b); III. (c).

WAGES.

See SALARY. SHIPPING, V. (b).

WAIVER.

1. In judicial proceedings, see APPEAL, IV. (b); VI. (b). ATTORNEY, II. (a), 3). CITATION, IV. EVIDENCE, V. (c). JURY, I. (d). OBLIGATIONS, IV. PLEADING, II. (b); V. (b), 5), B; (c), 3); VI. (a); (b), 1); 2); (c); VII.
2. In other matters, see BILLS AND NOTES, VII. (d). OBLIGATIONS, IV. RENUNCIATION. REMISSION.
3. Of maritime lien, see PRIVILEGE, III. (c), 2), B.

WALLS.

See SERVITUDES, II. (a), 2), c.

WAR.

1. The proclamation of the president of the United States, on the 20th of August, 1866, declaring peace, fixed the date when the war of States terminated. 9 Wall. 56; 23 A. 226, *State v. Burgess et als.*
2. For the purposes of judicial decision, the commencement of the civil war between the Northern and Southern States of the Union, will be assumed to date from the proclamation of extended blockade by the president of the United States, and the end of the war, from the proclamations announcing that fact. Hence, the war will be assumed to have begun in the States of South Carolina, Georgia, Alabama, Florida, Mississippi, Louisiana and Texas, on the 19th of April, 1861, and in the States of Virginia and North Carolina, on the 27th of April, of the same year; and the war will be assumed to have ended in the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Mississippi, Tennessee, Alabama, Louisiana and Arkansas, on the 2nd day of April, 1866, and in the State of Texas, on the 20th of August of the same year. 12 Wall. 700, *The Protector*; 15 Wall. 555, *Adger v. Alston*.
2. The citizens of countries at war, cannot trade with each other. See OBLIGATIONS, III. (a), No. 2.

WARDENS.

See CORPORATIONS, X. (c); (d); (e). NEW ORLEANS, II. (g), 2). Wardens of St. Louis Church authorized to sell, 1870, p. 177.

WARRANTS.

1. See PUBLIC EDUCATION. BILLS AND NOTES, 1.
2. Warrants for salaries of constitutional officers, receivable in payment of taxes, 1877, No. 10.
3. For metropolitan police warrants, see METROPOLITAN POLICE. BILLS AND NOTES, XVII. No. 3. TAXES, III. (a), No. 8.
4. No law to pay warrants of auditor by their date. See CONSTITUTION, II. (d), No. 11.
5. Warrants receivable for back taxes of New Orleans, 1877, E. S., p. 208.

WARRANTY.

1. As connected with pleading, see PLEADING, VIII. (c).
2. Judicial sales, see EXECUTION, V. (d), 8), B.
3. Other matters, see APPEAL, V. (b), 2). BILLS AND NOTES, IV. (f). EXCHANGE. SALE, III. (c); (d); VIII. (c). SHIPPING, X. (c), 2).
4. Execution in favor of a warrantee against the warrantor, will be suspended until the amount be paid to plaintiff. See EXECUTION, II. No. 2.

WASHINGTON.

Special tax, 1878, p. 126.

WASTE.

See MINORS, III. (c). SUCCESSION, VIII. (c).

WATER COURSE.

See CORPORATION, X. (w). SERVITUDES, II. (a), 1). THINGS, I. (b).

WATER WORKS.

1. The city, on becoming owner of the water works, had the right to sell to the highest bidder the exclusive privilege of using the hydrants for sprinkling the streets. 24 A. 413, *McKnight v. City*.

2. The commissioners of waterworks are not entitled to any compensation for appraising the pipes, etc., under resolution of the city council of the 31st of July, 1868. 26 A. 494, *Bosworth v. City*.

3. The charter of a bank authorized it to construct water works for the city of New Orleans, and declared that after the expiration of thirty-five years it should be lawful for the city to purchase said water works on certain prescribed terms, and pay for them in its bonds, and the bank was, on the election of the city to purchase, required to sell on the terms prescribed; *Held*: That this charter was a contract with the bank, and that any act of the legislature afterwards passed, imposing onerous conditions upon the issue of bonds by the city, so far as as they might apply to bonds to be issued in payment for the water works, impaired the obligation of the contract with the bank, and was void. 2 Woods, 188, *Sala et al. v. New Orleans*.

4. Where the contract for the purchase of the water works was executed, and the city got the water works and paid its bonds to the bank therefor, and the city did not deny its obligation to pay the bonds, nor threaten to do so, the bank could not repudiate the contract of sale on account of any supposed infirmity in the bonds. *Id.*

5. The city having authority to issue bonds, they are good in the hands of *bona fide* holders for value, whether the conditions precedent to their issue were observed by the city or not. *Id.*

6. The ownership of the bonds issued in payment for the water-works, did not make the holders thereof, stockholders in the bank, from which the water works were purchased. 2 Woods, 189, *Sala v. New Orleans*.

7. Nor did they have a vendor's privilege. See PRIVILEGE, III. (b), 2), c. No. 1.

8. See CORPORATIONS, X. (j); (cc).

WAY.

See THINGS, I. NEW ORLEANS, II. (d), 2). SERVITUDES, II. (a), 2), B.

WEBSTER.

Parish of, created, 1871, p. 59; special tax, 1878, p. 145.

WEST FELICIANA.

Bonds, 1872, p. 140.

WHARVES.

1. See NEW ORLEANS, II. (d), 2).

2. Power of legislature. See CONSTITUTION, II. (c), 4), Nos. 1, 4.

3. Wharves on Bayou Teche. See LAWS, II. (f), Nos. 1, 2.

4. Right to use a wharf. See OFFENSES AND QUASI OFFENSES, I. No. 5.

WIDOW.

See MARRIAGE, XIII, (e), 3); 4), D. MINORS, I. (b). PRIVILEGE, II. (c). SERVITUDES, I.

WILL.

See COURTS, II. (d), 4). DONATIONS, VI. EVIDENCE, XXII. (b). SLAVES, I. (b), 3). SUCCESSION, IX. (b).

WINN.

Burnt records, 1868, p. 56.

WITNESS.

See BILLS AND NOTES, XII. (b). CRIMINAL LAW, XII. (f). DONATIONS, VI. (a), 3); 6). EVIDENCE, XVI. XXIV. (b); XXV. (b), 2).

WOMAN.

See APPEAL, (e), 2). CONCUBINAGE. DOMICILE, III. DONATIONS, I. (d); III. (e); VII. EVIDENCE, XVI. (b), 4). MARRIAGE. MINORS, I. (b); III. (b). MORTGAGE, IV. (c). PARENT AND CHILD. PLEADING, I. (c), 1). PRESCRIPTION, V. (c); (d). PRIVILEGE, II. (b); (c). REGISTRY, II. (a), 2). SERVITUDES, I. SURETYSHIP, I. (b).

WRIT OF ERROR.

1. Whether a public survey, under the authority of the United States, of a large tract of land, operated an eviction of a person claiming title to a portion of such tract, is not such a question as can be revised by the Supreme Court of the United States by writ of error to a State court. 10 P. 291, *Keene v. Clark*.

2. The judgment of the State court is conclusive on all questions, except the one of which the United States Supreme Court has jurisdiction. 95 U. S. (Otto's), 41, *McMillen v. Anderson*.

3. A case cannot be brought up to the Supreme Court of the United States, by writ of error, upon an agreed statement of facts. 13 P. 459, *Keene v. Whitaker*; 18 H. 109, *Curtis v. Petitpain*.

4. The Federal courts in Louisiana have no jurisdiction over questions of title between citizens of Louisiana, when those titles depend upon French and Spanish grants; nor will a writ of error lie to the Supreme Court of the State to revise its judgment in such a case. The stipulation in the treaty of cession of Louisiana, for the protection of the inhabitants in their property, ceased to operate when that State was admitted into the Union. 9 P. 224, *City of New Orleans v. Armas*.

5. Where land has been granted by the French or Spanish government, to persons in Louisiana, the State courts may properly adjust the boundaries of such grants, without calling in question the validity of a title claimed under a treaty of cession. The Supreme Court of the United States, has, therefore, no jurisdiction to re-examine the decisions of the Supreme Court of Louisiana in such cases. 3 H. 693, *McDonough v. Millaudon*.

6. The Supreme Court of the United States cannot review a judgment of a State court upon a mere question of boundary, although the title to the land, the boundaries of which are to be ascertained, may have been derived from the United States. 4 Wall. 204, *Lanfear v. Hunley*; 9 H. 1, *Almonster v. Kenton*.

7. The judges of the court granting a writ of error, have alone the right to determine what security shall be necessary to operate a *supersedeas*, and to pass upon the sufficiency of the security offered. 3 H. 483, *Black v. Zacharis*.

8. When a patent has been issued to two persons, as joint owners of a tract of land, the State court is the proper tribunal to effect a partition of their property, and a writ of error will not lie to revise the decision of the State court in such a case. 4 H. 500, *Downes v. Scott*.

9. A writ of error will not lie from a judgment of the Supreme Court of Louisiana, remanding the case to the district court for a new trial. 5 H. 51, *Pepper v. Dunlap*. See No. 39.

10. A writ of error is "brought," in the legal meaning of the term, not when it is allowed by the judge, but when it is filed in the court which rendered judgment. 11 H. 204, *Brooks v. Norris*.

11. When a case has been removed by writ of error from the Supreme Court of Louisiana to the Supreme Court of the United States, and the opinion of the State court clearly shows that the point ruled upon to give the Supreme Court of the United States jurisdiction, was not raised or passed upon by the lower court, the writ will be dismissed upon the motion of the defendant in error. 12 H. 165, *Grand Gulf Railroad Banking Co. v. Marshall*.

12. When a case is brought to the Supreme Court of the United States by writ of error, to the courts of Louisiana, the opinion of the Louisiana court will be examined, in order to ascertain what questions arose in that court, and were decided by it. 19 H. 202, *Cousin v. Blanc*.

13. The Supreme Court of the United States has no jurisdiction, under the 25th section of the judiciary act, to review the judgment of the Supreme Court of Louisiana in a case of conflict between two claimants to lands, under patents issued by State authority. 19 H. 16, *Shaffer v. Scudday*.

14. The Supreme Court of the United States has always asserted the right, when the question before it was the impairing of the obligation of a contract by State obligation, to ascertain for itself whether there was a contract to be impaired. If it were not so, the constitutional provision would always be evaded by the State courts, giving such construction to the contract, or such decisions concerning its validity, as to render the power of the Supreme Court of no avail in upholding it against unconstitutional State legislation. 14 Wall. 661, *Delmas v. Insurance Company*.

15. When a State is a party to a suit, the citation in a writ of error should be served upon the governor and attorney general, but when an officer of the State is a party (though he may be acting in behalf of the State), he alone is the person upon whom service should be made. 17 H. 1, *Heirs of Poydras v. The Treasurer of Louisiana*.

16. The Supreme Court of the United States has jurisdiction over a judgment of the Supreme Court of Louisiana, where the plaintiff in the suit claimed land under a purchase made from the United States, and produced muniments of title issued by their authority, and this title is pronounced inoperative by the Supreme Court of Louisiana. 19 H. 252, *Bell v. Hearne*.

17. An appeal will not lie from a refusal of the court to open a former decree. 18 H. 507, *McMicken v. Perin*.

18. The Supreme Court of the United States cannot be called upon to review the judgment of an inferior State court of Louisiana, when there could have been an appeal to the Supreme Court of that State, and none was taken. 22 H. 473, *Adams v. Preston*.

19. A case must be tried in the Supreme Court on the rulings of the court below on what was before it, and this must appear by the record; and if the facts are to be considered, they must appear by bills of exception, or by an agreed statement submitted to the court for its judgment, or by the finding of the court under the statute. 12 Wall. 275, *Kearney v. Case*.

20. Where the Supreme Court of Louisiana has decided that a contract, the consideration of which was Confederate money, was invalid at the time it was entered into, the Supreme Court of the United States cannot review the decision under the twenty-fifth section of the judiciary act. 14 Wall. 9, *Bank of West Tennessee v. Citizens' Bank of Louisiana*.

21. The same principle applies to a case where the Supreme Court of Louisiana has refused to enforce the collection of a promissory note given for the purchase of a slave, the ground of the decision of the State court being that the note was binding when it was given. 14 Wall. 10, *Palmer v. Mouton*; 19 Wall. 572, *Stenson v. Williams*. But see No. 14.

22. When different parties claim a fund which has arisen from sales under an execution (the money being still in the hands of the marshal), a judgment of the circuit court on rules as to whom the money be paid, is not such a judgment as can be re-examined in the Supreme Court of the United States. 18 H. 109, *Curtis v. Petitpain*.

23. An order of seizure and sale in Louisiana, is substantially a foreclosure of a mortgage in chancery, and can only be reviewed by the Supreme Court of the United States by appeal, and not by writ of error. 17 Wall. 14, *Marin v. Lally*.

24. When a right is claimed in a State court, under the constitution or laws of the United States, and the decision of the State court is in favor of such claim, the case cannot be reviewed by the Supreme Court on a writ of error. 12 H. 423, *Linton v. Stanton*.

25. If the record of an action at law in Louisiana (brought up to the Supreme Court by writ of error), contains the evidence and not the bills of exception, and nothing raising any points of law distinct from the evidence, the Supreme Court will simply affirm the judgment of the court below. 2 H. 392, *Minor v. Tillotson*.

26. The Supreme Court has jurisdiction, where the plaintiff in error claims title under a sale by a marshal of the United States, and the final decision in the State courts is adverse to that title. 6 H. 14, *Collier v. Stanborough*.

27. A writ of error will lie from the Supreme Court of the United States, to a State court of last resort, for the purpose of determining whether an instrument has been improperly received in evidence in a State court, when its admission has been objected to, on the ground that the stamps affixed to it had not been cancelled in accordance with the act of congress. 14 Wall. 361, *Pugh v. McCormick*.

28. The Supreme Court of Louisiana, decided that an act of the general assembly of that State was unconstitutional, on the ground that the State debt would thereby be increased, when it already exceeded the constitutional limit twenty-five million dollars; *Held*: That this decision involved no Federal question, and that no writ of error lay from such a judgment to the Supreme Court of the United States. 15 Wall. 208, *Solomons v. Graham*.

29. Where, in a case brought up by a writ of error to the Supreme Court of Louisiana, it appeared from the record and from the opinion of the court, that the only question before the court below, related to the interruption of prescription, and that this question was decided exclusively upon the principles of jurisprudence of the State; the writ of error was dismissed on motion, for want of jurisdiction. 16 Wall. 351, *Marqueze v. Bloom*.

30. A suggestion by counsel that a decision of the Supreme Court of Louisiana was rendered, while the State was in rebellion, and its judges therefore incompetent, will not be noticed by the Supreme Court of the United States, when the question as to the competency of the court was not made on the trial, and when the court below did not consider and determine any such question. 6 Wall. 124, *Walker v. Villavaso*.

31. The assertion, in a petition for a re-hearing filed in the Supreme Court of Louisiana, that the judgment of the court violates a certain provision of the constitution of the United States, is not sufficient to support a writ of error, under the twenty-fifth section of the judiciary act. 18 H. 192, *Heirs of Poydras v. Treasurer of Louisiana*.

32. Inasmuch as, by the Louisiana practice, no replication is admitted, it becomes impossible for the plaintiff to spread upon the record of the court any objection which he may be able to urge to defendant's answer, founded upon a law of congress; but where he urges in a petition for a re-hearing, in the Supreme Court of the State, that he mainly relied in the lower court, upon an act of congress, and that the decision of that court was against the validity of the act, and when the decision of the Supreme Court of the State was to the same effect; *Held*: That the question of the validity of an act of congress was shown to have been raised in the lower court; and that such question appeared sufficiently on the face of the record to give the Supreme Court of the United States jurisdiction. 11 Wall. 493, *Stewart v. Hahn*.

33. No one but an appellant can be heard in an appellate court, for the reversal of a decree rendered in a subordinate court. Appellees may be heard in support of the decree, but not for a reversal. 12 Wall. 130, *Mail Company v. Flanders*; 5 Wall. 377, *The William Bagaley*.

34. Each defendant may sue out a writ of error without joining his co-defendants in the writ. 6 P. 172, *Cor v. The United States*.

35. Error may be shown by a bill of exceptions, or by a demurrer to the declarations, or a material pleading, or it may appear by an agreed statement of facts, if made a part of the record, or in a special verdict, if put in due form; but even when all these are wanting, it is no cause for dismissing the suit, when the writ of error has issued to a circuit court of the United States, because in that case the writ brings up the whole record, and their absence only shows that there is no error in the proceedings; and if there is no error in any part of the record, the prevailing party in the circuit court is entitled to an affirmance of the judgment. But cases brought up by writ of error to a State court, issued under the 25th section of the judiciary act, stand upon a very different footing, as in such a case it must appear on the face of the record, in express terms or by necessary implication, that some one, at least, of the questions described in that section, did arise in the State court, and that the question so appearing in the record was decided in the State court, as required in that section; and if it does not so appear in the record, then the Supreme Court has no jurisdiction of the case, and in that event the writ of error must be dismissed; as the court, under those circumstances, has no power either to reverse or affirm the judgment rendered in the State court. 10 Wall. 256, *Railroad v. Morgan*.

36. A decision of the Supreme Court of Louisiana, in accordance with the law of that State, that all obligations, the consideration of which was Confederate money, are null and void *in their inception*, and not recoverable in the courts of Louisiana, does not violate any provisions of the Federal constitution. 10 Wall. 537, *Bethell v. Demaret*.

37. Whenever an error is apparent in the record, the rule is, that it is open to re-examination, whether it be made to appear by bill of exceptions or in any other manner. 16 Wall. 378, *Insurance Company v. Piaggio*.

38. Where, in a suit pending before it, a State court dissolves an injunction (previously granted by it on an allegation by the mortgagor that the mortgagee had agreed to give him further time) against proceedings to sell mortgaged premises, under a foreclosure already had, and after such dissolution, the effect of which is, of course, to leave in force a final decree of sale, a alien defendant petitions for a removal into the circuit court, under the act of July 27, 1866, "for the removal of causes in certain cases from State courts," and the State court refuses to grant that petition, the defendant not excepting, and the case is afterwards taken to the Supreme Court *on an appeal from the decree dissolving the injunction*, no jurisdiction exists here to review the judgment of the Supreme Court, under section 709 of the Revised Statutes, and on the ground that a right, title, privilege, or immunity has been claimed under a statute of the United States, and that a decision of the highest court of the State, where a decision could be had, has been against it. The refusal of the State court to grant a removal, under the act of congress, not having been excepted to, and *that* matter not having been involved in what was before the Supreme Court, its judgment cannot be held to have embraced it, nor, indeed, anything but the matter of the dissolution of the injunction; a matter which involved no federal question. 23 Wall. 417, *Fashnacht v. Frank*.

39. Where the Supreme Court of a State, on appeal, overruled an exception which had been sustained in the lower court; and, on setting aside the judgment below, remanded the case to be proceeded with according to law; *Held*: That the judgment of such Supreme Court was not final, and that the writ of error must be dismissed. 91 U. S. (Otto's), 487, *Zeller et al. v. Switzer*. See No. 9.

40. Where suit was commenced November 16, 1868, for rent claimed to be due August 8, 1865, and where, throughout the whole intervening time the district within which the cause of action, if any arose, was under the control of the Federal authorities, and the defendant could be served there with process; *Held*: That the decision of the Supreme Court of the State, that the suit was barred by the statute of limitations, is not subject to re-examination in the Supreme Court of the United States. 92 U. S. (Otto's), 111, *Harrison v. Myer, executrix*.

41. The right of the Supreme Court to enforce a *supersedeas* on a writ of error exists from the time the party, in whose favor the writ was granted, has complied with all the conditions prescribed in the act of congress to make the writ of error operate as a *supersedeas* and stay of execution. 10 Wall. 273, *Slaughter House Cases*.

42. Where the Supreme Court of a State gave judgment for a perpetual injunction against defendants, and they sued out a writ of error to the Supreme Court of the United States, and within ten days gave bond in the sum of ten thousand dollars to supersede the judgment of the State court, a justice of the United States Supreme Court refused, on motion, to require plaintiffs in error to give an additional bond with a larger penalty, although satisfied that the bond already given was not sufficient to cover the fees and emoluments claimed by defendant in error, which would come to the possession of the plaintiff in error, by reason of the *supersedeas* of the judgment of the State court. 1 Woods, 51, *Butchers' Association v. Slaughterhouse Company et al.*

43. As soon as a writ of error from the United States Court is applied for and allowed, the jurisdiction of that court attaches and supersedes any further action of a justice of that court at chambers. *Ib.*

44. It seems to be the settled understanding of the courts of the United States, that both appeals and writs of error operate as a *supersedeas*, without any express order to that effect, if taken within the proper time and with an offer of the requisite security. *Ib.*

45. If, in the copy of a writ of error, lodged with the clerk of the court for the defendant in error, the return day of the writ is correctly stated, and the record be actually returned and filed in due time, a mere clerical error in the return day in the original writ, is immaterial, and is cured. 1 Woods, 234. *United States v. Six Lots of Ground*.

46. The allegations contained in the petition for a writ of error do not give the requisite jurisdiction. See COURTS, II. (b), No. 12.

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